

NORTHEASTERN UNIVERSITY SCHOOL OF LAW
Public Law/Public Policy
The Role of the State Attorney General
Visiting Lecturer Dean Richlin
Spring 2010

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Class Location: TBA

Class Meeting Time: Tuesdays and Thursdays, 6:00 pm to 7:30 pm

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COURSE OVERVIEW: In recent decades, the state attorneys general have played an increasingly prominent role in making public policy through legal process both for his or her state and for the nation. As a result, state attorneys general have had a profound effect on the development of individual rights, public health, environmental protection, public charities and business regulation. By reviewing cases and commentaries touching such topics as separation of powers, federalism, pre-emption, the doctrine of parens patriae and current issues such as same sex marriage, executive compensation, the financial crisis and health care, this course will explore the powers and duties of modern state attorneys general and the influence they wield. Students will consider where the modern attorney general fits within our legal and constitutional framework and whether state attorneys general effectively represent the public interest or have become a new branch of government unbounded by the usual checks and balances.

SYLLABUS AND COURSE OUTLINE

Required reading:

The readings listed below generally will be available electronically. Students may be expected to locate some materials.

Assignments:

Identification of Current Cases or Commentary. In addition to the Course readings, you will be assigned one or more class topics for which you will be expected to identify current developments reflected in judicial opinions, commentary or news articles. Such materials may be found in media stories and on the web, including at the following websites, which you should periodically visit during the duration of the course: www.naag.org;

law.columbia.edu/center_program/ag; as well as the web sites of individual attorneys general.

Policy paper. You will write a memorandum (15 pages) on a major policy issue raised in this course with proposals for action by a state attorney general. Topics are to be selected by **March 23, 2010**. A **topic outline and list of legal source material** are due on **March 30, 2010**, and a **first draft is due on April 13, 2010**. The **final memo** is due on **May 6, 2010**. See the description of the assignment following the course outline.

Attendance and class participation:

Attendance is required absent exceptional circumstances. Class participation will be noted. Participation and performance of the assignments noted above will form the basis of your evaluation.

COURSE OUTLINE**Session 1**

INTRODUCTION TO THE COURSE: Overview of course outline, assignments and logistics. Discussion of powers and duties, roles and relationships, of the state attorney general, including the policy dimensions of the attorney general's role and the factors that direct how he or she exercises discretion.

Assignment:

- [Garrett v. Board of Trustees, 531 U.S. 356 \(2001\)](#) [majority opinion only]
- Brief of Amici Curiae States of Hawaii, et al., in Support of Petitioners [optional]
- Brief of Amici Curiae States of Minnesota, et al., in Support of the Respondents [optional]

Session 2

HISTORY AND DEVELOPMENT OF THE MODERN OFFICE OF ATTORNEY GENERAL: Discussion of the evolution of the role of attorney general from the 14th Century to modern times with a particular focus on the causes of the attorney general's expanded role, how that expanded role is perceived, and how, if at all, that expanded role might be limited.

Assignment:

- Richardson, The Office of the Attorney General: Continuity and Change, 53 Mass. L.Q. 5 (1968)
- [Comm. v. Kozłowsky, 238 Mass 379 \(1921\)](#)
- [Florida v. Exxon Corporation, 526 F.2d 266 \(5th Cir. 1976\)](#)
- [Feeney v. Comm., 373 Mass. 359 \(1977\)](#)

Sessions 3 and 4

POWERS AND DUTIES: What are they? What is the source of the attorney general's authority? What, if anything, limits the attorney general's authority? Who is his or her client? If it is the attorney general's job to say what the public interest is, how does the attorney general determine the public interest? Must the attorney general always defend the government? If not, what choices does he or she have?

Assignment:

- Rule 3:07, Massachusetts Rules of Professional Conduct, Section I, Client-Lawyer Relationship
- [Sec'y of A&F v. Attorney General, 367 Mass. 154 \(1975\)](#)
- [People vs. Brown, 29 Cal. 3d 150 \(1981\)](#)
- [Lawyer Disciplinary Board v. McGraw, 461 S.E.2d 850 \(1995\)](#)
- [In re Fordice, 691 So.2d 429 \(Miss 1997\)](#)
- E. Ugarte, "Post Conference Reflections: The Government Lawyer and the Common Good," [40 S. Tex. L. Rev. 269 \(1999\)](#) [optional]

Sessions 5 and 6

SAME SEX MARRIAGE AND THE DEFENSE FUNCTION: Examination of the various choices that face the attorney general when called upon to defend the status quo against an effort to protect or expand civil rights, including consideration of whether or not to defend, what arguments to advance, and when to declare the fight over.

Assignment:

- [Loving v. Virginia, 388 U.S. 1\(1967\)](#)
- [Baker v. State, 170 Vt. 194, 744 A2d 864 \(1999\)](#) [introduction only; balance of opinion is optional]
- [Goodridge v. Department of Public Health, 400 Mass. 309 \(2003\)](#) [introduction and Section IV only; balance of opinion is optional]□
- Press Release (MA AG), 11/18/03, "Statement from Attorney General Tom Reilly on Supreme Judicial Court's Ruling in the case of Goodridge vs. Department of Public Health"
- [Senate 2175 \(2004\)](#)
- [Opinions of the Justices, 440 Mass. 1201 \(2004\)](#) [majority opinion only]
- "Reilly Gives Governor a Hurdle," Boston Globe, 3/30/04
- [Cote-Whitacre v. Department of Public Health, 446 Mass. 350 \(2006\)](#) [optional]
- [Doyle v. Secretary of the Commonwealth, 448 Mass. 114 \(2006\)](#)
- [Massachusetts vs. US Department of Health & Human Services, Complaint \(D. Mass., July 8, 2009\)](#)
- [In re Marriage Cases, 43 Cal. 4th 757 \(2008\)](#)
- [Strauss v. Horton, Cal. 4th, 93 Cal. Rptr. 3d 591 \(2009\)](#)
- [Perry v. Schwarzenegger, et al., Answer of AG Edmund G. Brown, Jr., \(ND CA, June 12, 2009\)](#)

Sessions 7 and 8

PUBLIC PROTECTION: THE AFFIRMATIVE CIVIL LITIGATION FUNCTION.

Examination of the scope of the attorney general's authority to affect society through affirmative litigation including consideration of the factors that guide the attorney general in where to allocate resources and exercise discretion. Consideration also of the influence of the state legislature and private plaintiffs.

Lead Paint Poisoning and the Doctrine of Parens Patriae

Assignment:

- [*Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 \(1982\)](#)
- "Poisoned: Babies as lead-detectors," Prov. Journal, 5/13/01
- "Poisoned: Enact new laws, enforce the old," Prov. Journal, 5/17/01
- "U.S. Chamber Counterattacks Lead-Paint Suit by RIAG," Prov. Journal, 3/29/01
- *Rhode Island v. Lead Industries Assoc., Inc.*, C.A. No. 99-5226, Decision on Defendants' Motion to Dismiss (Prov. Sup. Ct., April 2, 2001) [Entire case with particular focus on pages *3 - *4 and *6 - *8]
- [*Ieyoub and Eisenberg, Class Actions in the Gulf South Symposium: State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 Tul. L. Rev. 1859 \(2000\)](#) [optional]
- *State v. Lead Industries Assn, Inc.*, 951 A.2d 428 (2008) [read "Track I," pages 434 - 458; "Track V," pages 468 - 481]

Session 9

PUBLIC PROTECTION: Continued

Enforcement of Environmental Laws against State Agencies

Assignment:

- [*Mass. Gen. Laws c. 12*, § 11D](#)
- Press Release MA AG, 10/4/01, "Attorney General Reilly Sues MBTA over Arsenic and Lead Contamination in Readville Rail Yard"
- Press Release MA AG, 10/12/01, "Court Orders MBTA to take Immediate Steps to Protect Readville and Dedham Neighborhoods from Contaminated Rail Yard"
- 2002 Report to the Governor
- *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007)

Session 10

PUBLIC PROTECTION: Continued

Due Application of Charitable Funds: Oversight of Non-Profit Boards of Trustees and Executive Compensation

Assignment:

- [Mass. Gen. Laws c. 12](#), §§ 8, 8L
- Letter, December 5, 2007, David G. Spackman to Dr. John William Poduskie, Sr.,
- *People v. Grasso*, 11 N.Y.3d 64, 893 N.E.2d 105, 862 N.Y.S.2d 828 (2008)
- Memorandum, September 2, 2009, David G. Spackman to Massachusetts Hospital Association, et al.

Session 11

PUBLIC PROTECTION: Continued

Hand Guns and Consumer Protection

Assignment:

- [Mass. Gen. Laws c. 93A](#), §§ 2 and 4
- 940 CMR 3.16
- [940 Code of Massachusetts Regulations 16.00](#): Attorney General's Regulations of Handgun Sales
- [American Shooting Sports Council, Inc. v. Attorney General](#), 429 Mass. 871 (1999)
- Kaplan and Barry-Smith, "Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and Other Consumer Goods Safer," [17 Yale J. on Reg. 253 \(2000\)](#) [optional: 282-320]

Session 12

PUBLIC PROTECTION: Continued

The Sub-prime Mortgage Crisis and Consumer Protection

Assignment:

- [Mass. Gen. Laws c. 93A](#), §§ 2 and 4
- *The American Dream Shattered*, Report of the Attorney General for the Commonwealth of Massachusetts, November 2007

- 940 CMR 8.06
- *Commonwealth vs. Fremont Investment & Loan*, 452 Mass. 733 (2008)

Session 13

PUBLIC PROTECTION: Continued

Health Care

Assignment:

- 940 CMR 26.00, Regulations on Discount Health Plan and Discount Health Plan Organizations
- Mass. Gen. Laws c. 188G, §6 ½ (b)
- Investigation of Health Care Cost Trends and Drivers, Preliminary Report, January 29, 2010
- Letter, AG Henry McMaster to Speaker Nancy Pelosi, December 30, 2009.

Session 14

STATE ENFORCEMENT OF FEDERAL LAWS

Assignment

- [New York v. Microsoft Corp., 209 F.Supp.2d 132 \(DDC 2002\)](#)
- [Jay L. Himes, Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case, 11 Geo. Mason L. Rev. 37](#)

Session 15

MULTISTATE LITIGATION: Examination of the phenomenon over the past quarter century of state attorneys general banding together to file consolidated or coordinated litigation against individual companies or industries, including discussion of the conditions that have given rise to multistate litigation, the process for developing such litigation and the policy implications.

Assignment:

- J. Lynch, "Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation," 101 Col. L. Rev. 1998 (2001)
- "States Sue over Acid Rain," U.P.I., March 20, 1984
- "Baldwin Accord Criticized," NY Times, February 8, 1985

- "Attorneys General Crusade Against Corporate Misdeeds; States Often Sue when the Federal Government Won't," Washington Post, February 19, 2003
- "States Flex Prosecutorial Muscle, Attorneys General Move into What Was Once Federal Territory," Washington Post, January 12, 2005
- "Transporting Lawsuits Across State Lines," NY Times, November 9, 1997

Session 16

TOBACCO: Examination of the historic effort by state attorneys general, from 1994 until 1998, to take on the Tobacco Industry. Discussion of the context for the tobacco litigation, the development of the strategy (including the use of private counsel on a contingent fee basis), key victories and defeats, and special consideration of the substantial policy implications.

- On the Docket: Tobacco Road: The Massachusetts Story, April 20, 2004, at <http://docket.medill.northwestern.edu/archives/000078print.php>
- "Massachusetts Files Suit Against Tobacco Industry," The New York Times, December 20, 1995
- Commonwealth v. Philip Morris Inc., et al., CA No. 95-7378 (Middlesex Sup. Ct., 12/19/95) Complaint, at <http://www.library.ucsf.edu/tobacco/litigation/ma/8macomplaint.html?printfriendly=1&>
- Commonwealth v. Philip Morris Inc., et al., CA No. 96-10014-GAO (D. Mass., 5/20/96) at <http://www.library.ucsf.edu/tobacco/litigation/ma/3maremand.html?printfriendly=1&>
- Minnesota, et al. v. Philip Morris Incorporated, et al. File #C1-94-8565 (Ramsey County Dist. Ct., 11/29/94) Order, at <http://www.library.ucsf.edu/tobacco/litigation/mn/6mnrobin.html?printfriendly=1&>
- Letter from D. Morales: Whether the State may enter into a contingent fee contract with a private firm, Letter Op. No. 96-124, November 6, 1996, at <http://www.library.ucsf.edu/tobacco/litigation/tx/11-6-96ltr.html?printfriendly=1&>
- Attorneys General Settlement Agreement, March 15, 1996 at <http://www.library.ucsf.edu/tobacco/litigation/fl/agsettlement.html?printfriendly=1&>
- Summary of the Attorneys General Master Tobacco Settlement Agreement, at <http://academic.udayton.edu/health/syllabi/tobacco/summary.htm> [Introduction, and The Tobacco Settlement at a Glance]

Sessions 17 and 18

TOBACCO: AFTERMATH - Consideration of two questions in particular: more than ten years later, what are the effects of the litigation; and what have been the consequences of the partnership forged between the attorneys general and private counsel.

- A Broken Promise to Our Children: The 1998 State Tobacco Settlement Seven Years Later, Executive Summary, Campaign for Tobacco Free Kids, November 1998, at <http://www.tobaccofreekids.org/reports/settlements/>
- [Price v. Philip Morris, Inc. 341 Ill.App.3d 941, 793 N.E.2d 942, 276 Ill.Dec.183 \(2003\)](#)
- The Wall Street Journal Interactive Edition, April 8, 2003, at <http://www.lctf.org/tobacco/tdn/TND-030408.html>
- Battle against Big Tobacco Not Over, Harvard Public Health, November 12, 2004, at <http://www.hsph.harvard.edu/now/nov12/richmond.html>
- Challenge to the State Attorney General - Tobacco Cartel, Competitive Enterprise Institute, October 12, 2005, at <http://www.cei.org/gencon/005,04894.cfm>
- [Brown Rudnick Freed & Gesmer, et al. v. Massachusetts, 17 Mass L Rptr 11, 2003 WL 22707347 \(Mass Super\)](#)
- [Brown Rudnick Freed & Gesmer, et al. v. Massachusetts, 16 Mass L Rptr 815, 2003 WL 22707409 \(Mass Super\)](#)

Session 19

BACKLASH: The effort to curtail the authority of state attorneys general.

Assignment:

- **Chamber to Court: Don't Allow Private Attorneys to Litigate on Behalf of State Governments on Contingency Fee Basis**, US Chamber of Commerce, at <http://www.uschamber.com/nclc/news/alerts/ba060403.htm> (link to Amicus Brief)
- **M. Greve, Government By Indictment: Attorneys General and Their False Federalism**, American Enterprise Institute, May 2005, at <http://www.instituteforlegalreform.com/resources/index.php?p=papers>
- **Rules Would Limit Lawsuits**, Washington Post, 2/16/06
- **'Silent Tort Reform' Is Overriding States' Power**, NYTimes, 3/10/06

Session 20

THE AGE OF OBAMA: Is there a role for state attorneys general with the return of an activist federal government.

Assignment: TO BE DETERMINED

Sessions 21 and 22

SUMMARY PRESENTATIONS OF POLICY PAPERS.

POLICY PAPER

(topic due March 23, 2010; outline and list of legal source material due March 30, 2010; first draft is due April 13, 2010; final memo due May 6, 2010.)

Select an important legal or public policy issue of interest to you involving a matter addressed by a state Attorney General. Then write a memorandum **(no less than fifteen pages)**. The following is a suggested focus for your papers:

- A description of the issue faced by the state Attorney General and the action he or she took;
- Identification, with appropriate source of law references, of the specific powers and duties that served as the source of authority for the Attorney General's action;
- A description of the discretionary choices involved in the action undertaken by the Attorney General;
- Consideration of whether, and if so which, other federal, state or local officials or private parties might have addressed the issue addressed by the Attorney General; and
- Your analysis of whether the Attorney General's action, including his/her discretionary choices, was proper and reflected an effective and appropriate means of achieving the Attorney General's objective.

In selecting a topic, it is recommended that you visit the web sites listed above. [end]