Jury Selection and Bull: Tips from the TV Program and Observations and Suggestions from a Practitioner

Jury selection is the crucial foundation for a successful verdict. We have the opportunity to assist in shaping the factfinders. We must grasp this opportunity by understanding and utilizing the persuasive principles that apply at every stage of the trial.

We learn how to do voir dire by reading, watching, and doing. Books, articles, lectures, and even television programs assist us in adapting principles to our jury selection. In this article we will discuss a television program featuring fictional jury consultants and how they use jury selection techniques. We will also discuss the methods that I personally employ.

In the 2016-2017 television season, CBS introduced the program Bull, loosely based upon the early jury consultant work of Phil McGraw, PhD, known as Dr. Phil on TV. The series’ main character, Dr. Jason Bull, heads Trial Analysis Corporation (TAC). It utilizes high-tech data and psychology to create and shape narratives (case theories) that assist in choosing jurors and uses a mirror (shadow) jury during trial to modify the narrative throughout the trial process.

Of course, all you need to do to use Dr. Bull’s system is have several million dollars to develop the 400+ factor analysis of each potential juror, to assemble a mirror jury to watch the trial and comment on the effectiveness of the narrative as it actually develops, and the willingness to have staff hack others’ computers, trespass or burglarize others’ businesses and residences, and steal others’ property. Dr. Bull’s goal is to win at any cost. He claims to use psychology, neurolinguistics, and demographics to this end. Not all episodes start with or even mention jury selection. Some are purely jury consultation in action in the ongoing trial.

Jury consultation has spawned a growing industry since it was first used in the 1970s. Many companies now exist that use “scientific jury selection.” Some companies offer much of what Dr. Bull advocates. Internet sites claim to have a “unique and proven ability to help you craft a compelling story to successfully persuade a jury.” They claim to be experts in case themes and the analysis of mock juries. They have developed experience and use statistical analysis to understand jurors including which ones to keep and which ones to strike. They also do witness preparation.

Let’s face facts. We do not have several million dollars to hire anything like Dr. Bull’s company or even the ability to hire one jury consultant. We are on our own to determine the best narrative and the best jurors.

Real jury selection preparation begins with developing theories, themes, and trilogies.

The legal theory, determined by the plaintiff or prosecution, is the cause of action and the burden and standard of proof. It also includes counterclaims and crossclaims.

The case theory is the story that occurred outside the courtroom from our client’s point of view. The case theory will later be expanded to become our opening statement. Both the plaintiff and the defense will have their own case theories.

The legal theme is determined by the defendant and is the defense, elemental or affirmative. Affirmative defenses will have their own elements and burden and standard of proof. The legal theme provides the focus for the trial.

The case theme is a few words, phrase, or a sentence that comments on the legal theme from our client’s perspective. Both parties will have at least one case theme. Perhaps the best known case theme is “if it [the glove] doesn’t fit you must acquit.” Working back from the case theme to the legal theme, the legal theme in the O.J. Simpson murder trial was identity. The prosecution’s case theme must then have addressed identity.
A trilogy consists of the key concepts in the case. While originally created as a trial tactic requiring three concepts, the trilogy has evolved into a listing of key concepts as few as two and as many as seven. Jury research has determined that, if there are more than seven key concepts, the jurors will be unable to remember all of them.

At the heart of jury selection are only three broad areas of inquiry: case-specific issues, law issues, and demographics. Attention must be paid to all three. Our theories, themes, and trilogies will be useful in determining what case-specific and law issues to address.

There are only two functions for questions that can be asked during jury selection – searching questions and education questions. Searching questions seek information from the jurors, primarily life experiences and attitudes. Education questions seek to provide information to the jurors. Case-specific issues usually utilize searching question. Law issues usually utilize education questions. Both may use either. Demographics always use searching questions.

Make a list for each category of inquiry. Then decide the importance of each issue. Although primacy, what we believe is what we hear first, is important in jury selection, we can rarely use recency, what we believe is what we hear last. You never know how long a particular issue will take and you cannot chance that the judge will make you stop before you get to the last issue. The topics should funnel from what is most important to what is least important. Begin with your most important issue, then second most important, and so on. That way you have time to discuss your most important issues.

So what can we learn from Dr. Bull?

Life Experiences and Word Choice

Episode 1 – The Necklace. Dr. Bull’s client is charged with murder and the defense is alibi. Dr. Bull tells us that jury trials “never start at zero.” Jurors have life experiences and attitudes that largely determine how they perceive the facts and decide the issues. Dr. Bull opines that it is essential that we understand the likes, keywords, and avoidances that will influence each juror. Dr. Bull utilizes moot jury selection to make sure that “my client is vindicated” and that he receives a “fair trial.”
**Analogies**

Certainly, as Dr. Bull explains, we must determine the likes and avoidances of the potential jurors. But there is much more than that. We need to explore their life experiences as they relate to issues in our specific case. The best way to explore life experiences is through the use of analogies. Consider your life experiences and the life experiences of those close to you in creating analogies that will bring alive the jurors’ experiences.

Suppose that an issue in your case is that the victim of an automobile accident left out key facts when he filled out the accident report. Consider when you or someone close to you have had to fill out reports. Were key facts left out? Consider the conditions under which the report was made. Create a story, an analogy, that applies.\(^\text{13}\)

An analogy may be an objective story. More importantly, if the judge and jurisdiction permit, is to put the “you” in your analogies. For example: “I was at a family gathering. My grandfather and my wife’s brother got into an argument. Ultimately my brother-in-law pushed my grandfather down three steps causing a broken arm. The police came. I was given a sheet of paper and asked to make a statement. I was very upset by the argument and injury. I only wrote that my brother-in-law pushed my grandfather and he broke his arm. I only wrote one sentence. I did not write anything about the long history of animosity and the argument that immediately preceded the broken arm. I certainly did not write everything I could have. Have you or anyone close to you ever written a report and left out key facts?”

First, such an example focuses the juror’s attention on a specific situation for the juror to consider. Our analogy should come as close to the situation in trial as possible without crossing the line of asking the jurors to prejudge your case. Second, the analogy puts us in a different light than just being attorneys. The above analogy tells the jurors that you are married, that you have a brother-in-law, that you have a grandfather, and that there is animosity within the family. By putting the “you” in the analogy, you inform jurors that you are a human being with a life beyond your profession as an attorney. Those little facts about ourselves permit the jurors to identify with you, showing that you and the jurors have things in common. Also, the principle of reciprocity holds that, when you reveal something personal about yourself, jurors are more likely to respond with personal information about themselves.

**Word Choice**

Dr. Bull mentions that the lawyers need to know the keywords. More importantly, crucial to a successful outcome in a case is the key principle that the words that are used in the courtroom are the words that the jurors will use during deliberations.\(^\text{14}\)

“Calling names” is a subset of word choice. Determine the most favorable label to put on each party and every witness. For example, in a criminal case if identification is not an issue, the prosecutor should refer to and have the witnesses refer to the accused as “the defendant.” As much as possible, when there is a victim, refer to her as “the victim.” When the jurors go back to deliberate, they will talk about the defendant and the victim – a step toward a conviction.

**Why Do We Catch a Cold?**

This is the key question that Dr. Bull wants the attorney to ask the jurors. The reason for this question is not explained in the series. What Dr. Bull does talk about is how individual jurors perceive what controls their lives. The locus of control is important in determining the jurors that we want in a case. If the juror takes responsibility for having caught a cold, it indicates that the locus of control is with the individual. If the juror places blame on an outside force, the locus of control is with someone/something else.

I use a similar analogy in my voir dire. Imagine you are driving in a rainstorm/snowstorm (depending on time of year) where it is so bad that you cannot see. You keep slowing down, but you still cannot see. All of a sudden you smash into a car in front of you. Who/what is responsible for the accident. If the juror indicates that it was his fault, it indicates that he takes personal responsibility. If the juror indicates that it is the fault of the weather, the juror places responsibility on outside forces. As a prosecutor, I want to keep jurors who take personal responsibility – and assign personal responsibility for the acts of the defendant. It is not the drugs, it is not the alcohol, and it is not his mental condition; it is the defendant's acts alone and, for these acts, he must take personal responsibility.

**Dress-Appearance**

Dr. Bull emphasizes the importance of dress and appearance in persuasion. TAC employs a fashionista, Chunk, to dress not only the client, but also the attorney. Dr. Bull decides the message he wants to
Dress and appearance are important. When I was a public defender, I was assigned a case of kidnap and sexual assault of an adult woman. The defendant told me that the woman was a prostitute and that she only made an outcry after her boyfriend caught them together. The story seemed highly improbable because the woman had been picked up on an interstate highway where her car had broken down. She said that the defendant had offered her a ride home. Once they arrived at her home, she began to get out of the car when the defendant purportedly pulled her back into the car and drove to an open field where she was raped. Where she began to get out of the car one of her shoes had slipped off onto the street. The case did not look promising for the defendant. However, when she walked into the courtroom to testify, she was dressed like a prostitute. That was all the jurors needed to reach a 10-minute “not guilty” verdict.

Social Media

The best informed make the best decisions. Dr. Bull has several assistants and a multitude of computers always with lights flashing, even in the middle of the night. He has a computer hacker and a couple of investigators. One of the tasks of the hacker is to gather as much information as possible on potential jurors. The investigators are also utilized to gather information. TAC places all the information into a computer that analyzes 400 factors for each juror.

Indeed, social media may be an important source of information about jurors. But who has the time, money, or staff to search social media of all potential jurors? Some judges formally prohibit the use of social media to investigate jurors. In some jurisdictions, the courts may require that any information gathered by social media be shared with opposing counsel. Some jurisdictions impose an affirmative duty to check and monitor potential jurors and jurors’ social media. In some jurisdictions, we may receive the juror list well in advance of trial. In other jurisdictions, we may not receive the juror list until the day trial begins.

Gender and Racial Bias

Episode 2, “The Woman in 8D,” and Episode 19, “Bring It On.” In Episode 2, turbulence is responsible for an airplane crash. The pilot is a woman. Although highly trained and experienced, the issue of gender bias is the key in jury selection during this episode. Here Dr. Bull attempts to “adjust assumptions” of the jurors on gender bias by having the attorney ask questions about women automobile drivers. The key is discovering “unaware assumptions” that jurors have.

In Episode 19, a rich, powerful, controlling minority attorney is charged in the murder of his girlfriend. The issue of race of a defendant is introduced in this episode. The defendant is seen giving press conferences during trial to help his defense. He is also a celebrity. Ultimately, through plot twists and turns, it develops that the defendant did not kill his girlfriend.

We all utilize stereotypes, heuristics, and attitudes to make quick decisions during our journey through life. We are aware of some of these. We are not consciously aware of others. Implicit bias occurs at a level below conscious awareness and without intentional control. Implicit bias can arise from and be reinforced by many factors including social learning experience, personal experience, common
cultural understanding, emotional learning, and fear conditioning. The key to defeating implicit bias is awareness. Increasing discussion about or contact with implicit bias can, at least in the short term, reduce the impact. Questions to jurors that bring to the forefront implicit biases may help to reduce their impact. Also, broaching the subjects may make some jurors more aware so that the issue is discussed during jury deliberations.

In the episode involving the woman pilot, the mere bringing forth of the issue of implicit bias against women will assist in reducing the bias’s impact.

On March 10, 2017, the Eastern District of Washington adopted criminal jury instructions that discuss unconscious bias. Part one of the instructions reads:

Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.

The Eastern District of Washington also permits the judge and/or the attorneys to ask questions concerning unconscious or implicit bias. One technique is to ask hypothetical questions concerning situations that present the potential jurors with situations where there is a minority involved and another where a non-minority is involved. This can work both with race and gender. Suppose that there is a fight in a bar between a man and a woman. A jury question might then be: “what is your initial reaction as to who was the aggressor?”

Leaders-Followers-Loners

Dr. Bull opines that it is essential in jury selection to determine who the leader(s) will be, who will follow, and who will stand by themselves. A verdict is the result of the interaction among jurors. Lisa Blue in her 2016 AAJ Paper suggests that there are actually five categories of jurors: leaders, followers, fillers, negotiators, and hold outs. The most powerful member of the jury is the leader. When I was a line deputy public defender or prosecutor trying over 12 felonies a year, I could easily determine who the foreperson would be. The juror’s participation in voir dire both by talkativeness and attention to other jurors, as well as the juror’s occupation and participation in other organizations, will give you a very good idea on who the foreperson will be. Followers either want to get the job finished quickly or are simply not assertive or aggressive. Fillers are more passive than followers and will follow the majority. Negotiators are important to keep peace during deliberations. They keep the peace by analyzing and verbalizing the issues. Holdouts are also known as rebels with a cause: jurors who will never change their position.

It is essential to your case that you pick a juror who has demonstrated those leadership qualities to make a decision in your favor. It is also important to have at least one good negotiator. It is okay to have followers and fillers who may appear to be “bad jurors,” so long as you have the right leader and negotiator.

A factor in determining whether a juror will become a leader, a follow, or a loner can in large part be determined by the occupation he has or has had. Occupation is a key factor in determining our attitudes and styles. What we do during the workweek says a lot about your attitudes and beliefs, and whether we are a leader or follower.

Dress - What Jurors Actually Do-Demeanor

Episode 3, “Unambiguous.” In this episode Dr. Bull represents a woman who is charged with the murder of the man who sexually assaulted her. In this episode Dr. Bull stresses the importance of what the parties, the attorneys, and the jurors wear. Dr. Bull opines that dress is as important as what people actually say.

Certainly how we dress is important to establishing rapport with jurors. But I would disagree that it is as important as the content of communication. You can control what you wear and largely control what your client and your witnesses wear. As a general rule of thumb, I dress to the level of the community in which I am trying the case, looking to how the community dresses when they go to a formal occasion such as a wedding, a religious service, or a graduation.

The second issue in the episode is what jurors actually do during trial. Dr. Bull opines that jurors are told not to pay attention to the media, but they in fact do. In your case the media may play a major factor in your case, or be of little or no consequence.

Dr. Bull opines that the key where the media is a big factor is to influence the media toward your
position. Everyone hopes that the jurors follow the instructions of the court – but can we expect that the jurors do? We do not know what the jurors do once they leave the courtroom. In some cases a juror might self-report or jurors may discuss media together. However, in my experience, jurors rarely report on themselves or other jurors concerning media exposure and discussions among jurors before deliberations.

The third issue in the episode is having the witness take control of the examination. In this episode, the woman is prone to panic attacks. Dr. Bull advises her on how she can take control when a panic attack occurs. One of the techniques he uses is for the person having the attack to repeat random numbers. When the focus is on the random numbers, the victim/witness pays less attention to the panic and is able to relax.

It is important in witness preparation and in trial to teach the witness how to get and maintain control. One suggestion is to demonstrate the technique of “listen-pause-answer-stop.” The witness can use pauses, request that a question be rephrased, ask for water, or even request a break to maintain control in the courtroom. Inform the witness that it is all right to say that he does not remember, does not know, or that he is confused.

Trust the Attorney

Episode 4 “Callisto.” A juror’s decision may be based, partially at least, on which attorney the juror finds more trustworthy. An attorney may have the advantage of the “halo effect.” Outside knowledge of an attorney or a firm may impact the jurors’ ability to trust that attorney. The notoriety and history of the attorney, if any, will have impact on the jurors’ trust. If neither side has the outside influence, a lawyer needs to develop trust. Trust can be developed based upon the attorney asking the questions, the style of questions, and the manner of questioning. Trusting you is a step in having the jurors decide in your favor.

False Confessions

Episode 5 “Just Tell The Truth.” A woman gives a false confession to murder after 11 hours of interrogation. Dr. Bull’s mission is to have the jurors understand being in a situation where they are helpless and coerced. The scenario from the police interrogation was mental exhaustion, a promise of escape by the police (“If you confess, then . . .”), an offer of a reward, and forcing language. He creates a situation in an elevator with several of the jurors and himself. The elevator does an emergency stop orchestrated by Dr. Bull’s employee. It looks like they
will be stuck in that situation for an extended period of time. In fact, the person who responds to the call from the elevator, actually one of Dr. Bull’s employees, tells that it will be several hours before they are rescued. One of the jurors then tells the employee that someone is having a medical emergency – a heart attack. This of course is a lie. After the lie, the elevator operates once more. This taught the jurors about false confessions.

We cannot ethically reconstruct the elevator scenario. We are left with creating analogies to make the jurors consider their real-life undesirable or coerced situations. We have to get as close as possible to the situation in the case while asking questions of the jurors. We can ask jurors if they have ever been in a situation when they took blame for something they didn’t do. We can ask the jurors to imagine the reasons someone might tell a false story. We can also use a story from our life experiences or from the experiences of those who are close to us as a springboard to asking questions to the jurors.

**When you are a Hammer, Everything Looks Like a Nail**

Episode 7, “Never Saw the Sign.” The defendant is charged with criminal vehicular manslaughter. The person killed was his passenger, his wife. Dr. Bull states that “jury selection is never perfect.” Without discussing case themes and trilogies, he does discuss the “magic words” that support the theory. These magic words should be introduced during jury selection and are re-emphasized in opening, examinations, and closing.

The key to the case was a sign warning of road conditions before the accident. The defendant does not remember seeing the road sign. A hacker had changed the road sign to say something about books, removing the traffic warning. The theme is that there was no need to read or remember a sign that talked about books. If the sign had been about road conditions, the defendant would have remembered.

In our cases we may have an issue of memory. We need to talk to the jurors about how memory works – or doesn’t work. We need to rely on analogies.

Consider also the life experiences that the jurors may have had that developed attitudes and emotions that may transfer to your case. This is what “when you are a hammer everything looks like a nail” means. Keep the focus on how the jurors, through the lens of their life experiences, will perceive the people and occurrences that make up your case.

**Love-Hate Dynamic - Celebrities**

Episode 8, “Too Perfect.” What do you do when your client is a celebrity? Dr. Bull talks about the “love-hate” dynamic where jurors may have admiration for a celebrity, but have little emotion or even hate for the person as well. The theme of the episode seems to be that, while we love celebrities, we also hate them because we believe that they get away with behaviors because they are celebrities.

**Specific Preconceived Beliefs**

Episode 9, “Light My Fire.” A restaurant explodes, killing a man. A former employee is arrested and charged with arson and murder. The location is a small town. The family of the defendant is detested in the town because of things that the defendant’s mother and brother did several years before. The defendant is cast in the light of his family’s reputation as a no-good bum who would participate in criminal activities. Dr. Bull has the defendant testify and, by adroit questioning of his attorney, humanizes the defendant.

Jurors may have preconceived impressions concerning a party or a place. The best way to deal with these concerns in jury selection is by way of analogy. Get the jurors to talk. One of the methods of getting jurors to talk is by telling them that there are no right or wrong answers. Tell the jurors that your questions will only be about topics relevant to the case and only concern the issues that they will have to determine. In my voir dire at the end of the introduction, I enumerate the topics for the jurors. “There are three topics I hope to discuss with you today. First . . . . Second . . . . Lastly . . . .” Putting the jurors at ease by demonstrating your promise that there are no right or wrong answers, that there will be no criticism, and by letting them know in advance the topics to be addressed will encourage them to answer your questions.

**Life Experiences**

Episode 11, “Teacher’s Pet.” A high school football player has a relationship with his teacher. The teacher is being sued by the child’s parents for inflicting harm on a minor. Dr. Bull has the attorney ask the following analogy concerning personal space: “You are at the movies alone, the theater has few people, and, except for you, there is no one else in your row, someone comes in and sits right next to you. How do you feel?”
The principle is that people decide cases based upon social norms and life experiences. We decide cases not only based upon our life experiences but also the experiences that people close to us have shared with us.

**Is a Hotdog a Sandwich?**

Episode 12, “Stockholm Syndrome.” Dr. Bull introduces this episode by opining: “We define people on the questions we ask and the answers we choose to believe.” The Stockholm Syndrome occurs when the hostages in a situation develop an attachment to the captors. In this episode, a woman, whose husband has been sentenced to 15 years after pleading guilty to a crime he did not commit, places a bomb in the basement where Dr. Bull is conducting a mock jury. The bomb goes off trapping Dr. Bull, his mock jurors, and the woman. Here, the captor is the woman and the hostages, Dr. Bull and the mock jurors.

Dr. Bull points out that people experience events differently – and, because of this, tell a different story of the same event. Dr. Bull holds a mock jury despite the fact that they are trapped. By asking “which blast was the loudest, the first or the second,” he introduces the topic of memory. Some jurors say the first. Other jurors say the second. The truth is that there was only one blast. Dr. Bull talks about how memories are altered by the questions that are being asked.

The question “is a hotdog a sandwich” seems nonsensical. The attorney does not tell the jurors why he is asking the question and there is never an explanation during the episode, but Dr. Bull insists that it be asked. One explanation may be that the question actually asks about defining terms. Attorneys, as word surgeons not word butchers, should use words very carefully. A “sandwich” is defined by certain attributes. Having defined the class, it must be determined whether a “hotdog” has the attributes required for the class. Is it murder or is it an accident? Was it fraud or was it a mistake? We need to think about the words that we use. Word choice, including “calling names,” is important in persuasion. It is important to choose the right words.

**Spy Versus Whistleblower**

Episode 14, “It’s Classified.” Is the woman officer who gives up classified information a spy or is she a whistleblower? She is charged with a violation of the Espionage Act. She leaked documents to a newspaper concerning the bombing of a hospital. Unfortunately, the document revealed the location of an Army Ranger unit which was ultimately attacked, leading to the death of three Rangers.

The episode discusses topics we have reviewed: words matter, body language matters, and eye contact is important. When we choose the facts to discuss we change the focus of the trial. Jurors make decisions based upon their life experiences. Facts exist. How these facts are told in a story persuades.

With the notion that turnabout is fair play, the Army hacks into Dr. Bull’s computer. The hack gives the wrong juror profiles to Dr. Bull. As a result, the wrong potential jurors remain on the jury.

**Risk-Takers Versus Controllers**

Episode 16, “Freefall.” The governor dies in a jump from an airplane. Dr. Bull represents the company that packed the parachute and flew the plane. The company is sued for wrongful death. A juror profile is created where the issues of control, risk, and fear are considered. Dr. Bull does not want jurors who do not take risks, whose favorite color is not red, who do not buy extra insurance on a rental car, and who desire a raise but do not get one.

Creating juror profiles is a good practice. They make us think about those attributes and attitudes that form the best and worst jurors. They make us think about the issues in the case. They point the way to discovering the analogies we need to use in voir dire.

The episode also points out that jurors know if the attorney is not committed to the case. We do not always have the luxury of representing a person or agency in whom we believe. However, no matter the party we represent, when we are in front of the jury, we must act “as if.” Even if you are not committed, act committed.

**The Program as a Jury Selection Issue**

The television program may create a jury selection issue in itself. By way of analogy, the existence of a “CSI effect” is controversial. CSI: Crime Scene Investigation is a CBS-TV crime drama series. Just as controversial is what attorneys can do to remediate the effect if it exists. Just as there may well be a “CSI effect” for scientific evidence, there may be a “Bull effect.” Uninformed jurors will believe that Bull is reality. The larger our office, the more likely jurors and judges will
believe we have the resources to do the things that Dr. Bull does. We know we don’t. Just as attorneys must prepare for a possible CSI effect on jurors, we will now need to acknowledge a possible “Bull effect” and develop strategies to combat the effect.

The believers in the CSI effect and scientific evidence point to the heightened and unrealistic jury expectations. We incorporate into our experiences expectations and attitudes about what should be presented in an actual jury trial by watching crime television programs. However, not every case has scientific evidence. Not every case needs scientific evidence. But jurors want to hear scientific evidence. The jurors also expect that the science be flawless. If only it were! Things happen: no DNA was found, a combination of contributors was discovered, something happens in the chain of evidence. Further, DNA evidence may mean nothing. For example, in a self-defense murder case the DNA will be meaningless. Further, jurors may believe that they understand the science behind a certain technology when the technology has been either exaggerated or entirely fictional.

We cannot afford to ignore the potential of a CSI effect. If we ignore it and it is true, we have blundered in jury selection when our cases may have involved scientific evidence. If we embrace it and discuss it, we have not lost even if it is not true. Care needs to be taken in the formulation of questions. Maryland courts have frowned on CSI effect questions and instructions. In Robinson v. State, the court held that the instruction must not be given without empirical proof that the CSI effect exists.

What effect, if any, will a Bull effect have on jurors? It will key in the stealth jurors on how to stay on a jury. It will suggest to the jurors that attorneys use all manner of criminal behavior to obtain information about them including, but not limited to, hacking, stalking, stealing, and burglarizing. It suggests to jurors that jury selection is a game played by the attorneys who will do whatever it takes to win at any cost.

Do not ask questions that are not relevant to the issues in your case.

How I Do My Voir Dire

There are three phases to voir dire: an introduction, the questioning, and the conclusion. In the introduction after greeting the jurors, the attorney should:

- Introduce other individuals at the table;
- Indicate that you requested, wanted, and welcome this trial;
- Inform the jurors that you will assist them in finding the facts and the truth, so that justice can be done;
- Tell the jurors how important they are individually in that search for truth and justice;
- Point out the purpose of jury selection;
- With the judge’s permission, explain that sensitive questioning can be done in chambers;
- Emphasize that there will be no criticism of their answers; and
- Stress that there are no right or wrong answers, only truthful answers.

In Colorado the Criminal Rule permits, in the discretion of the judge, the attorney to do a mini-opening to place the questioning in context. If the judge does not permit this, I will place some of the facts in the preface to any questioning topic. At the end of the introduction, I enumerate my topics using a roadmap.

Other Jury Selection Principles Not in Bull That We Need to Know

This season of Bull has left out some important jury selection principles. The author of Blue's Guide to Jury Selection, Lisa Blue, has a golden rule for jury selection: people relate to and identify with people with similar backgrounds, beliefs, and life experiences. When considering and creating questions for voir dire, we must consider our client, our client's position, our client's circumstances in life, and the key witnesses.
In the introduction, I do not necessarily go in numerical order. The greeting is first. The enumeration of topics is last. Some attorneys begin with the mini-opening. Primacy suggests that placing the mini-opening first may be the optimal strategy. Placing the mini-opening first previews the case and issues for the jury and gives context to your questions.

Gathering information through questioning is the function of voir dire. Using analogies does several things: it places the issues in the case in a more precise setting; it causes the jurors to think of their own life experiences in similar settings; it influences jurors who have not had those experiences by exposing them to the issue; and it permits the attorney to be seen as a human being. Analogies are essential to understanding for jurors. Always thank jurors for their answers, especially if the answer is bad for you. Wave the flag in response to bad answers: “This is America and you have a right to have an opinion. Even if the judge or a lawyer disagrees with you, no one in this courtroom will criticize you for your opinion.” Use focus-out and focus-in techniques to keep all the jurors involved in the process. Ask a general question to all the jurors and then focus on individual jurors. One technique you can use to get the jurors to respond to a question is to raise your hand yourself as you ask the question. This encourages jurors to respond. Be inclusive: do not forget those who do not raise their hands. Use inclusive language. Also talk about “we” and “us” instead of “me” and “my,” except when using analogies. Also ask inclusive questions: “Have you or anyone close to you . . . .”

You should use open-ended questions to receive the best responses. You can also use scaled questions, on a scale of 1 to 5 or 1 to 10, or “some people believe” questions. Follow up on answers.

Conclusions are very important. Watch your time. There are four concluding questions that you should always ask, even though you may rarely receive answers.

- Were you not asked a question that you would like to answer or would answer differently?
- Have things come to mind when a question was asked, but you did not get the chance to answer?
- Considering the issues that you will be called upon to decide, is there anything you want to say?
- Is there anything about you, your background, your experiences, your attitudes that has not been revealed that you believe, in fairness, should be revealed to the judge and the attorneys?

This works. As one example, I was trying a felony when I was a chief deputy district attorney. After asking all four of the questions, one of the jurors raised his hand and asked to speak in chambers. In chambers, the judge asked him what he had to say. The juror said: “I hate Edwards.” A little shocked by that answer I asked why. The juror indicated that I had prosecuted his girlfriend and that she was convicted. If I had not received that information, I would have kept him on the jury. What chaos would have arisen if he had been permitted to deliberate?

Finally, when I conclude the voir dire, I thank the jurors for their attention and honesty. Be sure to be sincere whenever you offer thanks. I then pass the jury for cause, giving up my challenges for cause, or ask to approach the bench to make my challenges.

Common Mistakes

The most common mistakes in jury selection are:

- Not being nice. From the moment you leave the house in the morning until the verdict, be nice to everyone. Potential jurors are watching. They know when you have been naughty and they know when you have been nice.
- Failing to prepare and organize. Know the courtroom procedure. Know the law.
- Not letting the jurors know what you are going to ask them and why that topic is pertinent to this case.
- Taking an adversarial role. Unlike any other part of trial, you are not an adversary to the jurors. You need the information. Bad answers are especially good for the information that they provide.
- Talking down to jurors and not understanding that jurors perceive the case through their life experience, attitudes, beliefs, biases.
- Not revealing who you are as an individual in your analogies.
- Not giving jurors sufficient time to answer your questions.
- Not calling upon jurors who wish to respond. Even if you are not going to let that juror answer a question, indicate that you are aware that the juror wanted to answer. “I also thank jurors (name or number) for offering to answer.” If you do not recognize the individual juror, that juror may no longer answer at all and other jurors will be discouraged from answering.
- Failing to protect your record. Even if a juror interrupts someone else’s answer, state the jurors
name or number so the response is attributed to a particular juror.

- And the biggest mistake: failing to listen. Listen to what the juror has to say. You can echo the response if it helps you. You can follow up on the answer to gain further information.

Conclusion

We must continue to adapt and progress how we do our voir dire. For example, I was just reading a book on rhetoric, Thank You For Arguing, when I came across a couple of questions that might be useful in voir dire. The author makes the point that people feel best when they live up to their values. To discover those values ask: “who are you first?” and “what one thing would you describe yourself as?”

_Bull_ can remind us of the many principles we need to utilize in jury selection. While we cannot have and do not have access to all the bells and whistles of the television drama, we can still utilize many of the underlying principles. This article has only touched the surface of developing theories, themes, and trilogies; searching for the jurors' life experiences; utilizing the principles behind word choice; and thinking about issues like implicit bias and trust. Learning about jury selection to effectively accomplish it is a lifetime pursuit.

Endnotes

1 There are so many sources about jury selection that I have read over the last 40 years that it is hard to say where I learned various principles. My education started with Cathy Bennett’s work on jury selection that began in 1972. Although she died in 1992, her work continues with Cathy E. Bennett & Associates, [http://www.cebjury.com/about](http://www.cebjury.com/about). The work of Juryworks, originally started in Chicago, has assisted in determining what jury demographics have statistical significance. I have also been influenced by Gerry Spence and his jury selection techniques and, more recently, by Lisa Blue’s articles. There are also many law review articles, too numerous to mention, which have influenced my trial techniques.


3 Id.

4 Id.

5 In discussing jury selection, I will use the term “juror” or “jurors” to also refer to a member or members of the venire.

6 Id.

7 Id.

8 Theories and themes have been taught since I was in law school 40 years ago. What is meant by theories and themes changes over time and between organizations. I have taught trial practice, evidence, criminal law, and criminal procedure for over 30 years at the University of Denver’s Sturm College of Law. Early on in teaching trial practice, I found that the students were not paying much attention to the law. That is when I began to divide theories and themes into legal theory, legal theme to emphasis the law and case theory, and case theme to emphasis the persuasive story and its interconnection with the law.


12 _Bull_: The Necklace (CBS television broadcast Sept. 20, 2016).

13 There are certain jurisdictions and certain judges who will not permit analogies.

16 Bull: Bring It On (CBS television broadcast April 18, 2019).  
17 Id.  
20 Variations of this technique is suggested in many sources. For example, Rutter Group Practice Guide: Federal Civil Trials and Evidence June 2017 Update, Chapter 1 E. 10. “Preparing Witnesses to Testify” suggests in different paragraphs that the witness listen, wait/think/pause, answer, stop.  
24 Bull: Too Perfect (CBS television broadcast on Dec. 6, 2016).  
26 See n. 19.  
33 Robinson v State, 436 Md. 560, 582, 84 A.3d 69 (2014) (noting studies from 2002 to 2007 that found no CSI effect) (two judges dissented, pointing out that the defense was the lack of any scientific evidence and that there cannot be proof without scientific evidence).  
34 See n. 19  
35 Id.  
36 In teaching jury selection, I have seen many law students do very persuasive introductions by placing the mini-opening first. I have learned a lot from my students.  
37 At some point many years ago, I picked up this technique from an article. Although I could not find that article, very similar questions are suggested by William Wegner, Robert Fairbank, Justice Normal Epstein & Eli Chernow in CALIFORNIA PRACTICE GUIDE CIVIL TRIALS & EVIDENCE, Ch. 5, app. C (29).  
Survey of “Ethics Gurus” in AG Offices Reveals Priorities

One Issue is the Use of Deception in Undercover Investigations

AMIE ELY, DIRECTOR, NAGTRI CENTER FOR ETHICS AND PUBLIC INTEGRITY AND NAGTRI PROGRAM COUNSEL

To assist in carrying out the mission of the Center for Ethics & Public Integrity (CEPI), I have been reaching out to attorneys who address ethics issues in their attorney general’s office (AGO). This outreach has included identifying these experts; developing and distributing an ethics survey; planning a summit and training for the experts; and sending email requests for information on topics requested by individual ethics experts.

AGOs from 43 states and several territories have identified their “ethics gurus,” over half of whom participated in the ethics survey. That survey will be used to ensure that CEPI and NAGTRI are providing responsive, cutting-edge ethics training, beginning with a National Ethics Summit & Training in late October 2017.

I have also solicited information about specific ethics issues, at the request of individual ethics gurus, to assist AGOs that are considering developing specific ethics policies or are engaging in litigation about ethics issues. One recent solicitation involves the use of deception in undercover investigations that are supervised by prosecutors.

Survey Says …

Twenty-six AGOs completed the ethics survey. It asked several preliminary questions about the resources AGOs devoted to ethics issues, and then asked the gurus to identify the ethics areas that regularly arose in their offices. The survey also requested guidance about topics to address in a training of the ethics gurus.

I learned that most of the gurus cover all ethics issues in their offices and also have other duties. Only three reported spending three-quarters or more of their time on ethical issues; 19 spend one-quarter or less of their time on ethics. The majority of gurus are responsible for administrative, civil, and criminal ethics issues, but a few (particularly in offices with limited or no criminal jurisdiction) focus entirely on administrative and civil issues.

In a response that was unsurprising, given the wide-ranging responsibilities of the typical AGO, all of the gurus who responded identified conflicts of interest as an issue that arose in their offices. Most (24) said that conflicts of interest within the office were more common; three reported that opposing counsel’s conflicts of interest were more frequent.

Most (23) also reported that issues involving specific rules of professional conduct typically arose in their office. Over half identified Rules 1.7, 1.10, and 1.11 (all of which relate to representation of clients) and Rule 4.2 (relating to contacts with current or former employees) as rules they typically encounter. Ten identified Rule 8.4(c), which requires candor and—as discussed below—can be an issue in undercover operations that are managed by prosecutors, as a rule that they confront.

Most offices (20) had a code of conduct and/or policies on conflicts of interest. Eighteen offices have policies setting forth methods to “wall off” from a specific case a person with a conflict of interest. Only nine offices reported policies regarding discovery/
disclosure, and five had policies addressing parallel proceedings.

Several offices reported having internal ethics committees that could be consulted if ethics issues arose, and/or consulting with either an outside ethics commission or bar counsel. Relatedly, in some states (11), attorneys from an AGO could also be called upon to provide advice to their state’s ethics body.

Suggestions of areas for the October training included the following:

- Potential and actual conflicts of interest, including:
  - Where the AGO once represented an entity but is now suing that entity
  - Internal conflicts of interest related to outside activities (including volunteering) and employment
  - Walling off attorneys in different parts of the office
  - Representing multiple state defendants
- Discovery issues, including whether there are Brady-like requirements in administrative/regulatory proceedings
- Use of deception
- Candor to the court
- Protection of attorney-client privilege and under the work product doctrine
- Class action issues, such as communicating with members of a class who are state employees
- Use of office letterhead
- AG taking positions different from those of a client agency
- Unauthorized practice of law by opposing parties who are not attorneys
- Prosecutorial discretion
- Attorney general as client
- Rule of Professional Conduct 4.3 issues, particularly when hearing officers expect government attorneys to explain procedural issues to unrepresented persons who are litigating against the government
- Whether a decision made by an internal ethics committee is akin to, for purposes of Rule 5.2, a decision of a supervisory lawyer

One Recent Ethics Issue: The Use of Deception in Undercover Investigations

I have also received and transmitted requests for information about ethics issues that AGOs are addressing. One example comes from the Colorado Attorney General’s Office, which recently asked its state supreme court to determine if Colorado Rule of Professional Conduct 8.4(c) permits prosecutors to supervise otherwise lawful undercover operations that involve subterfuge. That rule provides that “It is professional misconduct for a lawyer to… engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

a. Background

To contextualize Colorado’s Rule 8.4(c) issue, some background is in order. In December 2016, the Jefferson County (Colorado) District Attorney’s Office disbanded a successful child sex offender investigations unit after a defendant alleged that prosecutors had behaved unethically by supervising an online undercover operation. The Child Sex Offender Internet Investigations Unit—CSOII, but nicknamed Cheezo (complete with an eponymous Tony-the-Tiger-like mascot)—had been housed in the district attorney’s office for a decade, and convicted over 900 online sexual predators. To accomplish this, CSOII detectives posed as children online and communicated with adults who proposed engaging in sexual activity. A defendant convicted in 2012 of attempted sexual exploitation of a child (who unsuccessfully appealed his conviction) made an ethics complaint about prosecutors’ involvement in the investigators’ use of deception in his case.

The Colorado Office of Attorney Regulation Counsel (ARC) concluded that the defendant’s allegations were sufficient to trigger a formal investigation of a violation of Rule 8.4(c). While ARC eventually dismissed the complaint, it was only after the district attorney dissolved CSOII’s investigative arm, and its undercover investigations ceased.

While CSOII (and Cheezo) fortunately found a new home in the Jefferson County Sheriff’s Office, concerns remained about the ethics board’s intimation that prosecutors providing guidance to law enforcement investigations using subterfuge would violate Rule 8.4(c). As a result, Colorado Attorney General Cynthia H. Coffman ceased all undercover operations in her office. Her office quickly sought a writ of injunction from the Colorado Supreme Court “enjoining ARC from proceeding against a government lawyer solely for supervising or providing legal advice to assist with a lawful undercover investigation.”

On June 5, 2017, the Colorado Supreme Court denied the request for a writ. At the same time, it posted a notice of expedited rulemaking for 8.4(c), proposing the addition of the underlined language:
Federal guidance for prosecutors and law enforcement also contemplates that prosecutors will oversee undercover investigations. For example, the Federal Bureau of Investigation requires continuing consultation with “the Appropriate Federal Prosecutor” (defined as a U.S. attorney or a section chief of the Criminal Division of the Department of Justice) “upon initiating and throughout the course of any undercover operation.”15 The FBI supervisory special agent in supervising such an investigation should consult “particularly with respect to the propriety of the operation and the legal sufficiency and quality of evidence that is being produced by the activity.”16

Federal courts have generally approved of undercover operations by law enforcement and made clear that it is appropriate for prosecutors to supervise such investigations. For example, the Tenth Circuit recently discussed generally the approval by other courts and ethics bodies of prosecutors overseeing undercover operations, as such investigations are “authorized by law.”17 That court also cited a prior Tenth Circuit decision that concluded that Colorado would permit prosecutors to be involved in undercover investigations.18

At least one state court has, however, adopted a restrictive view of Rule 8.4(c). In In re Gatti,19 the Oregon Supreme Court rejected calls by a chorus of prosecutors to recognize a prosecutorial exception to the constraints in 8.4(c). As a result of that decision, the Rules of Professional Conduct in Oregon were later amended to explicitly permit attorneys to “supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct.”20

Of course, there are—and should be—limits to what investigators, confidential informants, and prosecutors can do in an undercover investigation, and prosecutors’ offices should consider developing policies to ensure that this powerful investigative tool is wielded thoughtfully. In a seminal case in the Second Circuit, United States v. Hammad,21 the investigation included a fake grand jury subpoena that the prosecutor drafted, and the judges were most displeased with that technique. Even so, when the court denied the government’s petition for a rehearing, it restated that it was not “requir[ing] that government investigatory agencies refrain from all use of informants to gather information.”22 It may be useful to add that, post-Hammad, the practice in the Second Circuit developed into one where federal prosecutors

b. Analysis
The American Bar Association (ABA), federal law enforcement agencies, most if not all federal courts, and legal ethics experts all support prosecutors' involvement in lawful undercover operations. This firmly suggests that the ABA and others already recognize that prosecutors' supervision of lawful covert operations—including that involving subterfuge by law enforcement officers or confidential informants—is permitted under Model Rule of Professional Code 8.4(c), notwithstanding the absence of explicit language allowing such oversight. These experts all share in the belief that “a rule forbidding a lawyer's involvement while continuing to allow undercover operations operates to prevent lawyers from serving as a brake or restraint on over-zealous undercover operations by lay-investigators.”10

The ABA's Standards on Prosecutorial Investigation recommend that prosecutors supervise undercover law enforcement operations and provide guidance about factors the prosecutors should consider when “deciding whether to use or to advise the use of” such operations.11 The Standards also suggest that, once such an investigation has commenced, prosecutors “consult” with the law enforcement agents involved in the undercover investigation “on a regular basis” regarding “the continued propriety of the operation and the legal sufficiency and quality of the evidence that is being produced by the operation” and regularly assess the risks and benefits of the undercover operation.12 Finally, the Standards contemplate that undercover officers might need to be involved in illegal activity to accomplish the goals of the investigation, but recommend that prosecutors “seek to avoid or minimize” the risks of such involvement and provide guidance to those officers “about authorized participation in otherwise criminal conduct.”13 These ABA Standards provide similar guidance to prosecutors involved in operations that utilize confidential informants.14

Federal guidance for prosecutors and law enforcement also contemplates that prosecutors will

(c) [It is professional misconduct for a lawyer to...] engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities.

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Federal guidance for prosecutors and law enforcement also contemplates that prosecutors will
were comfortable supervising pre-indictment undercover operations. That said, this oversight was exercised carefully.

Finally, legal ethics experts recommend that prosecutors supervise undercover operations. As one example, a private attorney in Colorado bemoaned "[t]he offensive use of the Colorado Rules of Professional Conduct by criminal defense lawyers to shackle CHEEZO" and said that the reassignment of that unit to the sheriff’s office "ha[d] the unfortunate consequence of relieving any public pressure which might have caused the Colorado Supreme Court to reassess its dogmatic approach to Rule 8.4(c), and to consider public policy considerations which favor a role for attorneys in advising clients, law enforcement, and investigators engaged in covert operations."23

c. Next Steps
The Colorado Attorney General’s Office welcomes input from other prosecutors and legal ethics experts, particularly those in the following states and the District of Columbia—all of which have amended their Rules of Professional Conduct to, in one form or another, explicitly permit lawyers to supervise lawful undercover activities: Alabama (Rule 3.8);24 Alaska (comment to 8.4(c)); District of Columbia (comment to 4.2); Florida (8.4(c) and comment); Iowa (comment to 8.4(c)); Michigan (8.4(b)); Missouri (8.4(c)); North Carolina (comment to 4.2 and comment to 8.4(c)); North Dakota (8.4(c)); Ohio (comment to 8.4(c)); Oregon (8.4(a)(3) and 8.4(2)); South Carolina (comment to 4.1); Tennessee (comment to 8.4(c)); Virginia (8.4(c)); Wisconsin (comment to 4.1); and Wyoming (comment to 3.8).

Conclusion
The tools we can use to identify, analyze, and address ethics issues—including the survey, the training, and the email solicitations—allow CEPI to harness the expertise and experiences of gurus in AGOs to benefit the entire attorney general community. Establishing a community of committed ethics experts ensures that, when the need arises, the Center can solicit information and guidance from these gurus. This network has permitted NAGTRI to solicit information about Rule 8.4(c) (and its analogues) from prosecutors around the country in an effort to assist the Colorado Attorney General’s Office. I am hopeful that the conversations among the ethics gurus will continue, and I encourage any interested AGO to contact me with any questions or suggestions.
Endnotes
1 Its mission is to “provide training, research, and technical assistance to prosecutors involved in the fight against corruption, and to provide training and other resources on the ethical practice of law by government attorneys.”
2 States for which I am still seeking ethics gurus are: Alabama, Arkansas, Delaware, Florida, Iowa, Minnesota, Oklahoma, and South Carolina. I also seek gurus for the following territories: American Samoa, Puerto Rico, and the U.S. Virgin Islands.
3 Several offices have more than one “guru,” and one of those offices completed the survey twice; as a result, I have 27 responses. I thank the gurus who took the time to complete the survey. If your office has not participated or you would like more information about the survey, please feel free to reach out to me at aely@naag.org.
4 Thanks to Jan Michael Zavislan, senior counsel in the Consumer Protection Section at the Colorado Attorney General’s Office, for providing information about Colorado’s writ. Information not otherwise cited is from the Colorado AGO’s submission to its Supreme Court or from Mr. Zavislan.
5 Rule 8.4(a) makes clear the Rules can be violated “through the acts of another.”
11 ABA Standards on Prosecutorial Investigations, Std. 2.3(c), (d), at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate.html#2.3.
12 Id. at 2.3(e).
13 Id. at 2.3(f).
14 Id. at 2.4.
16 Id. at 18.
18 Id. at 5896 at 21 n. 7 (citing Jones v. Union Carbide Corp., 577 F.3d 1234, 1245 (10th Cir. 2009) (“In our view . . . , it would be too adventurous on our part to assume that Colorado would depart from the Restatements”).
19 8 P.3d 966 (Or. 2000).
20 Ore. R. of Prof’l Conduct 8.4(b).
21 846 F.2d 854 (2d Cir. 1988).
22 United States v. Hammad, 855 F.2d 36, 37 (2d Cir. 1988) (quoting Hammad, 846 F.2d at 860 (quoting United States v. Jamil, 707 F.2d 638, 645 (2d Cir. 1983))).
24 Each of the numbers that follow the state names reflect the state’s Rule of Professional Conduct that was amended to permit prosecutors to supervise undercover investigations.
Recent Powers and Duties Decisions

**EMILY MYERS, ANTIMUTRUST AND POWERS AND DUTIES CHIEF COUNSEL**

**Conflicts in Representation and Due Process Rights**

In a complicated case involving the investigation of a sitting attorney general, the Arizona Supreme Court addressed due process rights in administrative proceedings where a single individual acts as both prosecutor and decision maker. The Arizona attorney general and other parties were accused of campaign finance violations by the secretary of state. Arizona law provides that the secretary of state refer such accusations to the Attorney General’s Office. In order to avoid the appearance of impropriety, the solicitor general appointed a special assistant attorney general (SAAG) to investigate the alleged violations. The SAAG investigated and issued a compliance order finding that the defendant had violated Arizona campaign finance law and ordering substantial refunds of contributions. Pursuant to the prescribed administrative process, the defendants requested a hearing before an administrative law judge (ALJ). After a hearing, the ALJ found that the SAAG had failed to prove the claims and recommended that the SAAG’s order be vacated. The SAAG then issued a final administrative decision rejecting the ALJ’s recommendation. The defendants appealed to the district court, and in the course of that appeal, learned that the SAAG had participated in the prosecution of the case before the ALJ, including preparation and strategy. The defendants claimed a violation of their due process rights, and the district court and court of appeals rejected those arguments. The Arizona Supreme Court granted review.

The Arizona Supreme Court held that due process requires a neutral decision maker, and, although there was no indication of actual bias, “once an official determines that a legal violation has occurred, that official can be expected to develop a will to win at subsequent levels of adjudication.” The court emphasized several times that the potential for bias is not “intolerable” if the functions are combined in a single agency, but if they are performed by the same person, they violate due process. The court noted, “We have here not only a single agency performing accusatory, advocacy, and adjudicatory functions, but the same individual performing all three functions.” The court held, “due process does not allow the same person to serve as an accuser, advocate, and final decisionmaker in an agency adjudication.” Again emphasizing that this decision involved the actions of a single person, the court stated, “The agency head may supervise personnel involved in such functions; but if she makes the final agency decision, she must be isolated from advocacy functions and strategic prosecutorial decisionmaking and must supervise personnel involved in those functions in an arms-length fashion.” The court remanded the case to the Attorney General’s Office for a final decision, because the current officeholder had no conflict and could render a final administrative decision. *Horne v. Polk*, 2017 Ariz. LEXIS 150 (Ariz. May 25, 2017).

**Attorney General’s Common Law Duties**

A Hawaiian case addressed the representation of the legislature by the attorney general and the attorney general’s common law powers. Plaintiffs filed a *quo warranto* claim against a long-time state legislator, Calvin Say, who they claimed did not live in the district that he represented. After an appeal, the court issued a writ of *quo warranto* against Say, requiring him to show by what authority he claimed the seat. The Hawaii House of Representatives, represented by the attorney general, moved to intervene in the action. After a number of lower court proceedings, the case was appealed to the Hawaii Supreme Court. The plaintiffs sought to disqualify the attorney general on the grounds that the attorney general had a conflict of interest. Plaintiffs argued that the attorney general’s client is the state of Hawaii, and the attorney general cannot represent the House of Representatives if that results in a position adverse to the general state interest. The Supreme Court held that the attorney general was not representing multiple clients in this case. The plaintiffs are represented by independent counsel, while the attorney general represents the House of Representatives. The court noted “The Attorney General’s common law duty to protect the public interest is subject to his or her definition of what is in the best interests of the state or public at large... [plaintiffs’] writ of *quo warranto* does not ipso facto
establish their position to be in the public interest and is not binding upon the Attorney General.” *Hussey v. Say*, 139 Haw. 181 (Haw. 2016).

**Attorney General Control of Litigation on Behalf of the State**

The authority of the Illinois attorney general to control all litigation on behalf of the state was reaffirmed in a recent decision. The director of Central Management Services (CMS), an Illinois state agency, sued the attorney general after she declined to defend CMS’s position that certain health care personal assistants were not state employees for purposes of the state’s workers’ compensation law. CMS sought to enjoin the attorney general from representing CMS and to require the attorney general to appoint a special assistant attorney general to represent the agency. The trial court dismissed the complaint, holding that the “unique” powers of the Illinois attorney general include the “responsibility to decide what arguments, strategies, and litigation tactics to employ.” The trial court also held that CMS’s “disagreement with the attorney general’s strategy” was not a conflict of interest that justified removal of the attorney general. CMS appealed.

The court of appeals affirmed the district court. Noting that the Illinois attorney general has extensive common law powers, the court described two situations in which there could be disqualifying conflicts for the attorney general: where the attorney general is individually interested in or a party to the case or when the attorney general is representing opposing state agencies. Neither of those circumstances applies in this case, because CMS simply disagrees with the arguments made by the attorney general. The attorney general was defending CMS, but was refusing to make arguments that had repeatedly been rejected by the Illinois Industrial Commission (the decision-making authority). In fact, the Attorney General’s Office “has been threatened with penalties and fees” because this argument “is unreasonable in light of numerous decisions [to the contrary].” The court of appeals concluded by citing Illinois Supreme Court precedent: “[I]f the Attorney General is to have the unqualified role of chief legal officer of the State, he or she must be able to direct the legal affairs of the State and its agencies.” *Hoffman v. Madigan*, 2017 IL App (4th) 160392 (Ill. App. 4th Dist. June 22, 2017).

**Contingency Fee Contract with Outside Counsel is Permissible**

As has been the case in other states, defendants’ challenge to the New Hampshire attorney general’s contingency fee contract with outside counsel was dismissed. The state of New Hampshire retained an outside law firm to assist the Attorney General’s Office in investigating and litigating potential claims of fraudulent marketing of opioid drugs. The attorney general issued documentary subpoenas to several defendants. The defendants refused to respond to the subpoenas, the state moved to enforce them, and the defendants counterclaimed that the attorney general’s retention of outside counsel on a contingent basis was unlawful. Defendants sought a protective order seeking to “bar the attorney general from engaging contingent fee counsel.” The defendants argued that the fee agreement violated New Hampshire statutes and common law, was *ultra vires* because the attorney general did not obtain legislative and executive
approval before entering into the contract, violated the doctrine of separation of powers, violated the New Hampshire Rules of Professional Conduct, and violated their due process rights. The trial court found that the defendants had standing to raise the issues, that the contingency fee contract was invalid because the attorney general had not received proper approval from the governor and legislature, but that there were no ethical violations or violations of due process rights. The attorney general appealed.

The New Hampshire Supreme Court first addressed the standing of defendants to challenge a government contract to which they are not a party. The court dismissed the defendants’ claim that the contract was ultra vires on the grounds that defendants’ claimed injury (the inherent bias of the outside counsel) would not be remedied if proper procedures had been followed. The court also held that the defendants could not challenge the contract as a violation of the New Hampshire statutes that require any funds obtained through litigation or settlement be deposited in a consumer protection escrow account. The defendants argued that this statute prohibited contingency fee contracts because all funds must be deposited in the escrow account. The court held that the defendants’ injury was neither actual nor imminent, since there might never be any funds at all. The court also dismissed defendants’ allegations that the contingent fee contract violated the state’s Ethics Code on the grounds that the Code provided no private right of action.

Defendants also argued that the contingency fee contract violated New Hampshire common law, because “[w]hen a private lawyer represents the State in a matter in which the lawyer has a personal interest, that interest compromises the ‘impartiality’ required of all government lawyers and creates at least the appearance of impropriety.” The court held that the outside law firm was not a “public attorney” for purposes of the common law. The Attorney General’s Office “retains direct authority over all aspects of the investigation” and the attorney general “will determine, in its sole discretion, whether to move forward to litigation.” Because the outside firm had no authority to make key decisions, it is not representing the state as a “substitute” for the attorney general. Finally, the court affirmed the district court’s ruling that the agreement did not violate due process. The court cited state Supreme Court precedent for the proposition that “the ‘rigid requirements of [neutrality], designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity.”


Authority to Issue Investigatory Subpoenas

The interplay of investigatory subpoenas and First Amendment rights was explored in a recent New York case. The New York attorney general issued investigatory subpoenas to a non-profit operator of crisis pregnancy centers. The attorney general was investigating whether the centers were engaging in the unauthorized practice of medicine when they counseled pregnant women not to terminate their pregnancies. The attorney general sought information on whether the facilities were designed to look like medical offices and whether women were misled into believing they were being seen by a medical doctor when they were not. The attorney general's subpoena sought documents about “petitioner's corporate structure and facilities, the names, education, and credentials of all of its staff members, the materials it provides to clients, its medical services, equipment, and supplies, and the source of its funding.” The non-profit entity sought a protective order on the grounds that the subpoena was an attack on its views. The trial court denied the motion for protective order and the petitioner appealed.

The appellate court first held that the attorney general had the authority to issue the subpoena even if the party to whom it was issued was not operating for commercial gain because the authorizing statute includes no such limitation. The court also held that the attorney general had an adequate factual basis to support the issuance of the subpoena. The materials supporting its issuance included testimony from the city council and evidence that the crisis pregnancy centers were set up to look like medical offices, with medical staff. The court held that this was a sufficient factual basis for the subpoena in this case. The court also held that the documents sought by the attorney general were reasonably related to the subject of the investigation.

The court then turned to the question of petitioner’s First Amendment rights. Under New York law, petitioner first must make a showing that its rights are damaged by producing the information. Petitioner did so by evidence that its long-standing contract with a hospital for ultrasound services had been terminated, among other effects. The burden then shifted to the attorney general to show that the
subpoena related to a compelling government interest. The attorney general also satisfied this requirement, asserting an interest in prohibiting fraudulent or illegal acts. However, the court held that the subpoena must be narrowly tailored and limited the subpoena to documents which pertain to the potential provision of medical or medical-related services. To implement its order, the court required production of documents responsive to the original subpoena for an in camera review by the trial court, which will determine which documents will be produced to the attorney general. *In the Matter of Evergreen Association v. Schneiderman*, 2017 N.Y. App. Div. LEXIS 5021 (N.Y. App. Div. June 21, 2017).

### Attorney General Representation of Private Parties

The South Dakota Supreme Court addressed the question of attorney general representation of private parties in a recent decision. Owners of the land under a large lake filed suit to enjoin the use of the lake by the general public. South Dakota law provides that all waters in South Dakota are held by the state in trust for the public. Owners of the land under the lake complained to the state Department of Fish and Game when numerous people used the lake for boating or ice fishing. The agency responded that, if people accessed the lake legally, they were entitled to use the lake. The landowners sued for declaratory and injunctive relief against the Department of Fish and Game, its secretary, the state of South Dakota, and the individuals who were using the water. The trial court designated a class for purposes of the case, which included all persons who have used or intended to use the waters. The secretary of the Department of Fish and Game was designated the class representative. The trial court issued an injunction in favor of the landowners and the attorney general appealed.

The state argued that the trial court erred in naming the secretary of the Department of Fish and Game as the class representative, thereby compelling the Attorney General’s Office to represent the private individuals who were also members of the class. The attorney general argued that the interests of the state and the private parties were not identical, so that the secretary would not be an adequate class representative. In support of that argument, the Attorney General’s Office noted that it is not authorized to represent private citizens, and South Dakota law provides that the attorney general “shall not actively engage in the private practice of law.” The court held that, although there are private individuals in the class, “This case concerns the interest of the public at large, and, in defending the action, the Attorney General’s Office is pursuing a matter in which the State is both a ‘party’ and ‘interested.’ The Attorney General is not engaging in the private practice of law.” The court concluded that, in the absence of a legislative act, neither the landowners nor the general public had a superior right. The court enjoined the state from “facilitating” access for members of the public. *Duerre v. Hepler*, 2017 SD 8, 892 N.W.2d 209 (S.D. 2017).

### Attorney General Communications Not Categorically Exempt from FOI Requests

A Vermont court has ordered the Attorney General’s Office to release documents pursuant to a Freedom of Information (FOI) request that the attorney general argued are covered by attorney-client privilege. The plaintiff sought documents relating to the attorney general’s participation in a Common Interest Agreement with the attorneys general of several other states on the subject of climate change. Specifically, the plaintiff sought documents that reflect requests to share records and responses to those requests, in particular refusals to divulge information pursuant to FOI requests. The Attorney General’s Office denied the request on the grounds that the release of the documents would cause the custodian to violate ethics standards and to violate statutory or common law privilege (two statutory exceptions to FOI requests). The attorney general argued that, since the state as a whole and the public interest are the attorney general’s client, “all of its work, including all of its records, qualifies for the professional ethics confidentiality exemption.” The court noted that although “many documents possessed by the Attorney General will be confidential or privileged, [the statute] cannot be read to reflect legislative intent that all records in the Attorney General’s Office would be completely exempt.” Turning to the common interest agreement, the court stated that, even if a common interest privilege were recognized in Vermont, the documents to which it applied would have to be subject to some underlying privilege, for example attorney-client or work-product privileges. The court held that the plaintiff’s request was for records “showing that requests were made by a party to the Agreement to share records, and records showing consent was given or objection made to such requests.” Characterizing these documents as having to do with “frequency and timing . . . and not with content,” the court held that the Attorney General’s Office must produce the documents. *Energy & Environment Legal Institute v. Attorney General of Vermont*, No. 558-9-16 (Vt. Super. Ct., Washington Unit, July 27, 2017).
The U.S. Supreme Court’s decision in North Carolina State Board of Dental Examiners v. FTC has now been on the books for two years, and the time seems ripe for an update on litigation, legislation, and advocacy that address the exception from application of federal antitrust laws known as state action immunity.

“State action immunity” is a doctrine created by the Supreme Court to provide states, when acting as sovereigns, with immunity from federal antitrust lawsuits if the state’s exercise of its authority has anticompetitive effects. Parker v. Brown, 317 U.S. 341 (1943). Parker and later Supreme Court decisions are based on the idea that the acts of the sovereign state, even if they are anticompetitive, outweigh the importance of a freely competitive marketplace. If the state itself (for example, through a state agency) is regulating the market, the state action is fairly clear. The interest of the state is less clear in situations where private parties are acting to regulate a market (for example, when state licensing boards are composed of practitioners licensed by the board).

The Supreme Court stated a two-part test to “determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws.” State action protection covers private parties only where (1) the challenged restraint reflects a clearly articulated state policy that permits the anticompetitive conduct (the “clear articulation” test) and (2) the permitted anticompetitive activities are actively supervised by the state (the “active supervision” test).

In its 2015 North Carolina Dental decision, the Supreme Court focused on the second prong of the test, active supervision, assuming, as the parties had, that the state had clearly articulated a policy to displace competition. The court held, “A state board on which a controlling number of decision makers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state-action antitrust immunity.” The court further held that active supervision by the state is to be determined on a case-by-case basis but requires that 1) A state supervisor must review the substance of the action (not just the process by which the action was taken); 2) The supervisor must have the power to veto or modify the action; and 3) There must be active supervision, not just the potential for supervision.

The Supreme Court’s decision left a number of questions unanswered. Those questions are gradually being addressed through litigation, legislation, and guidance from the federal agencies and state attorneys general. Developments in each of those areas are described in this article.

**Litigation**

Shortly after the NC Dental decision, a number of cases were filed around the country, alleging anticompetitive actions by regulatory boards, including denial of licenses to individual licensees and promulgation of general rules that impeded specific competitors or specific types of practice. A number of those cases have now been resolved in favor of the board. In some cases, the claim was dismissed quickly, not always on grounds of state action immunity, while, in others, the claim was appealed to, and eventually dismissed by, the federal court of appeals.

Several cases were resolved by settlement, some of which required legislative action. For example, a veterinary pharmaceutical company that delivers pet medications directly to pet owners sued the Nevada State Board of Pharmacy after the Board determined its operations violated anti-kickback statutes. After the case was appealed to the state supreme court, the parties reached a settlement, which required, in part, “legislative and/or regulatory changes to fully implement the Settlement, which changes may take a considerable amount of time to fully and finally accomplish due to the nature of the legislative and regulatory process.” A similar settlement was reached when LegalZoom, a company that provided
prepaid legal services plans (connecting customers to attorneys licensed in the state who have contracted with LegalZoom to provide services) sued the North Carolina State Bar. LegalZoom alleged that the Bar had sought to regulate prepaid legal services plans, over which the Bar had no jurisdiction. The parties reached a settlement, one of the provisions of which stated, “The parties have agreed to mutually support and use best efforts to obtain passage by the North Carolina General Assembly of HB 436 in the form currently pending before the House Judiciary Committee.”

Several cases against state regulatory boards have survived motions to dismiss and are still pending. One case pitted two state regulatory boards against one another. The case was brought against the North Carolina Acupuncture Licensing Board by physical therapists who want to perform “dry needling” and by two dancers who rely on dry needling for pain relief. The complaint alleged that the dry needling is a recognized and helpful physical therapy and that the North Carolina Physical Therapy Board has expressly determined that dry needling is within the scope of physical therapy practice. The Acupuncture Board issued a publication in which it concluded that dry needling is acupuncture and that physical therapists who were performing dry needling were endangering the public and were subject to legal enforcement to force them to discontinue the practice. The Acupuncture Board sent cease-and-desist letters to physical therapists who advertised dry needling and eventually filed suit in state court against the Physical Therapy Board and the plaintiffs in this case, seeking a declaratory judgment that dry needling by licensed physical therapists constitutes the unlawful practice of acupuncture. Plaintiffs sued in federal court, alleging violations of the Sherman Act. The Acupuncture Board apparently did not raise state action immunity as a defense, and the court did not address state action immunity when it denied the Acupuncture Board’s motion to dismiss.

In another recent decision, the plaintiff sued the Pennsylvania State Board of Auctioneer Examiners after the state charged him with operating an unlicensed auctioneer. He appealed the Board’s decision in state court. The Board is composed of two state employees, two members of the public, one registered auction trading assistant and four licensed auctioneers. Other than the government employees, who serve by virtue of their positions, the governor appoints all members. The court distinguished this case from NC Dental on the grounds that the members of the NC Dental Board were elected by the dentists in the state, rather than appointed by the governor, that they were acting on a subject not addressed by their governing statute and were not subject to review or reversal by state officials. In this case, in addition to being appointed by the governor, the Board was applying express statutory provisions, and its application of those provisions was subject to judicial review. Finally, the Board’s action, which was undertaken after a full hearing, was initiated by one of the plaintiff’s clients, not by a competitor. The court affirmed the holding of the Board.

The Supreme Court held, in Town of Hallie v. Eau Claire, that only the “clear articulation” part of the Midcal test is applied when the anticompetitive actor is a municipality or other “arm of the state.” Although the NC Dental decision dealt solely with “active supervision” of non-state actors, a recent decision from the 10th Circuit addressed the “clear articulation” part of the Supreme Court’s test. In the 10th Circuit case, the University of Colorado-Denver instituted a residency requirement for its students that forced many students to live at Campus Village, an apartment complex owned by an arm of the University, thus damaging a competing apartment complex, Auraria Student Village. Although the court dismissed the case on the grounds that the plaintiff had not properly pled or provided evidence of the relevant market, the court held that Campus Village was not entitled to antitrust immunity because there had been no clear articulation of state policy. Although state statutes authorized the issuance of bonds and entering of agreements to ensure the security of the holders of bonds used to fund the new University-owned housing, that does not mean the legislature “blessed anti-competitive behavior in the marketplace.” Nor was the anticompetitive activity foreseeable from that grant of power.

**Legislation**

During recent legislative sessions, several states enacted bills designed to protect the state licensing boards from antitrust claims.

Maryland’s statute (HB 628) was approved by the governor in May and covers licensing boards for health care occupations only. The statute makes the Office of Administrative Hearings the supervisor of health care boards “composed in whole or in part of individuals participating in the occupation or profession regulated by the board or commission.” The Office of Administrative Hearings “shall review a decision or action of a board or commission that is referred to the office by the Secretary or the Secretary’s
designee in order to determine whether the decision or action furthers a clearly articulated state policy to displace competition in the regulated market.” The Office may not approve the action if it does not further the state’s clearly articulated policy. A board may not implement a final action until after the Office of Administrative Hearings has reviewed the merits of the proposed action; assessed whether the proposed action furthers a clearly articulated state policy to displace competition; and issued a written decision approving, disapproving, or modifying the proposed action.

The Mississippi legislature passed, and the governor signed, the Occupational Board Compliance Act of 2017. The statute seeks to “ensure that occupational boards and board members shall avoid liability under federal antitrust laws.” The Act states that it is the policy of the state that regulatory boards use the least restrictive regulation available, and defines the types of regulation from least to most restrictive, beginning with market competition and ending with occupational licensing. The Act creates an Occupational Licensing Review Commission, composed of the governor, the secretary of state, and the attorney general. The Commission is to be the supervisor of “state executive branch occupational licensing boards controlled by active market participants.” The Commission must review the substance of occupational regulations proposed by the occupational licensing board and may approve, disapprove, or amend the regulation. Those regulations will not be effective unless they have been submitted to the Commission.

Montana enacted HB 141, to “ensure that Montana law provides for the active supervision of boards as required by the U.S. Supreme Court decision for purposes of state action antitrust immunity.” The commissioner of Labor and Industry is designated as the supervisor of professional and occupational licensing boards with a controlling number of market participants. The commissioner is authorized to “approve or disapprove any board action identified by the department as restraining or potentially restraining competition in trade or commerce.” The commissioner’s decision must be in writing and may include recommended modifications. If no written decision is received within 30 days, there is a rebuttable presumption that the board action was approved by the commissioner. Boards may also seek a determination that their actions are not subject to active supervision requirements.

The Ohio statute, which was one part of a large budget package, makes the “office of common sense initiatives,” within the Governor’s Office, the supervisor of state occupational and professional boards. The statute applies to a number of specified boards as well as “any multi-member body created under state law that licenses or otherwise regulates an occupation or industry to which one or more members of the body belongs.” The office will review board actions that are referred to it by the board or by any person affected by the board’s action. The statute specifies that denial of an individual license for failure to comply with the law or disciplinary action against an individual licensee will not be reviewed by the office. Referral must be made within 30 days of the board’s action and, once a referral has been made, the board may not take the action until it has been reviewed. The office must approve or disapprove the action in writing, and its decisions are to be made publicly available. The action shall be disapproved if “the action is not pursuant to a clearly articulated state policy or that if it is pursuant to [such] policy, that policy is a pretext” by which the board enables members of the regulated occupation “to engage in anticompetitive conduct that could by subject to state or federal antitrust law. . .”

Tennessee also enacted legislation (HB 326) to provide active supervision to regulatory boards. The head of the administrative department under which the board operates is made the supervisor of the board. The agency head (who must designate another person if he or she is a member of the regulated profession) must remand any administrative rule that may constitute a potentially unreasonable restraint of trade to the regulatory board for additional information, further proceedings, or modification, “if the rule is not consistent with a clearly articulated state policy or law established by the general assembly with respect to the regulatory board.” With respect to board actions other than rulemaking, the agency head must “determine whether the action may constitute a potentially unreasonable restraint of trade and, upon finding that further review is warranted, notify the board that took the action followed by a review and written determination.”

**Federal Action**

The federal antitrust agencies have filed only one case involving state action immunity since the Supreme Court’s decision in *NC Dental*. In May, the Federal Trade Commission (FTC) filed an administrative complaint against the Louisiana
Real Estate Appraisers Board, alleging that the group violated federal antitrust law by unreasonably restraining price competition for appraisal services in Louisiana. According to the complaint, the Dodd-Frank law requires appraisal companies to pay “a rate that is customary and reasonable for appraisal services performed in the market area.” The Appraisers Board allegedly commissioned surveys of fees charged, then required, in its regulations, that appraisers charge fees that equaled or exceeded those median fees. The board then investigated and sanctioned companies that charged fees below the specified levels. The FTC’s complaint alleged that the appraisal board’s regulations exceeded the scope of the mandate outlined in the Dodd-Frank Act. After an Executive Order issued by the governor strengthened the “active supervision” of the Board’s actions, the FTC administrative law judge granted a 90-day stay of the proceedings.\footnote{12}

During the past year, the FTC and the U.S. Department of Justice (DOJ) Antitrust Division have also commented on a half-dozen state legislative proposals involving occupational licensing, and, tangentially, regulatory boards and their authority. Their comments indicate the framework that the agencies are using to review licensing regulations. The agencies only comment when asked to do so, so their choice of legislation on which to comment does not necessarily indicate their enforcement priorities.

The FTC and DOJ jointly commented on a Puerto Rico bill that would expand the scope of practice of optometrists in Puerto Rico and allow them, after training, to prescribe certain topical and oral medications. The agencies supported the legislation, noting that optometrists are more readily available to consumer than ophthalmologists and can therefore increase access to eye care. The agencies also noted that this legislation would bring Puerto Rico in line with most other U.S. jurisdictions, which allow optometrists to use and prescribe medications.

On the other hand, the FTC was critical of an Iowa proposal to “establish specific minimum standards or a definition of supervision for appropriate supervision of physician assistants (PAs) by physicians.” In the FTC’s view, the regulatory structure, which was proposed by the Board of Medicine, imposed additional requirements and restrictions which were not necessary for patient protection, in particular, requiring additional face-to-face meetings between PAs and the supervising physicians.

The agencies commented favorably on a number of proposals to expand telehealth in both Michigan and Delaware, which would expand the definition of telehealth and permit telehealth professionals to prescribe drugs that are not controlled substances. The FTC also commented favorably on an Ohio bill that
would provide for the licensure of dental therapists, mid-level dental practitioners. The FTC commented that the licensing of dental therapists could increase consumer choice among providers of certain dental services, enhance competition, reduce prices, and expand access to dental care. The FTC was concerned, however that the bill allowed dental therapists to practice only in certain underserved settings, and this would limit their ability to provide service to Ohio consumers.

Most recently, the FTC commented on four bills in Nebraska, which were part of a regulatory licensing reform push in that state. The bills addressed licensure requirements of bank executive officers, motor vehicle salespeople, potato shippers, and school bus operators. Rather than comment on the four bills specifically, the FTC laid out a framework for examining licensing regimes, asking four questions:

- What legitimate policy justifications, if any, were articulated when the original license requirements were imposed?
- Are there currently any specific, legitimate, and substantiated policy objectives that justify continuing the license requirements?
- If current, legitimate policy objectives are identified, do they outweigh the expected harms from licensing? Such harms may include reduced economic opportunities, restricted employment, increases in consumer prices, and reductions in quality or access.
- If state licensing appears justified, are there any less restrictive alternatives to the current licensing system? For example, registries or certification of providers?

Acting FTC Chair Maureen Ohlhausen recently announced the creation of the Economic Liberty Task Force within the FTC. Acting Chair Ohlhausen expressed concern about occupational licensing in terms of its cost to consumers, costs to people seeking to move up the economic ladder in a new profession, and difficulties it causes to those who seek to practice their profession in different states, in particular, spouses of military personnel. Acting Chair Ohlhausen “believes in federalism and the important principles that it embodies” and if state policy makers have made the decision to displace competition, their decision should be respected. However, she stated “When market participants control state boards that impose regulations on potential new entrants and competition in their own profession, self-interest often supersedes consumer welfare and undermines the industry knowledge that such participants can impart.”

The acting chair has created an Economic Liberty Task Force to “advance economic liberty issues, with particular focus on occupational licensing regulations.” She “hopes to create a new level of partnership with governors, state attorneys general, state legislative leaders and other state and local officials to integrate competition concerns into the decision-making process.” She emphasized that, although the FTC will bring enforcement actions when appropriate, “advocacy and partnership will be the primary work of the FTC’s Economic Liberty Task Force.”

**Endnotes**

4 Auraria Student Housing v. Campus Village Apts., 843 F.3d 1225 (10th Cir. 2016) (district court denied state action immunity, 10th Cir. affirmed, case voluntarily dismissed with prejudice); Colindres v. Battle, Director, Board of Dentistry, No. 1:15-cv-02843 (N.D. Ga.) (antitrust claims not dismissed, no state action defense, case settled); Strategic Pharmaceutical Solutions, Inc. v. Nevada State Board of Pharmacy, No. 2:16-cv-00171 (D. Nev. May 24, 2016)(dismissed without prejudice as a result of settlement requiring legislative action); LegalZoom.com, Inc. v. North Carolina State Bar, No. 1:15-CV-439 (M.D.N.C.) (voluntary dismissal); Express Lien, Inc. v. Cleveland
Metropolitan Bar Association; No. 2:15-cv-02519 (E.D. La.); CoesterVMS v. Virginia Board of Real Estate Appraisers, No. 1:15-CV-980 (E.D.VA.).
6 LegalZoom.com, Inc. v. North Carolina State Bar, 2015 NCBC 96, (N.C. Super. Ct. Div. Oct. 22, 2015). A long-running case against the Texas Medical Board by the telehealth company Teladoc was stayed to allow the Texas legislature to redefine the practitioner/patient relationship to include telemedicine services that comply with the Board's standard of care regulations. The legislature passed, and the governor signed, SB1107 in May 2017. The case has been stayed until September 2017. Teladoc, Inc. v. Texas Medical Board et al., No. 15-343 (W.D. Tex. Apr. 10.2017).
10 Auraria Student Housing v. Campus Village Apartments, 843 F.3d 1225 (10th Cir. 2016). The Third Circuit reached a different conclusion in a similar case in Pennsylvania. In that case, the court applied a similar standard and held that the University was an arm of the state but was entitled to state action immunity because “mandating on-campus residency is a foreseeable consequence of the legislative mandate to provide appropriate student living facilities.” Edinboro College Park Apts. v. Edinboro University Fndn., 850 F.3d 567 (3d Cir. 2016).
11 H.B. 49, §107.56.
13 The FTC noted that Nebraska has already adopted federal requirements that school bus drivers obtain a commercial driver’s license with a special designation to carry passengers.
14 The FTC’s advocacy on regulatory issues can be found at https://www.ftc.gov/policy/advocacy/economic-liberty. Both the FTC and the U.S. Department of Justice commented favorably on a proposed North Carolina statute that excluded from the definition of “practice of law” the operation of websites that generate legal documents based on customer responses to questions (like the web-based service LegalZoom). The legislation required that the website state clearly that the forms are not a substitute for attorney advice or services and disclose the provider’s legal name and physical location and address. In approving this legislation, the agencies stated, “Overbroad scope-of-practice and unauthorized-practice-of-law policies can increase prices, impede innovation, and otherwise harm competition and consumers.”
Bridging Gaps to Reduce Prescription Drug and Opioid Abuse and Misuse

JEANETTE MANNING, NAGTRI PROGRAM COUNSEL

The prescription drug and opioid epidemic has taken a shattering toll on our nation in every way imaginable and in a relatively short period of time. Significant numbers of overdoses and deaths, the catastrophic mixing of harmful synthetic opioids with heroin and opioids like fentanyl and carfentanil, children left orphaned or neglected, families losing loved ones, burgeoning medical crises at emergency rooms, HIV outbreaks, and first responders being exposed to or ingesting dangerous materials and often administering life-saving drugs to repeat users are just a few of the challenges this epidemic has wrought. The epidemic manifests itself in a variety of ways, but it is far from being a new phenomenon.

For decades, the United States has suffered the devastating effects of drug epidemics, stemming from excessive use and abuse of heroin, powder cocaine, and crack cocaine. Communities have been ravaged and families have been damaged from addiction and public responses to these issues in myriad ways such as having, for example, a significant increase of incarcerated people, overdoses, deaths and homicides, public health and safety challenges for law enforcement officials, and medical and lost personnel costs. However, the impact of the opioid epidemic has impacted our nation in a wholly magnified way given the daily number of overdoses and deaths by overdose.

The overdose statistics for opioids and other drugs illuminate dire circumstances. In a brief 15-year period from 2000-2015, over a half million people died from drug overdoses. The recorded numbers during this period are staggering, but the most concerning data bears that the figures are rising, unfortunately. In 2015 alone, the Centers for Disease Control and Prevention (CDC) recorded the drug overdose rate at 16.3 per 100,000 people resulting in 52,404 fatal overdoses.\(^2\) Despite these shocking figures of drug overdoses generally, the opioid epidemic belongs in a special category because it alone is claiming more lives than other drugs with nearly 100 people dying daily in 2015.\(^3\) In simpler terms, an estimated six out of every 10 drug overdoses are from opioid use. And, yet, even these incredible numbers appear to be rising. The most recent data suggests that as many as 142 people a day are now dying from opioids.\(^4\) In the first two quarters of 2016 (data typically lags by one year), the death rates were 18.9 and 19.3 per 100,000.\(^5\) The last available recording period in 2016 reveals that in the last quarter, a record number of deaths occurred at 19.9 per 100,000.\(^6\)

Inarguably, the United States has had and continues to have a major drug problem. However, our progressively increased use of opioids has catapulted us into an alarming crisis. This epidemic, in particular, and unlike other drugs, has taken an emotional, social, and economic toll on virtually every ethnic and racial group between the prime ages of 25-44 and in almost every state.\(^7\) Although no state is immune from these deaths, some have been affected more relentlessly than others. Thus, the natural question remains to be answered: what must be done to resolve or lessen the effect of the opioid and prescription drug epidemic given its far reaching and seriously devastating impact on such large swaths of the population?

As to be expected when a problem reaches epidemic proportions, differing views exist on how best to answer the above-posed question and do so in ways that are effectual. The suggested responses to successfully address opioid challenges are no different. Some experts and government officials believe a public safety or law enforcement response that cracks down on users, sellers, and prescribers is the necessary approach. Others support devoting attention and resources to increased, quality drug treatment and life-saving measures that instead focus on a medical and public health response. Both approaches are critical to addressing the opioid crisis, but one must not be pursued at the expense of the other. This crisis must be seen as both a public safety and a public health issue, with both communities working together to tackle the problem.

Given the National Attorneys General Training and Research Institute’s (NAGTRI) work with both
Training Calendar

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### National Courses

- **Management and Leadership - Conflict**
  Little Rock, Ark. | Sept. 8, 2017
- **Deposition Skills**
  Charleston, W.Va. | Nov.15-17, 2017
- **Anatomy of a Complex Consumer Protection Case**
  Memphis, Tenn. | Dec. 5-8, 2017
- **Sexual and Interpersonal Violence on College Campuses: What Attorney General Staff Needs to Know**
  New York, N.Y. | Dec. 7-8, 2017

### Mobile Courses

- **Overdose Death Investigation and Prosecution Training for OAG-RI:**
  Providence, R.I. | Sept. 8, 2017
- **Advanced Trial Techniques and Investigative Skills for OAG-NC:**
- **Opioid Abuse Consumer Protection and Enforcement Training for OAG-OK:**
  Oklahoma City, Okla. | Sept. 19, 2017
- **Deposition Skills for OAG-NY**
  Albany, N.Y. | Sept. 27-28, 2017
- **Overdose Death Investigation and Prosecution Training for OAG-MT:**
  Helena, Mont. | Oct. 11, 2017
- **Advanced Human Trafficking with UMCPI:**
  San Antonio, Texas | Oct. 16-18, 2017
- **Paralegal and Legal Assistant Training for OAG-AZ:**
  Phoenix, Ariz. | Oct. 18-19, 2017
- **Representation of State Agencies for OAG-AK:**
  Anchorage, Alaska | Oct. 24-25, 2017
the alteration of the brain’s circuitry; regulatory changes and opioid prescription guidelines; responses, responsibilities, and duties within the pharmaceutical and medical communities; law enforcement approaches that target users, sellers, and prescribers; outreach and preventative measures; the historical context of other drug epidemics and emerging trends with opioids; opportunities and methods to ensure local, state, and federal engagement and collaboration; state models successfully tracking and treating the epidemic as a medical phenomenon as opposed to a public safety only issue; chronic pain management practices, the importance of prescribing opioids responsibly, and an accurate portrayal on how opioid use disorders affect those struggling with addiction; financial incentives and burdens of long-term but effective medications to stem the tide of addiction; challenges related to access to affordable and sufficient quantities of emergency life-saving medications such as Naloxone and Narcan and what role they should have in fighting this epidemic; effective methods and the need to minimize and eradicate the stigma associated with use disorders; and prevention of opioid mortality.

Fortunately, participants at the Summit also had the distinct honor of hearing several keynote addresses from national leaders in the field, including the former U.S. Surgeon General Vivek H. Murthy, former Office of National Drug Control Policy Director Michael Botticelli, Substance Abuse and Mental Health Services Administration Acting Administrator Kana Enomoto, and Drug Enforcement Agency Acting Administrator Chuck Rosenberg. Attorneys General Peter Kilmartin (R.I.), Pam Bondi (Fla.), and Brad Schimel (Wis.) and former Attorneys General Joseph Foster (N.H.) and Greg Zoeller (Ind.) also participated as panelists or moderators, all of whom have been proactive leaders in their states, devoting their time and resources to address and lessen the impact of the epidemic. Other expert panelists provided innovative strategies and techniques on how best to create efficient and effective solutions.

Unquestionably, the Summit’s experts provided a plethora of critical information that helped attendees determine best strategies that may work in their respective jurisdictions. However, the Summit served as only one vehicle and the first of many necessary conversations to bridge gaps and enable individuals from different disciplines to share their ideas. The primary takeaway from this Summit proved that the conversation must continue between the law enforcement and public health communities. It also became clear that law enforcement cannot police their way out of this problem just as the public health community cannot solely focus on medical approaches. In addition to the law enforcement and
public health communities working together, other players must be part of the conversation such as social workers, drug disorder counselors, people in recovery, pharmaceutical and medical groups, and the like. None of these groups can operate in a vacuum, lest they risk alienating critical players who must have a seat at the table. The groups working together are more likely to meet the needs of those most affected—users with opioid disorders, society at large, first responders, and families impacted from addiction.

The conversation to combat this epidemic must continue, especially within the attorney general and public health communities. The attorneys general, as chief legal officials for their states, have served as leaders in bringing attention to the subject and developing effective strategies to tackle problems. Attorneys general have led the effort to bring diverse groups and stakeholders within their jurisdictions to work together and provide solutions aimed at strengthening their capacity in fighting the opioid epidemic. Pulling in the medical and public health communities and partnering with all who are working to combat the plague optimizes resources and provides a way forward in the fight. Medical and public health specialists have also contributed to changing the conversation on how we should deal with this epidemic as a society in crisis. Each group has a distinctive but important role in this fight, and forming alliances is the most impactful and necessary response at this critical time.

Despite being in the throes of this epidemic nationally, timely best and promising practices were shared at this Summit. The hearty discussions and panels culminated in a report being produced after the Summit. The publication was prepared to offer practical tips and assistance to practitioners, develop best practices and learn about new and effective approaches, and identify experts in the field who specialize in particular areas of law, science, and the medical profession. The report details and summarizes suggested next steps, promising and best practices, and a description for and primary takeaways from each keynote speaker and panel from the aforementioned topics. These suggestions serve as great starting or intermediate points and concepts as states grapple with few resources but great burdens.

Given the frightening number of overdoses and deaths the country is experiencing daily, it is evident that much more work must be done where new legal and medical responses will be implemented to diminish the epidemic’s hazardous consequences. As these discussions continue, there are some current efforts highlighted in the Summit report that are making a demonstrable difference at little to no cost. The key strategies for the most effective responses are initiative and effort and include incorporating a combination of approaches outlined in the report as it relates to enforcement, social changes, and education.

A full copy of the report detailing specific information on promising and best practices aimed at reducing the deleterious effects of the epidemic can be found here. Additional Summit materials, including reports, studies, hyperlinks to services, available speaker presentations, research materials, and guidelines have also been made available and can be found here. Through concerted efforts, the epidemic may not be eradicated, but it certainly can be alleviated with commitment and innovation to serve those so desperately in need of assistance.

Endnotes
3 Opioid Basics, supra note 1.
4 See, Bernstein, supra note 2.
5 Id.
6 Id.
8 This special funding was made available through the multi-state settlement of consumer fraud claims regarding the marketing of the prescription drug, Neurontin.
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The NAGTRI Journal is a free, public document, published quarterly and disseminated via email to approximately 6,500 subscribers. The Journal editors invite contributions from attorney general office staff on topics of legal and practical interest to the attorney general community. Please send all inquiries, ideas for articles, and submissions to jmckee@naag.org.

By submitting an article for consideration, the author(s) of the article agrees that the work he/she/they submit meets the appropriate criteria explained on this page and are asserting that the article and its contents do not infringe any intellectual property rights. All submitted articles are first screened to determine the suitability and appropriateness of the article topic, the contents, and writing quality. Articles should be submitted at least six weeks prior to publication.

An article meeting the criteria will go through an editing process and then will be peer reviewed by selected AG and/or NAAG staff.

We encourage authors to explore a diversity of topics and concepts; however generally, we will not accept unsolicited articles on public policy.

SUBMITTED JOURNAL ARTICLES

Articles should explore the chosen topic, but there is no required length. Articles should be referenced with endnotes in appropriate Bluebook style. Prospective authors may wish to review earlier issues of the Journal, found at http://www.naag.org/publications/nagtri-journal.php.

All articles must be submitted as a .doc formatted Microsoft Word document.

Any article selected for publication will be reformatted to fit the formatting requirements of the publishing platform. See existing Journal issues for examples.

The author of articles chosen for publication will be asked to provide a two-sentence article summary, a short biographical paragraph, and a headshot.
About the Authors

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

Dan Edwards is a senior assistant attorney general on the Colorado Department of Law’s Violent Crimes Assistance Team. He assists local prosecutors in their homicide cases. Most recently he was a special deputy district attorney on the Aurora Theater massacre case. Early in his career he was a criminal defense attorney, and, after that, a Denver magistrate judge before becoming a prosecutor. As a trial attorney, Dan has tried over 300 cases including 59 first degree murder cases. He is also an adjunct professor at the University of Denver College of Law. Dan is a 2017 recipient of the NAGTRI Faculty of the Year award.

Amie Ely is director of the NAGTRI Center for Ethics and Public Integrity (CEPI) as well as NAGTRI program counsel. She is staff liaison for the National Association of Attorneys General (NAAG) Law Enforcement and Prosecutorial Relations Working Group. Amie received her undergraduate degree from Oberlin College and her law degree from Cornell Law School. After law school, Amie clerked for the Honorable Stephen C. Robinson in the Southern District of New York, and for the Honorable Richard C. Wesley on the Second Circuit Court of Appeals. Following her clerkships, Amie joined the U.S. Attorney’s Office for the Southern District of New York. During her nearly seven years at that office, Amie prosecuted hundreds of defendants, was lead or co-counsel in more than 10 trials, and represented the government in over a dozen appeals to the Second Circuit.

As NAGTRI program counsel, Jeanette Manning is responsible for coordinating legal trainings on an array of topics, conducting research, and writing and editing various publications. Additionally, Jeanette serves as the staff liaison to the NAAG Energy and the Environment and Civil Rights Committees, the NAAG Midwestern Region, and also assists with organizing many of NAGTRI’s international programs. Jeanette previously served in the District of Columbia Attorney General’s Office for eight years, as an assistant attorney general in the Family and Public Safety Divisions. She graduated from Western Connecticut State University with a degree in Justice and Law Administration and obtained her Juris Doctor degree from the American University, Washington College of Law.