The Role of the State Attorney General

Harvard Law School

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Note: Syllabus is subject to change depending on developing issues and the schedules of visiting speakers

Introduction

The roots of the Office of State Attorney General run deep in American jurisprudence. All 13 American colonies had an Attorney General and today all 50 States and the District of Columbia have opted to provide legal services through an Office of State Attorney General. Each office possesses broad jurisdiction and to varying degrees is independent from the executive branch of state government. Attorneys General in 43 states are elected statewide on a partisan basis. The combination of sweeping jurisdiction and constitutional independence has given rise to a unique American legal institution of growing importance.

The course will cover the day-to-day challenges faced by Attorneys General and their staffs in delivering the high quality legal advice that will guide state government in a constitutional and ethical manner. The course will also cover the relationship of Attorneys General with the federal government, the private bar, and a myriad of advocacy organizations. It will focus on some of the most controversial legal issues affecting society today because Attorneys General operate at the intersection of law and public policy. Although Attorneys General have been in the news almost daily with lawsuits against
Presidents Obama and Trump, the focus of this class is not on suing or defending the President.

Although each State is unique, the course will demonstrate the remarkable congruence that exists among State Attorneys General when addressing similar challenges and issues. Unlike private and other government lawyers, who work subject to ethical rules that defer decision-making to agency "clients," the 13,000 men and women who serve in Attorneys General offices represent the "public interest."

This Syllabus contains federal and state statutes and case law, law review and descriptive articles from a variety of sources, and hypotheticals that describe the nature and function of the Office of State Attorney General. The numerous hypotheticals are drawn from actual cases which, because of their nature, have not been studied or, in most cases, ever made public. The materials have been collected from over 40 years of studying and participating in the decision making of Attorneys General and their staffs.

Students are evaluated based upon either a final take-home examination or, if approved by the instructors, a paper. For the readings that are marked "supplemental reading," these are optional readings to enable you to take a deeper dive into that week’s topic.

Additionally, students can improve their grades based upon class participation, and we strongly encourage each student to participate in some fashion each week in class. Because there is no text or hornbook covering the subject material, class attendance each week is required. Because many, if not most, of the decisions of Attorneys General and their staff are based upon judgment, and thus are not obviously right nor wrong, we work to create an atmosphere in which both extroverts and introverts, and students of differing political perspectives, feel comfortable contributing diverse viewpoints to the class discussion.

In anticipation of the first class, we urge students to watch this video: A Brief Introduction to the World of State Attorneys General, AG 101: Intro to State AGs, StateAG.org.

We enjoy meeting with students, and encourage everyone to visit us at our office to discuss the class, your interests and aspirations, or the world in general. Please go to the following link to schedule office hours: HLS: Office Hours: Jim Tierney.

_Harvard Law School is dedicated to facilitating equal access for students with disabilities and to cultivating a campus culture that is sensitive and responsive to the needs of students. To request an accommodation for a disability during the course, students should reach out to Student Support Services in the Dean of Students Office at studentsupport@law.harvard.edu or at 617-495-1880, or visit the office in WCC 3039. Additional information, including how to register for accommodations can be found at HLS: Accessibility Services Resources._
Week #1 – Jan. 27, 2020

The Authority and the Culture of the Attorney General

The first week explores the nature of the authority and the culture that pervades offices of Attorneys General. The first chapter of Walter Mondale’s *The Good Fight*, which covers Mondale’s time as the Attorney General of Minnesota over 50 years ago, serves as an introduction to the Role of the Attorney General. Used with the permission (and to the personal delight) of the author, this edited chapter combines almost all aspects of the office of Attorney General that we study throughout the semester, e.g., the common law, statutory authority, conflicting legal and policy demands, resource restriction, the role of academics and outside counsel, partisan politics, and personal ambition. The chapter is also testimony that for all of the changes in the legal and political world, some things remain remarkably the same.

The first week also contains readings that describe *parens patriae* and the duty of Attorneys General to represent all of the people of their States and not to limit themselves to representing a specific state agency.


Week #2 – Feb. 3, 2020

The Structure of the Office of the Attorney General

State Attorneys General have never fit easily into the existing framework of state government. States generally have rejected the federal model in which the Attorney General serves at the pleasure of the Chief Executive, and this "divided executive" approach results in numerous possible conflicts as the Attorney General attempts to represent the
"client," which could be the Governor, the state agency, or the public interest. This week explores the independence inherent in the office of a modern Attorney General.

7. "High Court to Hickenlooper: We're not getting involved". Colorado Independent, Corey Hutchins (December 03, 2015).
10. "Who is the Client?" – A Role Playing Hypothetical.

Week #3 – Feb. 10, 2020

The Ethics of Client Representation

The constitutional and statutory duties of Attorneys General can be at variance with the Model Rules of Professional Responsibility. This week focuses on core ethical readings as well as concrete ethical dilemmas that are faced by almost every Attorney General.

7. The Four Seasons – Ethics Hypotheticals.
Week #4 – Feb. 17, 2020

Consumer Protection

Since the passage of state Unfair and Deceptive Practices Acts (UDAP) in the late 1970’s, all State Attorneys General have responsibility in the area of consumer protection, which increasingly includes privacy issues. This week discusses the broad nature of that authority and the development of multistate AG consumer litigation against the backdrop of increased use of arbitration in private consumer litigation.

6. AG Ferguson, Judge Finds Comcast Violated Consumer Protection Statute Nearly Half a Million Times (June 6, 2019) (supplemental reading).
10. Law360, Supreme Court Ruling Cuts Off Avenue to Class Proceedings (April 24, 2019).

Week #5 – Feb. 24, 2020

Multistate Advocacy & Private Counsel

Although State Attorneys General engaged in multistate matters for years, they burst onto the national scene with the over $200 billion settlement against the tobacco companies, with many of the States relying on outside plaintiffs’ contingency counsel. Following that case, there was a backlash against the use of plaintiffs’ contingency counsel, with court decisions and legislative efforts to curtail the use of such counsel, or at least provide greater transparency. This week will discuss the growth of multistate AG settlements and the role of outside counsel.

5. Paul Nolette, Multistate Actions and Settlements. (Review both the chart on the link on the page, and the interactive settlement database on the on the link on the page and select an interesting settlement to discuss in class.)

Week #6 – Mar. 2, 2020

Negotiation

This week, we put to use the information we have learned so far about Attorneys’ General, multistate litigation, and outside counsel by engaging in a mock negotiation between a bank (along with its insurer) on the one hand, and the States (along with outside counsel), on the other hand. The problem is posted below, along with the character assignments. Each student also will be given secret, personal instructions the week before the exercise that you may share, or not, with your team or with the other side, as you see fit. Each side should meet ahead of class to discuss strategy. As instructed in the problem, each team should meet beforehand to map out strategy. You cannot meet with the other side or with another section. Come to class prepared to negotiate. The negotiation will be in real time. In other words, you will be given you a set amount of time to complete the negotiation that will not be extended.

1. Negotiation Background.
2. Negotiation Character List.

Week #7 – Mar. 9, 2020

U.S. Supreme Court Practice
Other than the U.S. Solicitor General, state government is by far the most frequent litigant in the U.S. Supreme Court. This class will study States’ practice before the Supreme Court, including the important role played by Attorneys General submitting amici curiae briefs. It will also discuss the increasing role of Solicitor General in many States.

Joining us this week will be Dan Schweitzer, ’89, who is the Supreme Court Counsel for NAAG, and been advising and assisting States on their Supreme Court cases for over 20 years. We think you will appreciate his insight. Come armed with questions about what it is really like to litigate in the Supreme Court.

1. Results of Cert Petitions on Filed by States, NAAG (2020).
2. Statistics on Amicus Briefs filed by States in the U.S. Supreme Court, NAAG (2020).
6. Where Are They Now – The Promise and Peril of Being SG.
10. Jenny Deam, The Journey from Wisconsin to Texas and the ruling that struck down the ACA, Houston Chronicle (Jan. 11, 2019).
11. AG Memo on Nationwide Injunctions (Sept. 13, 2018).

No Class – Mar. 16, 2020

(Classes for the rest of the semester were conducted remotely.)

Week #8 – Mar. 23, 2020

Criminal Jurisdiction, Criminal Justice Reform, and Public Corruption

The extent to which State Attorneys General have criminal jurisdiction varies from State to State. But regardless of the extent of their actual legal authority, they are at the forefront of the national debate over criminal justice reform. Public corruption cases are often the most challenging, sensitive, and complicated criminal matters that State Attorneys General face. This class will focus on the challenges that arise under the criminal jurisdiction of attorneys general with a discussion of the appropriate ways in which State Attorneys General respond to allegations of corruption and ethics violations by state and local elected officials.
The flip side of this issue is that several attorneys general have themselves been subject to criminal prosecution for actions taken while in office, and have also been criticized for ethical violations on a wide variety of issues.

This week we will be joined by Assistant Attorney General Leanne Robbin. Leanne is a graduate of Bowdoin College and Cornell Law School and is a criminal prosecutor in the Maine office of Attorney General.


10. *What will change about the Chicago police under the consent decree?,* Chicago Tribune (Feb. 1, 2019).

**Week #9 – Mar. 30, 2020**

**Attorney General Opinions**

All State Attorneys General have the authority to issue formal opinions. They provide advice on issues large and small to government actors, from municipalities up to the Governor. This section reviews that authority, and the factors that go into when, and when not, to issue an Attorney General opinion. The class will end in a series of a rapid-fire hypotheticals in which everyone will be asked to vote on whether or not you would issue an opinion if you were the AG.

This week, in the first half of the class, we will be joined by Pennsylvania Attorney General, Josh Shapiro.

**Introduction:** James Tierney, AG’s and Opinions, Harvard Law School, March 30, 2020 (YouTube).
1. Emily Myers, Antitrust Chief Counsel, NAAG; Andy Bennett, Judge, Tennessee Court of Appeals, Chapter 5, Opinions, State Attorneys General Powers and Responsibilities (2019).
3. Jeff Schapiro, Virginia Attorney General Ken Cuccinelli was just doing his job, Richmond Times-Dispatch (September 16, 2012) (supplemental reading).

Week #10 – Apr. 6, 2020

Relationship with Local and County Government

Although the State Attorney General may be the State’s chief law enforcement officer, he or she is not the only law enforcement officer. Over two weeks, we examine the relationship between State Attorneys General with different levels of government. Before turning to the conflicts with local government or with the federal government, we look at the increasing polarization of the country, in which there are not only "blue states" and "red states," but within those states, there are "blue cities" and "red counties." We then consider the implications of these conflicts this week in State Attorney General actions concerning the hot button topics of guns and opioids.

This week, we are going to meet with the Attorney General of Montana and President of NAAG, Tim Fox.

4. Fox News, More than 100 Virginia cities, counties declare themselves gun sanctuaries as Dems prepare to take over legislature (Dec. 20, 2019).
7. Chris Trainor, SC attorney general demands that Columbia mayor repeal recent city gun laws, Post and Courier (Dec. 3, 2019).
8. Eric Eyre, WV counties, cities seek larger share of potential opioid settlement, Gazette Mail (Oct. 5, 2019).
**Week #11 – Apr. 13, 2020**

**Relationship with Federal Government**

State Attorneys General have a complex relationship with the federal government, including the White House, the Department of Justice, local U.S. Attorneys, and other federal agencies. Away from the headlines, in most cases, attorneys general cooperate with federal agencies to carry out federal policy but in some cases and in some states attorneys general attempt to either challenge or prompt federal action. This section analyzes this complex and changing relationship.

We also consider the role of preemption in which the federal government tries to prevent State Attorneys General from taking action. We conclude by considering how these differing cross-currents affecting State Attorneys General at the intersection of local, state, and federal government play out in in the hot button area of immigration.

This week, we will be joined by Former AG and SG of Ohio, Richard Cordray.

**Introduction:** James Tierney, State AG’s and Fed Gt, April 13, 2020 (YouTube).

3. States sue Trump administration at record pace, TheHill.com (Feb 12, 2020)
4. Nolette Summary: Multistate Lawsuits vs The Federal Government
7. 8 U.S.C § 1373.
Week #12 – Apr. 20, 2020

Non-Profit Corporations, Charities, and Foundations

State Attorneys General have always had some responsibility to review the operations of non-profit charities and foundations. Unlike like for-profit sectors of the economy, which answer to boards of directors and shareholders, Attorneys General often are the only entity with responsibility over non-profit charities and foundations. Particularly as non-profit organizations, such as hospitals, health insurers, and universities, contribute over $900 billion to the economy, the Attorney Generals' increased use of that authority has taken on national significance.

This week, we will be joined by the Attorney General of Nebraska, Doug Peterson.

7. Trump Foundation Complaint (June 14, 2018). (supplemental reading)

Past Exams for Review

Spring 2016 Exam.
Spring 2017 Exam.
Fall 2017 Exam.
Fall 2018 Exam.
Spring 2019 Exam.
Fall 2019 Exam.