State Attorneys General Powers and Responsibilities

Edited by
Emily Myers
National Association of Attorneys General

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This book is dedicated to Attorneys General and the men and women who work for them in the 56 jurisdictions. They continue to make an important contribution to state govenment and the American legal system. Without them, there would be no book to write.

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This book is a collaborative effort, in which different authors with expertise in each substantive area contribute their time and talent. The principal authors are noted on each chapter, but we would like to thank them again here for their hard work and dedication. Many thanks to the following authors:

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Chapter 6

Conduct of Litigation

By Emily Myers, Antitrust Chief Counsel, NAAG

The conduct of litigation on behalf of the state is one of the attorney general's primary duties. The attorney general is typically charged, by Constitution or statute, with representing the state in all cases in which the state has an interest, in all courts of the state and in federal courts.[1]

Much of the attorney general's litigation results from representation of state agencies, by either enforcing laws within an agency's jurisdiction or defending an agency when it is the object of a suit. In recent years, attorneys general also have been given independent enforcement duties to advance and to protect "the public interest" through litigation. To perform their litigation functions, attorneys general have established within their offices sections that handle general litigation and sections responsible for specialized litigation such as consumer protection, environment, antitrust and civil rights cases.

Even in situations where the attorney general is not responsible for the initial trial or hearing phase of a case, the attorney general invariably handles any appeals. Appellate litigation provides an opportunity for state attorneys general not only to advance a position that best represents the state's interests in a particular case, but also to ensure that the State presents its legal arguments in a manner that takes full advantage of the opportunity to influence the development of the law that will become binding precedent for the state and its citizens. Most attorneys general have established separate appellate sections within their offices to undertake these functions.

1 In most states, local prosecutors have responsibility for prosecuting criminal offenses. In some states, those prosecutors are under the supervision of the attorney general. *See* Chapter 17.

Legal Authority

The source of an attorney general's litigation authority may be a constitutional mandate, a statutory provision, or common law prerogative. The sources of authority also vary in their degree of specificity. State constitutional provisions typically speak in general terms. The Illinois constitution provides, "The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law."[2] But state statues differ in their enumeration of attorney general duties. For example, the Minnesota attorney general's authority has been very broadly stated. Minn. Stat. § 8.01 sets forth the attorney general's authority as follows:

> The attorney general shall appear for the state in all causes in the supreme and federal court wherein the state is directly interested; also in all civil causes of like nature in all other courts of the state whenever, in his opinion, the interests of the state require it. Upon request of the county attorney he shall appear in court in such criminal cases as he shall deem proper. Whenever the governor shall so request, in writing, he shall prosecute any person charged with an indictable offense; and in all such cases he may attend upon the grand jury and exercise the powers of the county attorney.

In contrast, the statute setting forth the Montana attorney general's authority is considerably more specific.

1. to prosecute or defend all causes in the supreme court in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest;

2. to represent the state in all bankruptcy proceedings in which the state's interest may be affected and in other debt collection proceedings at the request of a state agency;

3. after judgment in any of the causes referred to in subsections (1) and (2), to direct the issuing of a process as may be necessary to carry the judgment into execution;

2 Ill. Const. Art. V, § 15.

4. to keep a register of all cases prosecuted or defended by the attorney general. …

5. to exercise supervisory powers over county attorneys in all matters pertaining to the duties of their offices and from time to time require of them reports as to the condition of public business entrusted to their charge. . . .

6. when required by the public service or directed by the governor, to assist the county attorney of any county in the discharge of the county attorney's duties or to prosecute or defend appropriate cases in which the state or any officer of the state in the officer's official capacity is a party or in which the state has an interest;

7. to give an opinion in writing, without fee, to the legislature or either house of the legislature, to any state officer, board, or commission, to any county attorney, to the city attorney of any city or town, or to the board of county commissioners of any county of the state when required upon any question of law relating to their respective offices…

8. to discharge the duties of a member of the board of examiners and state board of land commissioners;

9. to perform all other duties as required by law.[3]

Representing the State

The attorney general has broad authority to represent the state in civil litigation. As pointed out by the Tenth Circuit in 1980, in Colorado, the "right to represent the state as to litigation involving a subject matter of statewide interest" is the exclusive province of the state attorney general.[4] In *Feeney v. Commonwealth*, the Supreme Judicial Court of Massachusetts unequivocally confirmed "[t]he authority of the attorney general as chief law officer, to assume primary control over the conduct of litigation which involves the interests of the

3 Mont. Code Ann. § 2-15-501(1).

4 *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 771 (10th Cir. 1980). *But cf. Martin v. Thornburg*, 359 S.E.2d 472 (N.C. 1987).

Commonwealth."[5] This policy protects the interests of the state as a whole as a unitary client, rather than any one of the many potential agency manifestations of the state.

A number of state supreme courts have expanded this view by prohibiting or limiting the use of counsel other than the attorney general. For example, the Oregon supreme court affirmed the attorney general's position that an independent public corporation created by statute could not employ outside counsel and institute legal proceedings without his authorization.[6]

State statutes also limit the ability of executive branch agencies to employ counsel other than the attorney general. For example, Georgia's Constitution provides that "The Attorney General shall act as the legal advisor of the executive department"[7] and the Georgia legislature has expanded on this statement, making the attorney general the sole legal advisor of the executive branch, including executive departments, offices, institutions, commissions, committees, boards, and agencies. Georgia law also provides that the attorney general must authorize any executive branch entity's hiring of counsel performing legal services.[8] Similarly, Washington's Constitution designates the attorney general as "the legal adviser of the state officers."[9] Although the state supreme court held that the words "state officers" applied only to elective state officers named in the state Constitution, the Washington legislature has expanded the attorney general's authority as legal adviser beyond this constitutional interpretation. Washington statutes make the attorney general the legal adviser of all executive branch entities, and prevent any executive entity from hiring any in-house or outside legal advisers.[10]

5 366 N.E.2d 1262, 1266 (Mass. 1977).

6 *Frohnmayer v. State Accident Ins. Fund*, 294 Or. 570, 660 P. 2d 1061 (1983).

7 Ga. Const. art. V, § III.

8 Ga. Code Ann. § 45-15-34 (2002) ("The [office of attorney general] is vested with complete and exclusive authority and jurisdiction in all matters of law relating to the executive branch of the government and every department, office, institution, commission, committee, board, and other agency thereof. Every department, office, institution, commission, committee, board, and other agency of the state government is prohibited from employing counsel in any manner whatsoever unless otherwise specifically authorized by law.").

9 Wash. Const. art. III, § 21.

10 Wash. Rev. Code Ann. §§ 43.10.040 (2003) ("The attorney general shall . . . advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.") and 43.10.067 ("No officer, director, administrative agency, board, or commission of the state, other than the attorney general, shall employ, appoint or retain in employment any attorney for any administrative body, department, commission, agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance

On the other hand, the Montana supreme court held that the authority to hire attorneys for the state does not rest exclusively with the attorney general[11] and the supreme court of Arizona acknowledged that the state's statutory scheme allows a client agency authority to decide, in some circumstances, not to accept the services of the attorney general.[12] Mississippi allows state agencies to employ their own counsel if the attorney general declines to represent the agency or if "there is a significant disagreement with the attorney general as to the legal strategy to be used in the case."[13]

Even when an agency is authorized by statute to employ outside counsel, the attorney general may still have a voice in deciding who will provide these legal services. For example, in Arizona, even though the attorney general may not impose restrictive supervisory conditions upon the client agency's use of outside counsel, the supreme court concluded that "the Attorney General serves as an approver of an agency's choice of counsel, rather than as a decider whether outside counsel may be hired."[14]

Directing State Litigation

Attorneys general typically have broad discretion in litigation matters. The attorney general usually controls decisions regarding initiating, pursuing, and appealing lawsuits. For example, the Minnesota Supreme Court held that the attorney general could sue an insurance company despite the ability of the state's Insurance Commissioner to bring similar suits. The court held, "The attorney

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of any of the duties specified by law to be performed by the attorney general . . ."). *But see Goldmark v. McKenna,* 259 P.3d 1095 (Wash. 2011) (attorney general must appeal on behalf of state agency at agency's request).

11 *See Woodahl v. State Highway Comm'n*, 465 P.2d 818 (Mont. 1970).

12 *Fund Manager Pub. Safety Personnel Retirement Sys. v. Superior Court*, 731 P.2d 620, 623 (Az. 1986).

13 Miss. Code § 7-5-7.

14 *Fund Manager Pub. Safety Personnel Retirement Sys. v. Superior Court,* 152 Ariz. 255, 258 (Az. 1986) ("Thus, the *sole* power conferred upon the Attorney General by A.R.S. § 38-848(k) with respect to the system's legal representation is the power to approve the fund manager's choice of counsel.").

general's discretion to bring suit is plenary and is beyond the control of any other state department or officer."[15]

A number of courts have upheld the exercise of discretion in litigation matters by attorneys general.[16] For example, after the Federal Aviation Administration ruled that funds generated by an airport that were directed to the Office of Hawaiian Affairs under state statute were instead required to be used to fund airport operations, the FAA withheld grants to the Hawaii Department of Transportation to make up for the monies directed to the Office of Hawaiian Affairs. The attorney general announced that the state would not challenge the FAA's ruling, and shortly thereafter, Congress passed a statute which forgave the $29 million already provided to OHA, but forbade the state from providing any additional funds to OHA from airport revenues. OHA sued the State, alleging that the Forgiveness Act would not have become law if the State had properly challenged the FAA's action and thus there would not have been a federal law in conflict with a state law. The Hawaii supreme court stated,

> The attorney general's decision to resolve the dispute between the State and the federal government fell squarely within her exclusive authority to control and manage "the settlement of imminent actions against the State." [citation omitted]. Therefore, the circuit court would have clearly intruded into an area committed to another branch of government if it reviewed the attorney general's actions and, as such, would have violated the doctrine of separation of powers.[17]

The Alaska Supreme Court similarly said,

> When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. . . . Both federal and state courts have . . . held that the attorney general cannot be controlled in either his decision of whether to proceed or in his disposition of the proceeding.[18]

15 *State ex rel. Hatch v. American Family Mutual Insurance Co.,* 609 N.W.2d 1, 4 (Minn. 2000).

16 *See, e.g., Fieger v. Cox,* 274 Mich. App. 449 (Mich. Ct. App. 2007) ("In determining what constitutes a state interest for the purpose of deciding whether to initiate litigation, the Attorney General has broad statutory discretion").

17 *Office of Hawaiian Affairs v. State of Hawaii*, 2005 Haw. LEXIS 475, *48-49 (Haw. 2005).

18 *Public Defender Agency v. Superior Court*, 534 P.2d 947, 950 (Alaska 1975). *See also Secretary*

Even in situations where the initiation of action is requested by client agencies or the governor, the attorney general typically has discretion in determining the litigation strategy. For example, the Georgia attorney general declined the Governor's direction to drop an appeal of a redistricting plan. The Georgia Supreme Court concluded that under the state Constitution, both the attorney general and the Governor had responsibility for representing the state's interests. In this case, however, the statutes also required that the attorney general obtain a "final determination" of the legality of the plan. "By appealing, the Attorney General was fulfilling his general duty as chief legal officer to execute state law and his specific duty to defend the reapportionment law as enacted by the General Assembly."[19]

On the other hand, the attorney general of Alabama was not allowed to take control of litigation initiated by a gambling task force created by the Governor. The court stated, "the statutes discussing the powers and duties of the attorney general do not authorize the attorney general to interfere with or to direct and control litigation being pursued by officers who are acting pursuant to directions from the governor [under the applicable statutes]."[20] Even in this case, the court indicated that the attorney general might be able to intervene in a case brought by the Governor in order to represent the public interest.[21]

In addition to conferring general authority on an attorney general to perform litigation functions, many state laws impose responsibilities on the attorney general. Many attorneys general have a duty to litigate, affirmatively and defensively, on behalf of client agencies.[22]

Other litigation duties of the various offices include instigation of actions relating to the licensing of businesses, occupations, charitable trusts and foundations, the regulation of insurance and utility rates, racketeering, and enforcement of open meetings law, election law and child support obligations. These duties are discussed in greater detail in later chapters.

of Admin. and Finance v. Attorney General, 326 N.E.3d 334 (Mass. 1975); *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813 (Okla. 1973); *Slezak v. Ousdigan*, 110 N.W.2d 1 (Minn. 1961); *State v. Finch*, 280 P. 910 (Kan. 1929).

19 *Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003).

20 *Riley v. Cornerstone Cmty. Outreach,* 57 So. 3d 704, 736 (Ala. 2010).

21 *Id.* at 739.

22 *See, e.g.*, Ala. Code, § 36-15-21.

Contingent Fee Contracts with Outside Counsel

The ability of attorneys general to hire outside counsel to handle litigation for the state is well established.[23] In a number of cases the attorney general's ability to hire private counsel through "contingency fee" contracts has also been upheld. Under a contingent fee contract, private counsel is paid based on the success of their representation, typically receiving some percentage of any recovery by the state.

Parties opposing such arrangements have argued that their due process rights are violated if the state's lawyer has a personal financial stake in the case or that payment of contingency fees are a misappropriation of state funds. For example, in a case involving off-label marketing of the drug Zyprexa, the defendant challenged the state's retention of counsel on a contingency fee basis on the grounds that it violated the due process clause of the U.S. and South Carolina constitutions because it gave the state's counsel a personal financial interest in the outcome of the case. The court rejected the due process claim, noting that attorneys representing the government in a civil case need not be neutral, but rather have a duty to represent the interests of the state to the fullest extent possible.[24]

In several cases, the attorney general's statutory or common law powers to hire counsel were the basis for his authority to pay counsel a contingency fee. For example, in the case brought by Missouri against tobacco companies (see Chapter 21), the attorney general retained counsel on a contingency fee basis. The Missouri supreme court held that the statute that authorized the attorney general to hire assistants did not "prohibit the attorney general in the exercise of his common law power from entering into contingency fee arrangements or agreements that otherwise provide for civil defendants sued by the State to pay attorneys' fees directly to the State's outside counsel."[25] In a North Dakota case involving a suit by the state against asbestos manufacturers, the court held, "In view of this long-standing acceptance of contingent fee arrangements and in view of the historical authority of the attorney general, we believe she has the authority

23 *See, e.g., In re Zyprexa Products Liability Litigation, State of Louisiana, ex rel. Foti, v. Eli Lilly and Co., Inc.*, 375 F. Supp.2d 170, 171 (E.D.N.Y. 2005); *State v. Eli Lilly*, No. 2007-CP-42-1855 (S.C. Ct. Comm. Pleas 7th Jud. Dist. 2009); *Rhode Island v. Lead Industries Ass'n,* 951 A.2d 428 (R.I. 2008).

24 *State v. Eli Lilly*, No. 2007-CP-42-1855 (S.C. Ct. Comm. Pleas 7th Jud. Dist. 2009). *See also, Merck Sharp & Dohme Corp. v. Conway, Attorney General,* 947 F. Supp. 2d 733 (E.D. Ky. 2013); *County of Santa Clara v. Superior Court***,** 50 Cal. 4th 35; 235 P.3d 21 (Cal. 2010) ("neutral government attorneys must retain and exercise the requisite control and supervision over both the conduct of private attorneys and the overall prosecution of the case.")

25 *State ex rel. Nixon v. American Tobacco Co. Inc.,* 34 S.W.3d 122, 136 (Mo. 2000) (en banc).

to employ special assistant attorneys general on a contingent fee agreement unless such agreements are specifically prohibited by statute."[26]

In a case seeking repayment of state and federal Medicaid dollars for off-label use of the drug Zyprexa, the defendants moved for dismissal on the grounds that private counsel representing the state did not have either express or implied authority to file the suits on behalf of the state of Louisiana, and that the fee arrangement for the private counsel was prohibited under Louisiana law. The court held, "The capacity of the attorney general to employ counsel is not contestable" and noted that the attorney general's authority to pay counsel is a matter of Louisiana law and that the risks of nonpayment of fees are borne by private counsel, not the defendants.[27]

Even where state legislatures have enacted procedures for payment of contingency fees, the attorney general's right to enter into such contracts and to pay such fees is recognized. In a Mississippi case, the state auditor challenged the payment of contingency fees to outside counsel on the grounds that the money did not come from the proper funding source. The court agreed that the funding mechanism used by the attorney general was improper, but held, "We wish to make clear in this case that our opinion should not be read as calling into question either Retained Counsel's right to be paid or the validity of the Retention Agreement."[28]

In Pennsylvania, the court limited the ability to challenge the attorney general's retention of outside counsel to the state agency being represented, holding that the legislature "intended that no party but the affected agency should be heard to complain about so fundamental an executive matter as the identity of the lawyers representing Commonwealth entities."[29]

Constitutional Litigation

A litigation function peculiarly within the jurisdiction of the attorney general is the defense of constitutional challenges to state statutes. In the vast majority of jurisdictions, the office of attorney general must be notified by private

26 *State v. Hagerty,* 580 N.W.2d 139, 148 (N.D. 1999).

27 *In re Zyprexa Products Liability Litigation, State of Louisiana, ex rel. Foti v. Eli Lilly and Co., Inc.,* 375 F. Supp. 2d 170 (E.D.N.Y. 2005).

28 *Pickering v. Hood*, 2012 Miss. LEXIS 247 (Miss. 2012).

29 *GGNSC v. Kane*, 2016 Pa. Commw. LEXIS 44 (Pa. Commw. Ct. Nov. 18, 2015).

litigants of all constitutional challenges to state statutes. Typically, the attorney general has a discretionary right to intervene to defend the statute in question. For example, Minnesota law provides,

> A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly: … (2) serve the notice and paper on the Attorney General of the United States if a federal statute is challenged, or on the Minnesota Attorney General if a state statute is challenged, by United States Mail to afford the Attorney General an opportunity to intervene. [30]

The federal statutes and rules of court also require notification to the appropriate state attorney general of constitutional challenges to state statutes in federal court actions.[31] In some states, trial courts are required to certify constitutional challenges to state statutes to the attorney general and provide the attorney general with an opportunity to participate.[32]

State laws differ on the consequences of failure to notify the attorney general of a constitutional challenge. For example, in Arizona, a litigant does not waive a challenge by failing to notify the attorney general, but the attorney general may move to vacate any finding of unconstitutionality, and the court must give the attorney general a reasonable opportunity to be heard.[33] Some states only require notice to the attorney general if the statute is being challenged as facially unconstitutional,[34] while others require it in all constitutional challenges.[35] Some states do not require notice to the attorney general in criminal cases,[36] and some do not require notice to the attorney general if a state officer is a party to the case.[37] In other states, courts will not consider constitutional challenges if

30 Minn. R. Civ. P. 5A.

31 28 U.S.C. § 2403(b); Sup. Ct. R. 29.4(c).

32 Tex. Const. Art. 5, § 32; Burns Ind. Code Ann. § 34-33.1-1-1.

33 Ariz. Rev. Stat. § 12-1841.

34 *Taylor Morrison of Colo., Inc. v. Bemas Constr., Inc*., 2014 COA 10 (Colo. Ct. App. Jan. 30, 2014).

35 *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008).

36 *State of Nevada v. Justice Court of Las Vegas Township*, 392 P.3d 170 (Nev. 2017); *State v. Kinstle*, 985 N.E.2d 184 (Ohio Ct. App. 2012); *Ex parte Williams*, 786 S.W.2d 781 (Tex. Crim. App. 1990).

37 *Commonwealth v. Miller*, 2013 PA Super 298 (Pa. Super. Ct. 2013).

they have not been served on the attorney general.[38] The attorney general is not required to intervene in the case, as long as notice of the constitutional challenge has been given.[39] In an Ohio case seeking a declaratory judgement that a statute was unconstitutional, the attorney general argued that he did not need to be included as a party to the suit. The court held.

> While this provision does not require the Attorney General's participation in any lawsuit alleging that a statute is alleged to be unconstitutional, it also does not prohibit inclusion of the Attorney General in the case. Indeed, the Attorney General may properly be named a party to the lawsuit if he has "some connection with the enforcement of the act" and he "threaten[s] and [is] about to commence proceedings" to enforce it.[40]

Challenging State Law

Some state courts have permitted the attorney general to challenge the constitutionality of a state statute, while others have expressly forbidden such challenges and still others have permitted them only in limited circumstances. For example, it has been long established in Florida that if the attorney general concluded that a statute involving the general public interest is unconstitutional, it is not only his right but his duty to institute ex officio appropriate proceedings to settle the validity of the legislative act.[41] It is also clear in New Jersey that it is within the scope of the powers and duties of the attorney general to take the position that a statute is unconstitutional.[42] As one New Jersey court noted,

> It may be unusual for the Attorney General to conclude that a statute is unconstitutional, but when a State agency asks for advice he must

38 *Shelton v. Bank of N.Y. Mellon*, 203 So. 3d 1003 (Fla. Dist. Ct. App. 2d Dist. 2016); *United States Bank Trust Nat'l Ass'n v. Junior*, 2016 IL App (1st) 152109 (Ill. App. Ct. 1st Dist. 2016); *City of Grant v. Smith*, 2017 Minn. App. Unpub. LEXIS 231 (Minn. Ct. App. Mar. 13, 2017) (issue deemed waived); *Brown v. Waldron*, 186 So. 3d 955 (Miss. Ct. App. 2016); NY Exec Law § 71; *Jackson v. Quality Loan Serv. Corp*., 186 Wn. App. 838 (Wash. Ct. App. 2015); *State v. Lautenbach*, 2014 WI App 16 (Wis. Ct. App. 2013).

39 *DeJean v. Purpera*, 199 So. 3d 11 (La.App. 1 Cir. Apr. 15, 2016).

40 *Bevan & Associates v. DeWine*, 2017 U.S. Dist. LEXIS 92039 (S.D. Ohio June 15, 2017).

41 *State ex rel. Landis v. S.H. Kress Co*., 155 So. 828 (Fla. 1934).

42 *Wilentz v. Henrickson*, 33 A.2d 366 (N.J. Eq. 1943), *New Jersey Highway Authority v. Sills*, 263 A.2d 498, 501 (N.J.Super.Ct. 1970); *see also* Flaherty, *Must an Attorney General Defend a Law He Thinks Is Invalid?* Nat. L.J., Jan. 17, 1983, at 6.

> give it, and his obligation to "enforce" the law includes the statutory law to the extent that it is constitutional. This is so because the Attorney General has an obligation to "[e]nforce the provisions of the Constitution" which is the fundamental or organic law.[43]

Similarly, in Arizona, the Court of Appeal held that although "the attorney general has a duty to uphold the constitutionality of enactments of the Arizona legislature.... as "chief legal officer of the state," citing Ariz. Rev. Stat. § 41-192(A), the Attorney General also has a duty to uphold the Arizona and United States Constitutions."[44]

The Illinois Supreme Court has explained its reasoning in allowing the attorney general to challenge state statues as unconstitutional:

> We are ... not persuaded by the contention that the Attorney General lacks standing to challenge the constitutionality of this statute because he is under a duty to defend statutes passed by the General Assembly and signed into law by the governor. We believe the Attorney General's duty to defend the constitution necessarily encompasses a duty to challenge, on behalf of the public, a statute which the Attorney General regards as constitutionally infirm.[45]

Tennessee courts have held that the attorney general may challenge the constitutionality of a statute under certain circumstances:

> Ordinarily, the state attorney general and the district attorneys general are under an affirmative duty to defend the constitutionality of statutes of statewide application that may be relevant in given criminal prosecutions. When, however, two relevant statutes in a case conflict with each other or one appears to repeal another, and the prosecutor or attorney general determines that one of the statutes is unconstitutional, that official may challenge the constitutionality of the state statute.[46]

43 *Mechanical Contractors Association of New Jersey, Inc. v. State*, 605 A.2d 743, 749 (N.J. Super. App. Div. 1992).

44 *Fund Manager, Public Safety Personnel Retirement System v. Corbin*, 778 P.2d 1244, 1250 (Ariz. Ct. Apps. 1989).

45 *People v. Pollution Control Board,* 404 N.E.2d 352, 355 (Ill. 1980).

46 *State v. Chastain*, 871 S.W.2d 661, 667 (Tenn. 1994).

In Kansas, the legislature sought to direct the attorney general to file suit challenging the constitutionality of a statute. The court assumed such a challenge would be within the attorney general's powers, but held that the legislative was invalid because neither the legislature nor the governor has the "constitutional authority to intrude into the attorney general's duties as an officer of the court." The legislature cannot override an attorney's ethical duties to not "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. . . ."[47]

A Colorado case involving legislative redistricting affirmed the attorney general's right to challenge state statutes as unconstitutional. The attorney general sought an injunction to prevent the Colorado Secretary of State from implementing a new redistricting plan which the attorney general contended was unconstitutional. The Secretary of State argued that the attorney general had no common law, statutory or Constitutional power to seek to enjoin a statute. The court held

> In his role as legal advisor to the Secretary of State, the Attorney General must advise the Secretary of State on the implementation of the election laws. Consistent with his ethical duties and his oath of office, if the Attorney General has grave doubts about the constitutionality of the impending 2004 general election, he must seek to resolve these doubts as soon as possible. A prompt resolution of the case will aid both the Secretary of State and the Attorney General in fulfilling their oaths to uphold the Colorado Constitution. [48]

Non-Defense of Statutes

The attorney general in several states is required, either by the state constitution or by statute, to defend the state's statutes. In other states, the attorney general may decline to defend statutes which she considers unconstitutional, under either the state or federal constitution. Although "non-defense" cases have occurred more frequently in recent years, state attorneys general in some states have long had the authority to decline to defend a state statute.[49]

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47 *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 887 (Kan. 2008).

48 *State ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003).

49 *See, e.g.*, *Karcher v. May*, 484 U.S. 72 (1987); *Sch. Bd. v. Opportunity Educ. Inst.*, 88 Va. Cir. 317 (Va. Cir. Ct. 2014) (local control of schools); *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008) (eminent domain); *Delchamps, Inc. v. Ala. State Milk Control Bd.*, 324 F. Supp. 117 (M.D. Ala. 1971) (state milk control statute).

State law takes different approaches to non-defense of statutes by the attorney general. In Nebraska, the statutory scheme requires that the attorney general to issue a written opinion that a statute is unconstitutional. When a state officer, relying on that opinion, refuses to implement the act, the attorney general must file an action to determine the validity of the statute, using the secretary of state as the default defendant. The secretary of state must defend the act, using special counsel. This procedure is only used if there is no other litigation pending as to the constitutionality of the statute.[50] On the other hand, Tennessee statutes specifically provide that the attorney general may decline to defend legislation he believes is unconstitutional and certify that opinion to the Tennessee legislature. The legislature may then decide whether to defend the statute.[51]

In a number of cases involving same-sex marriage, the attorney general declined to defend state law from constitutional challenge.[52] As an example, the California Supreme Court affirmed the attorney general's discretion in challenging or defending state legislation in connection with a voter-approved ballot initiative banning same-sex marriage. The attorney general declined to defend the initiative, stating that it violated the Equal Protection clause. The trial court struck down the initiative and the attorney general declined to appeal the decision. Proponents of the initiative filed a mandamus action seeking to force the attorney general to defend the law, but the California Supreme Court summarily denied the petition.[53] Although the California Supreme Court did not require the attorney general to defend the statute, it held, over the objections of the attorney general, that proponents of the initiative had standing to appeal the trial court's decision.[54] The case was appealed to the United States Supreme Court, which held that the proponents did not have standing to defend the statute. The court stated, "We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here."[55]

50 Neb. Rev. Stat. § 84-215.

51 Tenn. Code Ann. § 8-6-109.

52 *See, e.g., Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *Whitewood v. Wolf,* 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Griego v. Oliver,* 316 P.3d 865 (N.M.2013)*; Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. 2013).

53 *Beckley v. Schwarzenegger*, 2010 Cal. LEXIS 9708 (Cal. Sept. 8, 2010).

54 *Perry v. Brown*, 52 Cal. 4th 1116 (Cal. 2011).

55 *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

Criminal Prosecution

As discussed more fully in Chapter 17, a number of states impose limitations on the attorney general's duties to prosecute criminal matters at the trial stage. For example, the Minnesota attorney general litigates criminal actions at the request of the county attorney.[56] The Maine attorney general has a duty to litigate homicide and drug cases,[57] and the Georgia attorney general has a duty to litigate state governmental corruption and capital appeals.[58] The majority of attorney general offices litigate criminal appeals.[59]

However, in many states, the attorney general has supervisory authority over local prosecutors and may direct their actions. For example, several Alabama prosecutors filed a civil suit against a group of pharmacies, alleging they violated state pharmacy and consumer protection laws. The attorney general filed a mandamus action, seeking to have the suits dismissed. The court held,

> In short, although district attorneys (as well as the attorney general) are charged with instituting and prosecuting criminal and civil actions on behalf of the State, the district attorney has pointed to no rule or statute that permits a district attorney, in the exercise of those duties, to disregard the direction, control, and instruction of the attorney general in such cases. Where, as here, the attorney general clearly directs and instructs that litigation on behalf of the State be dismissed, his instructions in that regard take precedence over a district attorney's desire to proceed with the action.[60]

The attorney general, rather than the local prosecutor, is the representative of the state for purposes of criminal appeals. In a Texas habeas corpus case where the defendant alleged that his race and ethnicity had improperly been used in connection with the sentencing phase of his trial, the attorney general confessed error on the part of the state and waived any procedural default by the defendant. When the habeas petition was granted, the local prosecutor sought to appeal the court's decision. The court held that although the prosecutor may not agree with the attorney general's decision to waive the procedural default, the attorney

56 Minn. Stat. § 8.01.
57 Maine Rev. Stat. tit. 5, § 191.
58 Ga. Code Ann. § 45-15-10 and § 45-15-13.
59 *See* Chapter 17.
60 *Ex parte King,* 59 So. 3d 21, 28 (Ala. 2010).

general is authorized by law to make such decisions, and in this case, his decision "furthers the State's goal of ensuring that capital sentencing is untainted by racial prejudice, as manifested by recently enacted state legislation." The court dismissed the prosecutor's argument that the attorney general was not adequately representing his interests because both attorney general and prosecutor presumably share the interest in seeing that justice is done.[61]

Parens Patriae Litigation

The doctrine of *parens patriae* allows a state to bring an action on behalf of its citizens in order to protect its quasi-sovereign interests in their health, comfort, and welfare. Attorneys general increasingly are using this *parens patriae* authority to sue on behalf of their state's citizens.

In *Alfred Snapp and Son, Inc. v. Puerto Rico*,[62] the U.S. Supreme Court outlined the requirements for a state to achieve standing as *parens patriae*. The state must demonstrate (1) a quasi-sovereign interest and (2) "more . . . than injury to an identifiable group of individual residents."[63] The requisite quasi-sovereign interest may lie in the state's interest in the physical and economic health and well-being of its citizens, or it may lie in the state's interest in "not being discriminatorily denied its rightful status within the federal system."[64]

The distinction between *parens* claims and those brought to benefit individuals has frequently been discussed by the courts. For example, the Ninth Circuit dismissed a suit brought by six states challenging enforcement of certain California laws requiring that all eggs sold in the state must meet new standards for housing egg-laying hens. The Ninth Circuit held that the plaintiff states did not satisfy the *Snapp* text because the claims asserted affected only an identifiable group of egg famers; and complete relief could be had through suits by those farmers.[65]

61 *Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004).

62 458 U.S. 592 (1982).

63 *Id.* at 607.

64 *Id.* The question of whether a state has standing as *parens patriae* to bring an action against the federal government is unsettled. *Compare Massachusetts v. Mellon,* 262 U.S. 447 (1923)*, with Massachusetts v. EPA,* 549 U.S. 497 (2007). *See, also, Washington v. Trump,* 858 F.3d 1168,1186 (9th Cir. 2017); *Wyoming v. United States DOI,* 674 F.3d 1220, 1226 (10th Cir. Wyo. 2012).

65 *Missouri ex rel. Koster v. Harris*, 847 F.3d 646 (9th Cir. 2017). With respect to discrimination against state citizens, the Ninth Circuit noted that the California egg laws do not discriminate

A Mississippi federal court analyzed the *parens patriae* claims brought by the attorney general in an antitrust case, and concluded:

> This type of prospective relief goes beyond addressing the claims of previously injured organizations or individuals. It is aimed at securing an honest marketplace, promoting proper business practices, protecting Mississippi consumers, and advancing Mississippi's interest in the economic well-being of its residents. . . . The fact that private parties may benefit monetarily from a favorable resolution of this case does not minimize nor negate plaintiff's substantial interest.[66]

In another decision, the New Hampshire supreme court analyzed the attorney general's *parens patriae* claims for damages from pollution of wells and groundwater on private property. The court described its task as determining whether the state's interests in the damages to private property were sufficiently different from the interests of the private landowners. To determine this difference in interest, the supreme court remanded the case so the trial court could establish whether the state had alleged injury to a substantial segment of privately owned wells; whether the alleged injuries to those wells were speculative in nature, whether there was "community-wide risk" that went beyond risk to private well owners; and whether individual or class-action lawsuits by private well owners were possible.[67]

In a case involving retail gasoline pricing, the District of Columbia court of appeals addressed the question of the attorney general's *parens patriae* standing. The court noted that the Supreme Court's decision in *Alfred L. Snapp* addressed the requirements for *parens patriae* standing in *federal* court, but did not establish requirements for *parens* standing when a state brings suit in its own courts to enforce its own laws. The court found that the District's interest, in this case, is not quasi-sovereign, but sovereign—the District's power to create and enforce its own legal code. (The court noted that its conclusion that the District's interest here was sovereign did not mean that the District's interest in "fostering a competitive gasoline market for the benefit of consumers" is not an appropriate quasi-sovereign interest.) [68]

among eggs based on the state of origin, but rather require that all eggs be from hens housed in a way that complies with California law.

66 *Hood v. Microsoft Corp.,* 428 F. Supp.2d 537, 546 (S.D. Miss. 2006).

67 *State v. Hess Corp.,* 161 N.H. 426, 438-39 (N.H. 2011).

68 *District of Columbia v. ExxonMobil Oil Corp*., No. 14-CV-633 (D.C. Ct. App. Nov. 2, 2017).

Attorneys general have used their *parens patriae* authority to bring cases in a number of areas including antitrust,[69] charities,[70] consumer protection,[71] anti-discrimination,[72] disability,[73] securities and commodities,[74] bankruptcy,[75] and environmental law.[76] Several federal statutes specifically authorize attorneys general to bring actions as *parens patriae*[77] and many state statutes also authorize such actions.[78] In some states, if the state is suing in its *parens patriae* capacity, it must explicitly articulate its quasi-sovereign interest.[79] Attorneys general have

69 *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265 (1972), *Texas v. Scott & Fetzer Co.*, 709 F.2d 1024, 1024-28 (5th Cir. 1983), *Pennsylvania v. Mid-Atlantic Toyota Distribs., Inc.*, 704 F.2d 125, 131 (4th Cir. 1983).

70 *Commonwealth by Corbett v. Citizens Alliance for Better Neighborhoods, Inc.*, 983 A.2d 1274 (Pa. Comm. Ct. 2009) (the Commonwealth's interest in the well-being of the public that the charity was created to serve is a clear example of a quasi-sovereign interest).

71 *Nevada v. Bank of Am. Corp.*, 672 F.3d 661 (9th Cir. Nev. 2012); *West Virginia v. CVS Pharm., Inc.,* 646 F.3d 169 (4th Cir. 2011); *In re Edmond*, 934 F.2d 1304, 1311-13 (4th Cir. 1991); *Minnesota ex rel. Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112-13 (Minn. Ct. App. 1987).

72 *New York v. Utica City Sch. Dist.,* 177 F. Supp. 3d 739, 748 (N.D.N.Y. 2016); *EEOC v. Federal Express Corp.*, 268 F. Supp. 2d 192 (E.D.N.Y. 2003) (employment discrimination), *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 102 (D. Mass. 1998) (age discrimination), *Pennsylvania v. Flaherty*, 547 F. Supp. 172, 174-75 (W.D. Pa. 1982) (racial discrimination).

73 *People by Vacco v. Mid Hudson Medical Group, P.C.*, 877 F. Supp. 143 (S.D.N.Y. 1995).

74 *Kelley v Carr*, 442 F Supp 346 (W.D. Mich. 1977).

75 *In re Hemingway*, 39 B.R. 619 (N.D.N.Y. 1983), *In re DeFelice*, 77 B.R. 376 (Bankr. D. Conn. 1987).

76 *Terr. of Am. Sam. v. Nat'l Marine Fisheries Serv.*, 2017 U.S. Dist. LEXIS 39470 (D. Haw. Mar. 20, 2017); *Sierra Club v. San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997), *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994).

77 *See, e.g.*, 15 U.S.C. §§ 15c, 15h (2005) (Clayton Act); 7 U.S.C. § 13a-2 (1) (2006) (Commodity Exchange Act); 18 U.S.C. § 248 (c)(3) (2006) (Freedom of Access to Clinic Entrances Act); 15 U.S.C. § 6103 (2006) (Telemarketing and Consumer Fraud and Abuse Prevention Act); 47 U.S.C. § 227(f)(2) (Telephone Consumer Protection Act); 42 USCS § 1320d-5 (Health Insurance Portability and Accountability Act).

78 *See, e.g.,* Alaska Stat. § 45.50.577; Ark.Code Ann. § 4-75-212(b); Cal. Bus. & Prof. Code § 16760(f); Conn. Gen. Stat. § 35-32; Haw. Rev. Stat. § 480-14; Mass. Gen. L. ch. 93, § 9*;* Nev. Rev. Stat. Ann. § 598A.160; 79 Okl. St. § 205; R.I. Gen. Laws § 40-8.2-6; Utah Code Ann. § 76-10-916.

79 *Lynch v. Nat'l Prescription Adm'rs, Inc.,* 787 F.3d 868 (8th Cir. 2015). *See also, District of Columbia v. ExxonMobil Oil Corp.,* 2014 D.C. Super. LEXIS 7 (D.C. Super. May 6, 2014) (DC does not have statutory authority to sue oil company because general allegation of harm to competition in gasoline market does is not quasi-sovereign interest).

also used *parens patriae* actions in tort litigation against specific industries, for example, the tobacco industry[80] and manufacturers of lead paint.[81]

Although in some cases, consumer class actions may achieve results similar to those of the *parens patriae* action, one commentator has observed:

> *Parens patriae* litigation nevertheless finds justification in the relative ease with which such suits may be brought, the assurance—provided by the state's presence—that the interests of the suit's beneficiaries are truly the motivating force behind the litigation, and the importance of the state itself in taking an active role in the administration of civil justice, rather than leaving it entirely to the private bar.[82]

Qui Tam Litigation

The majority of states have enacted False Claims Acts, under which a whistleblower (also known as a relator), typically acting on the basis of inside information, files suit on behalf of the state against entities that are defrauding the state.[83] These actions are also known as "qui tam" suits. The complaint is filed under seal and sent to the state attorney general, who decides, within a set period, whether or not the state should intervene. If the case is successful, the whistleblower receives a portion of the recovery, generally between 15 and 25 percent. The authority of the attorney general in these suits has been contested in several cases.

A whistleblower filed a qui tam suit under the Illinois False Claims Act alleging failure of a business to pay appropriate use taxes to the state of Illinois. The state joined the case, and after two years, moved for non-suit and voluntary

80 For a detailed discussion of the tobacco litigation, see Chapter 22. In the Texas tobacco litigation, a federal district court upheld the State's right to sue for recoupment of Medicaid dollars in *parens patriae*. The court stated, "In the Court's opinion, [the *parens patriae*] basis for suit has long been available to the State. … In this case, the State has simply dusted off a long recognized legal theory and seeks to use it to further the purposes of the statutes in question and right the alleged wrongs involved in this matter." *Texas v. American Tobacco Co*., 14 F. Supp. 2d 956, 971 (E.D. Tex. 1997).

81 *State v. Lead Indust Aries Association, Inc*., 2001 R.I. Super. LEXIS 37 (R.I. Super. 2001).

82 Ryan and Sampen, *Suing on Behalf of the State: a Parens Patriae Primer*, 86 Ill. B.J. 684, 690 (1998).

83 *See, e.g.*, Del. Code Ann. tit. 6, § 1201 *et seq*.

dismissal, arguing that there was not a sufficient nexus between the company and Illinois to satisfy the Commerce Clause. The whistleblower appealed the dismissal. The Illinois Court of Appeals stated,

> [T]he issue here is whether the decision to proceed with a *qui tam* action should be made by the executive branch or by the judicial branch. Only the Attorney General is empowered to represent the state in litigation in which it is the real party in interest… Legislation can add to the powers of the Attorney General but it cannot reduce the Attorney General's common law authority to direct the legal affairs of the state. … If we interpret … the Act to require judicial review of the Attorney General's decision to dismiss an action … we give the court veto power over the state's decision to dismiss, essentially usurping the Attorney General's power to direct the legal affairs of the state and putting that power into the hands of the court.[84]

The Nevada Supreme Court took a similar view of the attorney general's authority in a case with essentially identical facts. The attorney general of Nevada initially declined to intervene in the case, then intervened and sought dismissal. The trial court declined to dismiss the case, and the attorney general appealed to the Nevada Supreme Court. The Nevada supreme court held separation of powers issues were implicated by a situation under which the legislative branch placed conditions on the prosecutorial actions of the executive branch. The court held, "Even after intervention, any subsequent motion to dismiss the action for good cause necessarily implicates the State's interests and the executive branch's prosecutorial discretion."[85]

The Florida courts also reaffirmed the attorney general's right to intervene in and dismiss qui tam suits. The court held, "Conducting and terminating legal actions brought in the name of and for the benefit of the State is the sine qua non

84 *State ex rel. Beeler, Schad and Diamond, P.C. v. Burlington Coat Factory Warehouse Corp,* 860 N.E.2d 423, 430 (Ill. App. 2006).*See also, Illinois ex rel. Saporta v. Mortgage Electronic Registration Systems, Inc.* 2016 IL. App. (3d) 150336 (Ill. App. 3d Dist. Dec. 19, 2016); ("[t]he State is the real party in interest in qui tam actions—qui tam plaintiffs, acting as statutorily designated agents for the state, may proceed only with the consent of the Attorney General and remain completely subordinate to the Attorney General at all times."); *People of New York ex rel. Qui Tam v. Bayrock Group*, 2017 N.Y. Misc. LEXIS 685 (N.Y. S. Ct. Feb. 24, 2017).

85 *International Game Technology, Inc. v. Second Judicial Dist. Court of Nevada*, 127 P.3d 1088, 1098 (Nev. 2006).

of the State's chief legal officer. . . . A State's chief legal officer without the authority to conduct the State's litigation would be no legal officer at all."[86]

86 *Barati v. Florida*, 2016 Fla. App. LEXIS 2658 (Fla. Ct. App. Feb. 23, 2016); *People of New York ex rel. Qui Tam v. Bayrock Group*, 2017 N.Y. Misc. LEXIS 685 (N.Y. S. Ct. 2017).