**B524: Representing the State**

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**Short Description:** State attorneys general have long represented and advised government officials, handled criminal appeals, and protected consumers from unfair trade practices. Nowadays, in many states they are expected to play a role in any social crisis that arises. This course will offer a systematic treatment of how and why state attorneys general function as they do. This is a writing class (satisfying the writing course graduation requirement) where, in lieu of a final exam, students will write two short papers (1000-1500 words) and participate in 2-3 all-class projects.

**Instructor’s General Approach:** The class is designed both to provide instruction as to the various tasks and roles of state attorneys general and to promote skeptical thought and discussion about what those tasks and roles should be. I intend to use a variety of modes to convey relevant information, including not only traditional reading materials but also brief audio and video presentations in class. My objective is to approach the subject from a national perspective. That said, in my view the Indiana experience provides useful examples of some common attorney general undertakings, and in some cases yields pioneering work with respect to emerging issues. Consequently, the course will probably feature texts and examples from Indiana more than any other single state, but that is not meant to suggest an Indiana-centric view. On the other hand, I am the Solicitor General of Indiana, so I suppose some level of Indiana-centrism is inevitable.

**Readings:** All assigned readings aside from the main textbooks will be supplied electronically on the class web page. Because this is a writing class, we will review various types of writings that lawyers can be expected to master both as writers and as readers, including judicial opinions, scholarly writings, advisory opinions, statutes, regulations, and legal pleadings.
The class features a fair amount of reading, though nothing beyond what upper-class law students should be able to handle for weekly two-hour sessions. Where possible, I have indicated particular pages to read rather than an entire case or text.

Note that some readings are listed under “Further Reading.” Each class will cover multiple topics, and my recommendation is that you complete all assigned readings, then select additional pieces from the “Further Reading” list that focus on one or two particular topics for that week that you will be especially well prepared to discuss. I will often draw upon the “Further Reading” in class lectures and discussions.

I encourage students to supplement the assigned readings even further by reviewing the James Tierney memo and web sites listed below and perhaps by discovering, and sharing with the class, other Internet sites or blogs that touch on relevant issues. Since this class encompasses issues that are frequently in the news, students should also make a habit of reading the Wall Street Journal on a daily basis, particularly the op-ed page, which mentions state AG activities with moderate frequency.

**Writing Assignments:** The individual writing assignments include a white paper and portions of a hypothetical Supreme Court multi-state amicus brief. The intent is that significant further research besides the texts supplied will be unnecessary for each paper, though it is possible that some fairly limited external research will be helpful. Students should bear in mind that the assigned writings are to be independent thought pieces rather than exhaustive scholarly treatments. Please submit all writing assignments in Microsoft Word format so that I can easily make comments and edits.

**Class Projects:** We will take advantage of our small class size by incorporating all-class projects into the syllabus. Below are brief descriptions of class projects:

1. **Advisory Opinion:** Ideally, the class will consider, analyze, and draft an actual advisory opinion responding to a request from an OAG client. N.B.: Students will be expected to disclose any legally significant conflicts of interest (though the instructor anticipates none), maintain appropriate confidentiality, and otherwise conduct themselves according to the rules and norms of professional responsibility. Given the nature of this type of document, the very existence of
the request for advice must be held in confidence unless and until an advisory opinion is made public.

2. **Save the World**: While some attorneys general focus on policing federalism, others focus on policing the world’s ills more generally, resulting in regulation by litigation. In this project, the class will identify a real-world problem where an attorney general might offer a creative litigation solution, analyze whether it is genuinely appropriate for AG action, craft a multi-state strategy, and draft documents (including a background memorandum and a complaint, but also potentially others depending on the strategy) that an AG might use to address the issue.

3. **Policing Federalism**: Many attorneys general have become public federalism watchdogs and regularly initiate suits against federal government officials and agencies challenging their authority to implement statutes and regulations in various ways. But how can an attorney general interested in playing such a role develop a system for identifying federal actions that may be susceptible to successful court challenges? The class will consider ways to approach the problem and develop a series of practices and protocols designed to identify potential federalism challenges to federal action.

**Class Discussion (herein of Computers in Class)**: The success of the class depends heavily on everyone’s participation, and, for that reason, a substantial portion of every student’s grade will depend on class discussion. Completing your reading each week, including one or more additional readings, will greatly help in this regard. This also relates to use of computers in class. My concern is that laptops in class discourage engagement. I am tempted to ban them outright, but must balance that against the need for everyone to have access to course documents during class. Therefore, rather than encourage students to lug stacks of printed materials to every class, I will permit use of laptops in class for purposes of taking notes and referring to relevant texts.

**Grading**: Equal Weight: Two individual writing assignments
Three Class Projects
Class Discussion
Required Texts:


SCHEDULE OF MEETINGS AND COURSE ASSIGNMENTS

UNIT ONE
INTRODUCTIONS

August 17, 2017: Introduction to the role of State Attorneys General Part I: The history of AGs and their powers and duties; common law authority; constitutional v. statutory offices; parens patriae.

Assigned Reading
State Attorneys General: Chapters 1-3 & pp. 95-97
Paul Nolette, Federalism on Trial Chapter 1 (2015)
Felix Morley, Freedom and Federalism 10-11 (1959)
Samuel H. Beer, To Make a Nation: The Rediscovery of Federalism 292-95 (1993)
Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 268-70, 273-74 (5th Cir. 1976)
Massachusetts v. Mellon, 262 U.S. 447, 485-86 (1923)
August 24, 2017: Introduction to the Role of State Attorneys General Part II: Responsibility for developing legal policy for the state; exclusive litigation authority.

Assigned Reading
State Attorneys General: Chapter 4

Authority Over Litigation

Hollingsworth v. Perry, 133 S. Ct. 2652 (2013), Majority Opinion Part III, Dissent Parts II.A., II.B.

State ex rel. Sendak v. Marion County Superior Court, 373 N.E.2d 145, 149 (Ind. 1978)


In re Opinion of Justices (Requiring Attorney General To Join Lawsuit), 27 A.3d. 859, 865-71 (N.H. 2011)

Authority over Legal Policy

Sec'y of Admin. & Fin. v. Attorney General, 326 N.E.2d 334, 338 (Mass. 1975)


Further Reading
Letter from California Department of Justice to California Supreme Court, Joshua Beckley v. Arnold Schwarzenegger (Perry), No.S186072 (Cal. Sept. 8, 2010)

August 31, 2017:  

Introduction to the Role of State Attorneys General Part III: Attorney-client relationships; ethical implications of professional and political independence; summary discussion of AG’s role and AG independence.

Assigned Reading
State Attorneys General: Chapter 4

Attorney-Client Privilege and other Professional Responsibility Issues


People ex rel. Salazar v. Davidson, 79 P.3d 1221, 1229-31 (Colo. 2003) (en banc)


The Independence of State AGs


Written Opinion on Remand Order, Sanford v. McMaster, No. 3:09-cv-01322-JFA (D.S.C. June 12, 2009)

Further Reading
Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865, 867-68 (Ky. Ct. App. 1974)

September 6, 2017: Paper 1 due on the following topic:

To what extent has development of the Anglo-American rule of law benefitted from the advent of the role of attorney general? What implications does that relationship have for the debate over whether state attorneys general should be elected by a state’s voters or appointed by a state’s governor?
UNIT TWO
CORE FUNCTIONS

September 7, 2017:  Advisory, Consumer Protection: Reviewing proposed contracts and regulations, producing legal opinions; deceptive consumer sales, CIDs.

Assigned Reading
State Attorneys General: Chapters 5 & 13

Advisory
North Carolina Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015)

Consumer Protection
Indiana Code § 24-5-0.5, Deceptive Consumer Sales
Nu-Sash, Inc. v. Carter, 887 N.E. 2d 92 (Ind. 2008)
Announcement of off-label marketing settlement v. GSK (2014)
Mississippi ex rel. Hood v. AU Optronics Corp., 134 S.Ct. 736 (2014)

September 8-29: Advisory Opinion
September 14, 2017: **Litigation Part I**: The varied roles of state attorneys general in criminal and civil cases; parallel proceedings; torts and common law sovereign immunity; federal claim immunities.

**Assigned Reading**
State Attorneys General: pp. 84-88; Chapter 17

**Parallel Proceedings**

*State of Hawai‘i v. Henry Ha‘Alilio Peters*, Findings of Fact, Conclusions of Law and Order Denying Defendant Jeffrey R. Stone’s Motion to Dismiss

New Mexico Attorney General’s Parallel Proceedings Policy

**Torts**
Ind. Code §§ 4-6-2-1

Indiana Tort Claims Act, Ind. Code §§ 34-13-3-3; 34-13-3-5(e)

*Campbell v. State*, 284 N.E.2d 733, **734-35, 737** (Ind. 1972)


**Sovereign and Absolute Immunity in Federal Court**


*Ex Parte Young*, 209 U.S. 123, **149-50, 155-56, 159-60** (1908)


*Stump v. Sparkman*, 435 U.S. 349, **355-60** (1978)


*Tenney v. Brandhove*, 341 U.S. 367, **372-77** (1951)
**September 21, 2017:** Litigation Part II: Civil rights/immunities; habeas corpus.

**Assigned Reading**

**Civil Rights**


Ind. Code §§ 4-6-2-1.5


*Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015) ([highlighted portions](#))


**Habeas corpus**

28 U.S.C. § 2254


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**Further Reading**


September 28, 2017:  Litigation Part III: Judicial review of agency action; duty to defend against claims of unconstitutionality; amicus and Supreme Court practice.

Assigned Reading
State Attorneys General: pp. 88-91, Chapter 22

Judicial Review

Constitutional Litigation
Gregory F. Zoeller, Duty to Defend the Rule of Law, 90 Ind. L.J. 513 (2015)

Amicus/Supreme Court
FRAP Rule 29
Supreme Court Rule 37.4
Ind. Code §§ 34-14-1-1, -11
Ind. Code § 34-33.1-1-1
Dan Schweitzer, Cert Petitions Filed by States (Terms 2007-2015)
Top 16 Cert Stage Amici (chart)

Further Reading
Sendak v. Debro, 343 N.E.2d 779, 781-82 (Ind. 1976)

October 4, 2017: Paper 2 due on the following topic:

Write the interest of amicus curiae and summary of argument for a State Amicus Brief in a case identified by the instructor pending before the Supreme Court this term.
October 5, 2017: Regulation by Other Means: Attorneys general as social police agencies; multistate activity; tobacco MSA and enforcement; lead paint.

**Assigned Reading**

State Attorneys General: Chapter 21
Paul Nolette, *Federalism on Trial*, Chapter 2

**Multistate Litigation**


**Tobacco**

National Association of State Budget Officers, Update on the Tobacco Master Settlement Agreement and Its Impact on States (2013)


**Lead Paint**


**Further Reading**


*Tritent Int’l Corp. v. Kentucky*, 467 F.3d 547, 553-58 (6th Cir. 2006)

*Curtis v. Altria Group, Inc.*, 813 N.W.2d 891, 895-901 (Minn. 2012)


October 6-27: Save the World
October 12, 2017
Fall Break – No Classes
October 19, 2017:  Regulation by Other Means, Cont.: Pharmaceuticals; credit markets and financial institutions; special problems related to using outside counsel.

Assigned Reading
Paul Nolette, Federalism on Trial, Chapters 3-5

Financial Institutions
In RE Standard & Poor’s Rating Agency Litigation, 2014 WL 2481906 (June 6, 2014) (Highlighted portions)
Wall Street Reform and Consumer Protection Act, NAAG

Contingency Fees
Ind. Code § 4-6-3-2.5
October 26, 2016: 

**Emerging Issues Part I:** States v. feds: preemption; policing boundaries of federalism.

**Assigned Reading**

State Attorneys General: Chapter 15

*John Choon Yoo, Federalism and Judicial Review, from The Tenth Amendment and State Sovereignty (2002), pp. 131-134, 141-147, 168-179*

**Preemption:**

NAGTRI, The Law of Preemption 1-20 (2d ed. 2011)


*Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2237, 2251-52, 2256-60 (2013)*

**Policing Boundaries of Federalism**


*Complaint, Texas et al. v. HHS (ACA HIP Fee)*


Petition for Review, *Wisconsin et al. v. FCC*, No. 16-1219

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October 27-November 18: Policing Federalism

**Assigned Reading**

State Attorneys General: 121-29; 141-43; 144-53; 162-68
Paul Nolette, *Federalism on Trial*, Chapters 6-8
*State v. Texas Co.*, 7 So.2d 161, **850-52** (La. 1942)
*Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, **147-48** (D.C. Cir. 2012) (per curiam)
*Michigan v. U.S. Army Corps of Eng’rs*, 758 F.3d 892 (7th Cir. 2014)
Petition for Review, *W.Va. et al. v. EPA*, No. 15-1363 (Challenge to Clean Power Plan 111(d) rule respecting existing power plants)

**Assigned Reading**

Paul Nolette, *Federalism on Trial*, Chapter 9


*Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, **11-13, 16** (1st Cir. 2012) (DOMA)


*State Nat’l Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015) (Dodd-Frank)


Complaint, *State of Nebraska, et al. v. U.S.*, No. 4:16-cv-03117 (Title IX guidance)

States’ U.S. Treasury Bond Complaint (unclaimed property escheat)


SUMMARY

November 16, 2017: Discussion: Have state AGs become flexible, responsive forces for the public good, or officious intermeddlers who impose regulatory costs disproportionate to the benefits they bring? The impact of attorney general activism on consumers and businesses; on constitutional law; AG politics and accountability.

Assigned Reading

Paul Nolette, Federalism on Trial, Chapter 10


Alan Greenblatt, The Story Behind the Prominent Rise of State AGs, Governing (June 2015)