Attorneys General: Role and Issues

As the chief legal officers of the states, commonwealths and territories of the United States, attorneys general serve as counselors to state government agencies and legislatures, and as representatives of the public interest. In many areas traditionally considered the exclusive responsibility of the federal government, attorneys general now share enforcement authority and enjoy cooperative working relationships with their federal counterparts, particularly in the areas of antitrust, bankruptcy, consumer protection, criminal law, cybercrime and the environment.

The Role of Attorneys General

They keep intrusive and unwanted telemarketers away. They protect consumers against fraud and abuse. They ensure a fair marketplace. They fight crime. They defend criminal convictions on appeal. These are among the myriad of legal activities in which attorneys general are involved. The following highlights some of their primary issue areas:

Antitrust

State attorneys general have worked together for more than a century to halt anticompetitive practices that raise prices, stifle innovation and hurt consumers. The first meeting of a group of state attorneys general took place in 1907 to discuss ways to protect consumers from the monopoly power wielded by Standard Oil. And today, state attorneys general are still working together to prevent anticompetitive behavior in a variety of markets, including pharmaceuticals, technology, food and health care.

State antitrust laws predate the major federal antitrust statutes, the Sherman and Clayton acts, and state attorneys general have long pursued anticompetitive activities, such as price fixing and bid rigging, within their own states. In the mid-1980s, state attorneys general became concerned by what they perceived as a void in federal antitrust enforcement. They began working closely together on antitrust cases that they were able to bring together in a single federal court. Since then, the attorneys general have developed sophisticated litigation strategies and policy positions, and are now viewed as an equal partner with the federal antitrust enforcement agencies, the Federal Trade Commission and the U.S. Department of Justice Antitrust Division.

The strength of multistate antitrust enforcement is the result of several factors. Attorneys general can enforce federal antitrust laws on behalf of the state—for example, when the state is the purchaser and the seller is fixing prices—and can recover damages. The attorney general can also get equitable relief to prevent injury to the general economy of the state. Finally, state attorneys general also have authority to bring parens patriae actions—lawsuits filed on behalf of residents of the state but not corporations—for violations of the Sherman Act. Attorneys general can thus file a single case together in a single federal court. There is a large body of federal court decisions interpreting federal antitrust law and making it relatively consistent across jurisdictions. Most multistate litigation is handled through the National Association of Attorneys General (NAAG) Multi-state Antitrust Task Force. The task force is comprised of the antitrust staff—assistant attorneys general—from all states.

The attorneys general have typically focused their attention on items that are important to the health and welfare of residents in their states. For example, 18 states and the District of Columbia filed a multistate action in March 2008 against two pharmaceutical companies alleging they manipulated the patent and generic drug approval processes to block a cheaper, generic version of the prescription drug TriCor, which is used to reduce high levels of triglycerides and cholesterol. The case, Florida vs. Abbott Laboratories, was still pending at press time.

In another area important to consumers, attorneys general have reached settlements with insurance companies and brokers over claims they rigged bids and fixed prices in the commercial general insurance market. The conspiracy included a “pay-to-play” scheme in which certain companies paid contingent commissions to insurance brokers, who then steered policy holders to the paying companies. These commissions were not revealed to the policy holders, including public entities, who paid higher premiums for insurance coverage.

State attorneys general can also sue to prevent anticompetitive mergers under section 7 of the Clayton Act. Again, attorneys general focus on mergers that will have an effect on important products for consumers. For example, a group of states reached a settlement with two school bus companies that
planned to merge. The companies sold school bus routes and depots in several states in order to preserve competition for school districts seeking school bus services. Another recent example is the joint federal-state challenge to the merger of two large beef processors, which would have made the company the largest beef processor in the United States and would have allowed the company to reduce the price paid to ranchers for cattle while raising the price of beef to consumers.

The attorneys general establish their policy positions through the NAAG Antitrust Committee, comprised of attorneys general, and other policy statements, including the NAAG Horizontal Merger Guidelines and the NAAG Vertical Restraints Guidelines. The Horizontal Merger Guidelines are designed to provide guidance to the business community on the enforcement intentions of the attorneys general; they were last revised in 1993. The Vertical Restraints Guidelines were last revised in 1995. Recent legal developments have made them out-of-date, and a staff group is beginning the revision process.

**Appellate Advocacy**

Attorneys general frequently appear on behalf of their states, state agencies and state officers in the U.S. Supreme Court and other appellate courts. Indeed, in the U.S. Supreme Court, only the U.S. Solicitor General’s office appears more often than the attorneys general. The issues the attorneys general address in appellate courts run the gamut from defending criminal convictions to enforcing environmental laws to defending state statutes against First Amendment challenges.

One noteworthy trend in attorney general appellate advocacy is the growth of the solicitor general position. More than 35 attorney general offices now have a designated attorney—usually called the solicitor general—who oversees the office’s appellate work in civil cases. The solicitor general ensures that the office’s work product is of the highest quality and helps ensure the office is taking consistent positions in its many appeals.

Attorneys general are also assisted in their appellate advocacy by the NAAG Supreme Court Project, which is dedicated to helping states present cases effectively before the U.S. Supreme Court. The project does this by organizing moot courts for virtually every state attorney who argues in the court; by editing 40 to 50 briefs filed by states in the Supreme Court each year, including merits briefs, amicus briefs, cert petitions, and briefs in opposition; by facilitating communication among states on amicus briefs; and by holding annual training programs.

**Criminal Law Enforcement**

In most jurisdictions, the attorney general’s prosecutorial role is limited and focused on complex crimes such as public corruption, environmental crime and Medicaid fraud. In many jurisdictions, the attorney general assists the locally-elected prosecutors upon request but otherwise does not assume primary responsibility for criminal matters. In Delaware, Rhode Island and Alaska, however, the attorney general serves as the sole prosecutorial authority. Still other jurisdictions, such as in Connecticut, have the attorney general almost completely removed from the criminal process. Most attorneys general handle their jurisdiction’s criminal appellate responsibilities.

While most attorneys general are limited in their prosecutorial authority, attorneys general use their offices to advance criminal justice initiatives within their own jurisdiction and nationwide. For example, many states have passed statutes restricting access to precursor chemicals used in the manufacturing of methamphetamine, based on a statute originally developed in Oklahoma in 2004. Oklahoma Attorney General W.A. Drew Edmondson traveled extensively to speak about his state’s efforts and many attorneys general similarly championed measures within their own respective jurisdictions. Other examples include initiatives related to sex offenders, cybercrime, gang violence and identity theft.

Attorneys general also advocate for adequate state and local law enforcement assistance funding. In March 2008, all 56 attorneys general from around the nation and its affiliated territories signed a letter urging Congress to restore funding for the Byrne Justice Assistance Grant Program, which was cut by 67 percent in fiscal year 2008.

NAAG’s Criminal Law Project supports the work of attorneys general related to criminal justice concerns, including its active Criminal Law Committee, and works to facilitate communication among the offices of attorneys general and their staff. The project monitors legislative and regulatory developments related to criminal justice matters and stays abreast of legal developments in the field. The project helps to coordinate and share NAAG information with related associations, federal agencies and coalitions working in the area of criminal justice.

**Cybercrime**

Attorneys general offices became heavily vested in prosecuting cases involving technology-facilitated crimes when the U.S. Office of Juvenile Justice and Delinquency Prevention (OJJDP), under the authority of the 1998 Justice Appropriations Act, P.L. 105-
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have been diligent in working to safeguard the health
protection at federal facilities, and attorneys general
environmental matters and provides assistance that
NAAG’s Energy and Environment Project
balancing environmental protection and energy reli-
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responsibility for providing training on best practices
which keeps attorneys general abreast of new devel-
attorneys have attended project trainings. In addi-
which addresses through
technology-facilitated crimes. To date, 700 of these
attorneys have attended project trainings. In addition,
the project publishes a bi-monthly e-newsletter
attorneys general by training their prosecutors and civil
enforcement attorneys in handling cases involving
computer crimes such as Internet fraud, Internet auction fraud and computer-
facilitated identity theft are often addressed through
state consumer protection laws.
The NAAG Cybercrime Project assists attorneys
ensuring that attorneys general are abreast of new de-
cases law and legislation in the computer
area. Most recently, the project has assumed
responsibility for providing training on best practices
in electronic discovery.
Energy and Environment
State attorneys general have been at the forefront of
environmental law developments in the last 30
years. As national legislation protecting the environ-
ment was enacted, many states followed suit with
parallel state statutes. Attorneys general made use
of the new laws and built on existing common law
to reduce pollution of the air, land and water. One
area specific to state enforcement is environmental
protection at federal facilities, and attorneys general
have been diligent in working to safeguard the health
and safety of their states’ residents by pushing the
federal government to meet the same standards that
private industry must follow. As energy concerns
have come to the attention of policymakers at the
state and federal level, the work of attorneys gen-
ral has come to reflect the intertwined questions of
balancing environmental protection and energy reli-
bility. NAAG’s Energy and Environment Project
assists the attorneys general in activities to influence
national and regional legal strategies on energy and
environmental matters and provides assistance that
allows the offices of the attorneys general to function
at a higher level of efficiency and knowledge.

Legislative
Frequently, attorneys general across the country are
asked by Congress, the media, business organizations
and constituents for their views on bills pending in
Congress that affect the powers and duties of attor-
neys general. Often, such legislation seeks to pre-empt
state law in the areas of consumer protection, envi-
ronment, antitrust, bankruptcy, securities, criminal
law and many other areas within the jurisdiction of
attorneys general. NAAG’s Legislative Project serves
as the initial point of contact for information requests
from attorney general offices, members of Congress/staff,
and other interested associations and individu-
als about attorney general view on federal legislation.
NAAG has requested that the Obama administration
and the 111th Congress resist federal pre-emption of
state laws, particularly in the enforcement of state
banking and mortgage foreclosure laws.

Medicaid Fraud
The state Medicaid Fraud Control Units were created
more than 30 years ago by the Medicare-Medicaid
Anti-Fraud and Abuse Amendments of 1977 (P.L.
95-142). The units are 75 percent federally funded
and are annually certified by the secretary of the U.S.
Department of Health and Human Services. This
responsibility has been delegated to the department’s
Office of Inspector General, which also has adminis-
terative oversight for the units. The jurisdiction of
the fraud units is limited to investigating and pros-
ecuting Medicaid provider fraud and to reviewing
complaints of resident abuse and neglect in nurs-
ing homes. However, in 1999, Congress passed the
Ticket to Work and Work Incentives Improvement
Act that granted the Medicaid Fraud Control Units
authority to investigate and prosecute fraud in other
federally funded health care programs, if the case is
primarily related to Medicaid, with the approval of
the inspector general of the relevant federal agency.
This law also authorizes the Medicaid Fraud Con-
trol Units, on an optional basis, to investigate and
prosecute resident abuse or neglect in non-Medicaid
board and care facilities.

Medicaid Fraud Control Units are located in the
office of 43 state attorneys general. Connecticut, the
District of Columbia, Georgia, Illinois, Iowa, Ten-
nessee and West Virginia have units that are located
in other departments of state government. A unit is
intended to operate using a strike force concept of
investigators, auditors and attorneys working together.
full-time to develop Medicaid fraud investigations and prosecutions. The unit staff must include attorneys experienced in the investigation and prosecution of civil fraud or criminal cases, auditors capable of reviewing financial records, and investigators with substantial experience in commercial or financial investigations. A unit director, generally an assistant attorney general, manages the unit, although some units are managed by an investigator.

The National Association of Medicaid Fraud Control Units was founded in 1978 to provide a forum for a nationwide sharing of information concerning the problems of Medicaid fraud, to improve the quality of Medicaid fraud investigations and prosecutions by conducting training programs, to provide technical assistance to association members, and to provide the public with information about the Medicaid Fraud Control Units program (www.namfcu.net). All 50 units are members of the association. The association is headquartered in Washington, D.C. at the NAAG offices and is staffed by a counsel, an association administrator and a part-time association assistant.

**Conclusion**

Nearly every aspect of citizen life is affected in some way by the work of attorneys general. Although states are experiencing increased caseloads and diminished resources, stemming from decreased state funding, the state attorneys general will continue to serve and protect citizens, and preserve the rule of law.

**About the National Association of Attorneys General**

The National Association of Attorneys General was founded in 1907 to help attorneys general fulfill the responsibilities of their office and to assist in the delivery of high quality legal services to the states and territorial jurisdictions. The association fosters interstate cooperation on legal and law enforcement issues, conducts policy research and analysis of issues, and facilitates communication between the states’ chief legal officers and all levels of government. The association’s members are the attorneys general of the 50 states and the District of Columbia and the chief legal officers of the commonwealths of Puerto Rico (secretary of justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam and the U.S.Virgin Islands.

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