

CIVILITY AND STATESMANSHIP
IN THE OFFICES OF
STATE, TERRITORIAL, AND DISTRICT OF COLUMBIA ATTORNEYS
GENERAL

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I. Introduction.

This project arises from the governance structure and leadership succession program of the National Association of Attorneys General (NAAG). NAAG is the professional organization of the attorneys general of the 50 states, five territories, and the District of Columbia (McPherson 2013, 424).^{*} Of those offices, 43 attorneys general are popularly elected and the remaining 13 are appointed by either a governor, the legislature or a state supreme court (Myers 2013, 12). While the powers and responsibilities of each attorney general vary from jurisdiction to jurisdiction, most offices, particularly those in which the attorney general is elected, have important powers in areas like criminal law, consumer protection, anti-trust law, and the ability to defend or promote the interests of their jurisdiction in courts and administrative bodies (Myers 2013, 27-44).

As the attorney general of Montana, this author's membership in NAAG is automatic, and opportunities for leadership positions within NAAG are subject to membership vote. In June of 2018, NAAG members elected the author of this paper as president-elect to serve as president of NAAG for the calendar year 2020 (National Association of Attorneys General 2018). NAAG presidents select a substantive legal or policy program topic to serve as that president's "presidential initiative" during the term of office. The presidential initiative

^{*} The phrases "attorneys general" and "office of the attorney general" as used in this paper refer collectively to the attorneys general of the 50 states, five territories, and the District of Columbia.

topic is then featured in NAAG's meetings, trainings and conferences for that year. The Presidential Initiative for the year 2020 is "Civility and Statesmanship in the Offices of the State, Territorial, and District of Columbia Attorneys General."

II. The Role of State, Territorial and District of Columbia Attorneys General.

While the balance of power between the states and the federal government has been an ongoing struggle since the early days of our Constitutional Republic (Nolette 2015, 11; citing *Federalist No. 28*), the last decade has seen a rise in federal-state conflicts (Shaub 2018, 653). These conflicts have elevated both the importance and the profile of the office of the attorney general as multiple attorneys general have joined together to oppose federal laws, regulations, executive orders, and policies (Higgins 2017). University of Montana law professor Anthony Johnstone suggests that partisanship among attorneys general has been on the rise, particularly with respect to "state resistance to federal power" (Johnstone 2018, 609-614). Illustrative of this resistance to federal power are the 35 lawsuits filed by Democratic attorneys general against President Trump's administration in the year 2017 alone, in contrast to the total of 46 lawsuits filed by Republican attorneys general against President Obama's administration in all eight years of that administration (Lucas 2018). This rise in partisanship, coupled with what Jonathan Haidt characterizes as a country that is now "polarized and embattled to the point of dysfunction," threaten to

sweep up the offices of attorneys general into the national trends of less bipartisanship and “divergent agendas that reflect nationalized conflicts elsewhere in American politics (Haidt 2012, 319-320; Nolette 2015, 169, 201).”

Over the years, attorneys general have collectively promoted many positive bipartisan initiatives and projects on a national level (Greenblatt 2017; Brumleve 2016, 2). Employing the mechanisms of multi-state investigations, letters to Congress and administrative agencies, *amicus curiae* briefs, and litigation, attorneys general have banded together to make or force important legal and policy changes (Lemos and Quinn 2015; McPherson 2013, 430-431). Perhaps the most prominent of these collective efforts was the national tobacco master settlement agreement which has, since 1998, resulted in the states’ recovery of over \$206 billion for tobacco-related health care costs (Saffell and Basehart 2009, 234-235; Jones and Silvestri 2010; Brumleve 2016, 3). Other multi-state attorney general actions have focused on broad areas of policy including antitrust, consumer protection, health care and environmental cases (Nolette 2015, 20-22).

Much of the collaboration and cooperation between the offices of the attorneys general is facilitated and encouraged through membership in the National Association of Attorneys General (NAAG). First established in 1907 to pursue a common approach to addressing anti-trust issues related to Standard Oil Company, NAAG has matured and grown to provide a non-partisan,

collegial, and professional platform for attorneys general to exchange ideas, debate, and cooperate on important issues (McPherson 2013, 424-425). NAAG has successfully fostered personal and professional relationships and collaboration between attorneys general of widely varied political and philosophical persuasions. NAAG also coordinates delegations to and from foreign nations for purposes of educating foreign leaders, judges, prosecutors, and others about American laws and justice systems. These NAAG foreign delegations also serve to foster international collaboration on such things as anti-drug trafficking, anti-human trafficking, and data security and privacy. NAAG's work in all of the above endeavors has resulted in great benefit to our nation, the individual states, and indeed the world on multiple topics.

Within this context of the rise in the profile and impact of attorneys general, also lies a trend of increased political activism to elect or appoint attorneys general of a particular political party or persuasion (Totten 2017). The past 20 years saw the rise of first the Republican Attorneys General Association (RAGA) in 1999, and shortly thereafter the Democratic Attorneys General Association (DAGA) in 2002, with both organizations committed to electing attorneys general of their political party (Johnstone 2018, 610). For most of the years since RAGA and DAGA were formed, the two organizations had a gentlemen's agreement, referred to as the "incumbency rule," that neither would seek to unseat an incumbent attorney general of the opposite party (Greenblatt 2017). That agreement ended in 2017 and gave rise to elections that now pit the

attorney general members of one party against their incumbent colleagues of the other party (Levinson 2017). The challenge for attorneys general is to continue to act civilly with one another while continuing to collaborate in a bipartisan manner on multi-state matters of legal and policy importance in the face of a rise in partisanship.

This NAAG Presidential Initiative, “Civility and Statesmanship in the Offices of the State, Territorial, and District of Columbia Attorneys General,” will seek to focus on those attributes which foster civility, mutual respect, understanding, fairness, cooperation, collaboration, bipartisanship, and statesmanship by and among the 56 attorney general members of NAAG, both now and in the future.

III. Defining Statesmanship.

The exercise of civility and bipartisanship in politics necessarily implies that people of differing views and philosophies will respect one another and will look for ways to work together toward a common goal or purpose. There is often agreement among attorneys general about how to accomplish the common good in policy areas like public safety, consumer protection, and data security and privacy. However, when it comes to the role of the federal government vis-à-vis state government or the role of the federal government in the lives of Americans, agreements that overcome political differences are often harder to find. While no one would expect all attorneys general to agree on everything all the time, it is imperative that these influential leaders have a methodology, or “road map,” for

tackling a problem in a way that fosters collaboration and that preserves their ability to work together in the future regardless of whether or not they find a bipartisan solution. That methodology is the exercise of statesmanship.

Alexis de Tocqueville posited that the role of a statesman in a democracy was to “ward off democratic despotism” (otherwise referred to as “majority tyranny”) and “administrative despotism” (Danoff 2011, 7; Habib 2011, 84). According to Tocqueville, educating citizens and shaping their character is the key task of statesmanship, while understanding the “nature of man” and history guides the true statesman (Danoff 2011, 2, 5). Moreover, Tocqueville believed that statesmen will successfully meld political science theory with the art of politics, while maintaining independence from partisan party politics (Danoff 2011, 5-6).

In his book *Statesmanship, Character, and Leadership in America*, Terry Newell defines statesmanship as follows: “[T]he moral act of a leader, which seeks to call forth the moral character of the nation, taken after prudential judgment, within our Constitutional framework, amid opposition and personal risk, aimed at achieving an important element of what, in the long term, constitutes a good society” (Newell 2012, 186). According to Newell, there must be more than mere thinking for there to be statesmanship, there must be action (Newell 2012, 186). Breaking down his definition of statesmanship, Newell explains that there must be “moral ends” to an act of statesmanship, based on what he calls “practical wisdom” acquired through facts, time and practice,

within the boundaries set forth in the U.S. Constitution, amid “passionate and diverging interests” and “intense disagreement,” for the good of society yet often “against the interests of self, party, policy, power, and/or pet philosophy” (Newell 2012, 186-187).

Newell hones further in on what constitutes statesmanship by listing six interacting factors: The leader must (1) know the context in which the leader acts; (2) exhibit moralistic and virtuous character; (3) define a transcendent purpose; (4) master the art of politics; (5) exhibit compelling persuasion; (6) invite, encourage, and persuade the people to rise to the leader’s vision to shape the nation’s character (Newell 2012, 188-207).

In a speech given to the Council of State Governments at their annual meeting in Las Vegas, Nevada on December 17, 2017, at which the author was in attendance, author and speaker Michael Beschloss recounted the actions of U.S. presidents George Washington, Abraham Lincoln, Henry Truman, and Lyndon Johnson in listing what Beschloss believes are the five traits of statesmanship: (1) having the courage to exercise leadership at the risk of being unpopular; (2) exercising great persuasiveness to explain what may be an unpopular decision; (3) acting in the context of the times with a sense of history; (4) an ability to reach across the aisle and work with people of differing political parties and persuasions; and (5) an understanding of why someone would hold an opposite opinion (Beschloss 2017). Beschloss lists some of these traits in the preface to his

book *Presidential Courage; Brave Leaders and How They Changed America 1789-1989* (Beschloss 2007, xi).

Notably, recurring themes in Tocqueville, Newell, and Beschloss' understanding of statesmanship are the ideas of bipartisanship, independence when necessary from party politics, respect for differing opinions, and a sense of history. Conversely, one could conclude that partisan politics, blind loyalty to party politics, disdain for, and a lack of understanding of, differing opinions, and a lack of historical context, all preclude statesmanship. It is exactly these statesmanship-inhibiting attributes that may threaten not only the practice of statesmanship among and by attorneys general, but that may also strain relationships and thwart future bipartisan projects and actions by attorneys general.

IV. The Rise in Partisanship Among Attorneys General.

In a law review article analyzing attorneys general advocacy before the United States Supreme Court, University of Montana law professor Anthony Johnstone suggests that the rise in partisanship and polarization, fueled in part by attorneys general mobilizing against the administrations of U.S. presidents of the opposite political party, the influx of money and influence from business and special interest groups, and the propensity to identify with national partisan debates rather than a state's distinct interests, all can work to distort the states' "voices" and prohibit the states from being "a part of the solution to the national partisan polarization" (Johnstone 2018, 612-613). Further complicating the

future of bipartisanship among attorneys general is the role that aspirations for higher political offices create in the tenor and tone of attorney general rhetoric, and the tendency to play to partisan political sentiments while seeking those offices (Brumleve 2016, 10-11; Kurtz 2018; Saffell and Basehart 2009, 234-235).

A frequent commentator on attorney general activities, Paul Nolette of Marquette University's Department of Political Science, contends that the increasing use of attorneys general to rely on political organizations like the Democratic Attorneys General Association (DAGA) and the Republican Attorneys General Association (RAGA) for influencing issues, policies, and elections, seems unethical and suggests that the NAAG's ability to foster cooperative operations among attorneys general "has (almost) completely broken down" (Shepherd 2018). Harvard Law School Lecturer and former Maine attorney general, James Tierney, believes that, while attorneys general are less partisan than Congress, the escalation of partisanship among attorneys general is set "to escalate . . . in dramatic ways," and "endangers the very function of the attorney general" (Cohen 2017; Neuhauser 2017).

While the author of this paper would not characterize the current state of affairs among attorneys general to be "unethical" or "completely broken down," there does appear to be a risk that the usual bipartisanship activities and collegial relationships among attorneys general may suffer without concerted efforts to foster those activities and relationships. Perhaps more alarming is how

the rise in partisan political rhetoric by many attorneys general, as they play to local political cultures and national party partisanship, can undermine the public's confidence that the office of the attorney general will be used not as a political hammer, but as an incubator for statesmanship, bipartisanship, political independence, and the defense of the rule of law. It is with these challenges in mind that this NAAG presidential initiative project was conceived.

V. Conclusion: Encouraging and Promoting Collaboration and Statesmanship in the Office of Attorney General.

Few would disagree that the quality and constructiveness of the national political dialogue has deteriorated. A review of the news stories covering the work of the attorneys general, and a random sample of attorneys general social media posts, would suggest that attorneys general are succumbing to the negative and divisive political rhetoric of the national scene. As previously noted in this paper, there are multiple causes for the increase in partisanship and negative rhetoric by and among attorneys general, including the increased involvement of political groups, aspirations for higher political office, each attorney general's personal background, and the culture of each attorney general's state and local politics. Acknowledging our political differences and these developments in the work of the attorneys general, and in the relationships among attorneys general, is the first step toward doing those things that are necessary to continue the type of good bipartisan work that attorneys general have done together in areas such as consumer protection, public safety, crime fighting, and social justice.

The primary avenue for interaction between all attorneys general in the last twenty years has been the meetings, committees, training, projects and work of the National Association of Attorneys General (NAAG). In this author's experience, most attorneys general participate in NAAG meetings, projects and activities, but there are many attorneys general, particularly from the more populated states of the Union, who participate in NAAG less frequently. Some attorneys general attend NAAG meetings, but they are absent from the meeting rooms all too frequently. Still other attorneys general do not take full advantage of those NAAG meetings, projects, committees and programs that could be beneficial to their offices and constituents. Importantly, some of the most beneficial aspects of participating in any politically diverse organization like NAAG is having the opportunity to create networks, learn from others, listen to and learn to respect other's viewpoints, and to collaborate. These benefits are lost if attorneys general do not participate and do not take advantage of the opportunity to rub shoulders with someone of a differing political party or opinion. It is not surprising that some of the most partisan current and former attorneys general in recent years have been attorneys general who do not regularly participate in NAAG activities, and who have made little effort to build relationships with attorneys general of the opposite political party.

For the reasons set forth in the paragraph above, this project would intend to not only provide future opportunities for training, speakers, panels and discussions, but would also work with NAAG to identify ways in which to encourage greater participation in NAAG meetings, projects, committees, and programs. For example,

what have we done to encourage participation, and have we inquired with attorneys general as to why they may not choose to participate? Have we sent ambassadors of NAAG staff or attorneys general directly to the offices of those attorneys general who do not participate in NAAG to learn how we can be more attentive to the needs of their offices? Should we ask non-participating attorneys general to host a meeting, lead a project, or participate directly on a panel? How can we encourage attorneys general to actually sit in on NAAG meetings, particularly when NAAG has invited a prominent expert or national figure to speak to the organization? These are just a few of the questions to ask as we seek to increase participation, build better relationships, and avoid undue partisanship among attorneys general.

In addition to being aware of how attorneys general are interacting with one another, and of how they are participating in the political dialogue, we must also acknowledge that the experiences, backgrounds, agendas, and politics of attorneys general are varied and diverse. It is our life's experience and perspective, and the political culture of where we come from, that shape our beliefs and politics. Daniel Elazar described three political cultures (individualist, moralistic, and traditionalistic) and the effect of those cultures on politics and beliefs in geographic regions of America (Elazar 2006, 30-35). Elazar explained how ethnicity and migration change the distribution of political cultures over time, and postulated that these political cultures influence "people's perceptions and expectations about the proper roles of politics and government, the recruitment of specific kinds of people into political life, and the actual practice of government and politics" (Elazar

2006, 35-42). Studying the political culture of a particular attorney general's jurisdiction might explain to some degree why they act as they do, but this is only part of a complex story. A more thorough understanding of an attorney general's background, experiences, beliefs, education, and politics can only come from interaction, dialogue, and debate. As Jonathan Haidt notes in his book *The Righteous Mind: Why Good People are Divided by Politics and Religion*, once the connections between humans are weakened, we find it easier to "treat members of the other party as the permanent enemy rather than as fellow member of an elite club" (Haidt 2012, 320).

The attorney general members of NAAG must do more than just discuss public safety, crime problems, consumer protection, elder abuse, data privacy and other important policy issues of the times when we meet or work together. We must also confront head-on our political differences, the rise of partisanship in our ranks, and the effect of our actions on our offices and on the public's perception of our work. Borrowing advice from Jon Meacham's book *The Soul of America: The Battle for Our Better Angels*, attorneys general must enter the arena of the direct political debate with our colleagues, resist digging our heels in the sand of political extremism, or "tribalism" as Meacham calls it, respect facts and deploy reason, find a critical balance for a "more rational political climate" that recognizes that no one has a "monopoly on virtue or on wisdom," and do all this while understanding the context of history on what we do (Meacham 2018, 266-272). To do these things adequately, we must listen to one another, ask questions, wait for our opportunity to speak and

acknowledge what others have said, be honest with ourselves and with others, be civil when together and when apart, and know when to stop or suspend the discussion (Hoyt 2018, 74-90). The best forum for doing all these things continues to be participation in the National Association of Attorneys General.

NAAG has for many years provided a forum for attorneys general to work together on many worthwhile projects, investigations, cases and programs. In fact, the greatest collective body of beneficial and impactful work by individual attorneys general and by groups of attorneys general has arguably been facilitated through, or assisted by, NAAG. NAAG's mission statement and core values (National Association of Attorneys General 2018) embody bipartisanship and cooperation:

NAAG's Mission Statement: The Association provides a forum for the exchange of knowledge, experiences, and insights on subjects of importance to the attorneys general of the states, territories, and district. It fosters local, state, and federal engagement, cooperation, and communication on legal and law enforcement issues. It provides training, research, and analysis to members and their staffs on a wide range of subjects relevant to the practice areas of the attorneys general offices. It assists in the implementation, administration and enforcement of the tobacco Master Settlement Agreement.

Core Values

Dedication – To provide outstanding support to the Association's members and their staffs as they serve the people of their state, territory, and district.

Integrity – To adhere to the highest level of personal and professional ethics in all Association endeavors, remembering that every member of the Association is accountable to the people of their state, territory or district.

Collaboration and Cooperation – To seek the views and experiences of the Association membership on issues the Association addresses and to provide members with opportunities to share their knowledge, experiences and insights.

Engagement and Inclusiveness – To provide a forum where every Association member can engage his or her colleagues on matters of mutual interest in a congenial atmosphere of trust and respect in which inclusiveness is always the goal.

In many respects, there is no need to reinvent the wheel when it comes to fostering collaboration and bipartisanship among attorneys general because NAAG seeks to accomplish these goals every day. But, as noted above, the rise in partisanship among attorneys general makes the time ripe to redouble efforts to encourage attorneys general to work together on the many challenges and issues confronting our Nation for which consensus and agreement are possible. This project would therefore intend to work with and through NAAG to include topics designed to foster civility, collaboration and bipartisanship in training newly elected or appointed attorneys general, and in encouraging discussion and dialogue so that attorneys general better understand and respect their philosophical and political differences. In addition, this project will seek to use training, discussion, and dialogue to instill a sense of independence from partisanship and a culture of communicating and acting in ways that enhance the ethical and professional reputation of the office of attorney general.

This paper was written concurrently with the preparation of a draft curriculum, attached as “Appendix A,” for the 2020 NAAG Presidential Initiative to be held in Montana on a date and at a location to be determined later. The draft curriculum lists preliminary goals and objectives and attempts to identify some of the areas of discussion that can help to build bipartisan relationships, statesmanship, political independence, ethics, integrity and professionalism in

the office of the attorney general. The draft curriculum is subject to change as the author of this paper works with NAAG and his attorney general colleagues to determine how this project can be of the greatest benefit to NAAG and to the attorneys general.

Initial implementation of portions of this project will be accomplished in the Fall of 2018 with the addition of some discussion and training on civility, statesmanship, bipartisanship, and collaboration for what could be one of the largest classes of incoming new attorneys general. NAAG has asked the author of this paper, a Republican, and District of Columbia Attorney General Karl Racine, a Democrat, to work with NAAG in developing portions of the curriculum for this year's "New Attorney General Orientation" to be held on November 27-28, 2018. Portions of the draft curriculum may also be included in NAAG meetings and trainings in the year 2019 subject to the approval of the NAAG Executive Committee.

In addition to defining and discussing statesmanship, the draft curriculum intends to provide opportunities for attorneys general to consider and discuss multiple key aspects of how they interact with one another, how they operate within their offices, how they communicate, and how they are perceived by their fellow attorneys general and the public. In addition, the overall intent of the curriculum is to encourage attorneys general to consider how their actions comport with statesmanship, bipartisanship, collaboration, ethics, professionalism, and the law. Finally, inasmuch as the ranks of the state and

territorial attorneys general include Democrats, Republicans, and appointees who may or may not have political aspirations or political predilections, the curriculum serves as a catalyst for discussions that will cause reflection, understanding, and mutual respect.

Much of the contemporary scholarship on the subject of statesmanship uses national figures like presidents and other prominent historical figures to illustrate circumstances and actions in which most would agree statesmanship was practiced. However, statesmanship is not likely limited to such prominent national leaders or historical figures, and one does not likely need to look too long or too far to find examples of statesmanship exhibited by leaders at all levels of government and business. Unfortunately, the statesmanship of city and county council members, state legislators, governors, and even attorneys general is not typically the subject of academic study or books. Between now and the 2020 NAAG presidential initiative, the author of this paper plans to request that NAAG hire an outside consulting firm to survey current and former attorneys general, and others familiar with their work, to identify examples of statesmanship displayed by attorneys general. These examples will then be used in NAAG training and conferences to educate attorneys general on how they might similarly be statesmen and women.

Like all elected and appointed officials, attorneys general come and go over time. New attorneys general often do not have the historical perspective that

some longer-serving attorneys general may have. One challenge for attorneys general in the coming years will be to pass on the institutional knowledge and historical perspective that has made possible so many bipartisan successes through the years. The greatest challenge, however, will be for attorneys general to continue to be the great examples of positive political dialogue and discourse that our Nation so needs at this time. This challenge, when understood in the context of what the office of the attorney general has been historically been known for - justice, unbiased devotion to the rule of law, professionalism, political independence, statesmanship, character, virtue, and ethics – is within our ability to achieve, and is vitally necessary for the prosperity and future of our Nation.

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APPENDIX A

PUAD 596 Independent Study - Tim Fox
2020 National Association of Attorneys General President's Initiative Conference
Curriculum (Draft)
July 23, 2018

Goals and Objectives:

1. Define statesmanship as it relates to the offices of attorneys general and encourage the exercise of statesmanship in appropriate circumstances.
2. Enhance the role of attorneys general in finding bipartisan solutions to state, territorial, and national problems.
3. Foster the attributes of civility, ethics, integrity, fairness, transparency, accessibility, and effectiveness in the offices of attorneys general.
4. Lead constructive and open dialogue and promote collaboration in fulfilling the duties and responsibilities of attorneys general offices.
5. Provide opportunities to understand political and philosophical differences and the reasons for those differences and encourage reflection on why attorneys general believe what they believe, and why they act as they act.
6. Show respect and even-handedness in voicing opposition to the opinions or actions of others.
7. Encourage restraint and reflection in the political rhetoric communicated by attorneys general, particularly through social media and the press.
8. Above all, place the rule of law above personal bias and political philosophies.
9. Promote and protect the integrity, professionalism, and political independence of the office of the attorney general.

Potential Panel Discussions:

1. Statesmanship and the Attorney General – What attributes define statesmanship in the unique circumstances and roles of the state attorney general?

Synopsis: Public officials and office holders are often confronted with challenges and crises requiring exemplary responses, sometimes described as the exercise of “statesmanship,” that bring results and outcomes that transcend politics and that have lasting beneficial consequences on public policy, public order, and the public good. It is generally understood that partisan politics and intractable political positions can preclude the exercise of statesmanship. This panel will explore the history of statesmanship in government, the generally accepted definition of statesmanship, and practical application of statesmanship as it relates to the unique duties and responsibilities of the attorney general. In addition, this panel will discuss generally the behaviors and actions of attorneys general that may preclude the exercise of statesmanship.

Potential Panelists: Michael Beschloss; Terry Newell, Leadership for a Responsible Society; Brian Danoff, Miami University; Sara Rinfret, University of Montana.

2. Splash investigations - When is it appropriate to publicly announce an investigation into alleged civil wrongdoing or crime in advance of the investigation.

Synopsis: Traditionally, investigations into civil or criminal wrongdoing are not made public until the investigation is complete and it is determined whether further official action is warranted (e.g., civil lawsuit, negotiated settlement, or criminal

indictment). In recent years, however, it has been increasingly popular for attorneys general to publicly announce investigations at the outset in order to obtain press coverage. For example, many attorneys general have publicly announced consumer protection investigations of oil companies, pharmaceutical companies, fraudulent charities, and other large businesses in advance of the actual investigation. This panel will explore the appropriateness of announcing investigations prior to official action, and the motives and justification, if any, for doing so.

Potential Panelists: a current or former AG who was or is a criminal prosecutor; a federal district judge; a state bar disciplinary counsel; a law professor who teaches professional responsibility.

3. Trial Publicity, Rule 3.6, and the Politicization of the Office of the Attorney General - The Intersection of Politics and Professional Responsibilities in the Media.

Synopsis: Most states have adopted model rules of professional conduct to regulate the conduct of attorneys. One such model rule, Rule 3.6, seeks to inform the attorney of his or her responsibilities with regard to extrajudicial statements that may or may not materially prejudice a civil or criminal case. This panel will focus primarily on the practice of attorneys general who hold press conferences, issue press statements, and conduct interviews with the media concerning ongoing civil and criminal litigation in the context of Rule 3.6. In addition to compliance with rules of conduct, this panel will also explore how such publicity might impact, and indeed undermine, the public's perception of the attorney general's motives for bringing litigation, particularly in the civil case setting.

Potential Panelists: A state bar disciplinary counsel; a sitting federal district court judge; a law professor who teaches professional responsibility.

4. Attorney Generals and Social Media - How does political rhetoric in social media detract from the public's confidence that an attorney general's actions are motivated by the Rule of Law and not by partisan politics?

Synopsis: Most attorneys general, and in particular those that are elected, have become adept in using social media to inform the public of important information impacting public safety, consumer protection and other integral functions of the office of the attorney general. Many attorneys general also use social media platforms such as Twitter and Facebook to engage in political rhetoric, political attacks, and political commentary. The use of social media for political rhetoric is often related to an attorney general's future political aspirations, the predominant political culture of his or her jurisdiction, or an attorney general's predilection to using the office primarily for political purposes as opposed to the exercise of statesmanship.

Words matter, and negative political rhetoric, particularly when it is communicated through social media, can cheapen the office of the attorney general and call into question an attorney general's motives, professionalism, and ethics. Consider litigation filed against a president of the United States by one or more attorneys general that is announced over Twitter with negative words and bold critical statements – “The President's actions are illegal and I will file suit,” or, “I am suing the Administration because the President's actions are unconstitutional and

bigoted,” or, “the President can’t be trusted and won’t do the right thing so I am suing.” Are such statements ethical, can they incite violence, or are they demeaning to the office of the attorney general? What happens when such statements are repeatedly made during the course of litigation, only to have the highest appeal court rule against the attorney general? Did the attorney general’s public statements influence the decision, or did the attorney general’s rhetoric violate his or her duties to show respect for the legal system, to uphold the legal process, and to respect the rule of law? This panel will review select examples of attorneys’ general use of social media and will provide commentary as to the potential for such use to undermine the legitimacy of the office and the public’s confidence in the office.

Potential Panelists: Dr. Joseph Zompetti, Illinois State University; A communications consultant; a political scientist specializing in political rhetoric over social media; a member of the Society of Attorneys General Emeritus (SAGE) whose tenure as an attorney general predated the advent of social media; one or two elected attorneys general who are active on social media, including one that utilizes political rhetoric, and one that does not.

Reference:

Utych, Stephen M. 2012. “Negative Affective Language in Politics.” Paper prepared for presentation at the 35th annual meeting of the International Society of Political Psychology, July 6-9, 2012, Chicago. Vanderbilt University, Nashville.

<https://www.vanderbilt.edu/political-science/graduate/utych-affective-language-ispp.pdf>.

5. Political Allies and Political Opponents in the Legislative and Executive Branches – How to maintain the integrity of the office of the Attorney General while getting the peoples' work done.

Synopsis: Attorneys general are often presented with legislatures or an office of the governor controlled by the opposite political party, thereby setting up potential political confrontations. In some cases, the legislative or the executive branch, or both, are controlled by the same political party as the attorney general thereby setting up an expectation that the attorney general will use his or her office to promote and protect the political positions of that party to the potential detriment of the rule of law or the exercise of statesmanship. In either circumstance, the attorney general's agency budget and statutory power are potentially subject to the control and political whims of an antagonistic legislative or executive branch wielding the "Power of the Purse," or going to court, to extract compliance from the attorney general. This panel will discuss how select attorneys general handled recent situations where they met with opposition, meddling or threats from their legislature or their governor.

Potential Panelists: Mississippi Attorney General Jim Hood; Colorado Attorney General Cynthia Coffman; former Virginia Attorney General Ken Cuccinelli; other current or former state AG's who have battled with their state legislature, or with their governor, or both, over the attorney general's authority; an attorney general who has successfully navigated potential conflicts with a legislature or governor of an opposing political party.

6. I Don't Like That Law – Is it okay for the attorney general to refuse to defend a state law or state constitutional provision?

Synopsis: In recent years, a trend has arisen whereby attorneys general increasingly refuse defend their own state laws or state constitution against constitutional attack. Examples include the Texas AG refusing to defend his state's affirmative action policy before the Supreme Court in *Fisher v. University of Texas*, the Pennsylvania AG declining to defend the state's voter ID law on appeal, the California AG refusing to defend the state's constitutional ban on same-sex marriage, and the Virginia AG decision to join litigation seeking to strike down that state's same-sex marriage ban. These examples, and others, are arguably illustrative of state attorneys general invoking their ideological beliefs to override their constitutional duties to defend state laws, particularly when those laws are embodied in a state constitution. This panel will discuss whether and when circumstances might permit an attorney general to refuse to defend state law, or to oppose state law, and will discuss the ethical and political implications of doing so.

Potential Panelists: former Indiana AG Greg Zoeller; former Colorado AG John Suthers (author of an article critical of AG's who refuse to defend their state's laws); Virginia AG Mark Herring; Texas Governor and former AG Greg Abbott; Paul Nolette, Klingler College of Arts of Sciences at Marquette University.

References:

Devins, Neal, and Saikrishna Bangalore Prakash. 2015. "Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend." *The Yale Law Journal*. Vol. 124, No. 6, 1836-2201. <https://www.yalelawjournal.org/feature/state-attorneys-general-and-the-duty-to-defend>.

Lindevaldsen, Rena M. (2016) "The Erosion of the Rule of Law When a State Attorney General Refuses to Defend the Constitutionality of Controversial Laws," *Barry Law Review*: Vol. 21: Iss. 1, Art. 1. <https://lawpublications.barry.edu/cgi/viewcontent.cgi?article=1097&context=barryrev>.

Zoeller, Gregory F. 2015. "Duty to Defend and the Rule of Law." *Indiana Law Journal* Vol. 90, Iss. 2, Art. 2, 513-557. <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11144&context=ilj>.

7. I'm Out of Here – Accomplishing the mission of the attorney general's office while the attorney general campaigns for reelection or for higher office.

Synopsis: Attorneys general frequently seek higher office, leading to such quips as calling AG's "almost governor" or "aspiring governor." In addition, most elected attorneys general have term limits that force them to find other work which in many cases leads to candidacy for other offices. Statewide campaigns for political offices are very time-consuming and make it difficult for a current attorney general office holder to adequately oversee his or her office while campaigning for another office. In addition, those attorneys general seeking another elected office can often have a propensity to either avoid conflict or to seek conflict in order to bolster their candidate credentials during the campaign. This panel will discuss the difficulties and challenges of being a candidate for another politically-elected office while holding the office of attorney general, and will suggest "best practices" for

campaigning attorneys general so that the office of the attorney general does not suffer from neglect, bias, or undue political manipulation, during the campaign.

Potential Panelists: Attorneys general who have run for another elected office either successfully or unsuccessfully.

8. Great Statesmanship – Examples of attorneys general who got things done and why they were effective.

Synopsis: Many attorneys general over the years have exhibited statesmanship while in office. This panel will be the result of a survey of current and former attorneys general requesting that they, using an outline for what constitutes statesmanship, identify current or former attorneys general who have used statesmanship to champion specific programs, causes, or activities while in office.

Potential Panelists: current and former attorneys general who will recount what they accomplished, or what other attorneys general accomplished, through statesmanship.

9. Reaching Out – How collaboration helps to better identify problems, find consensus, craft solutions, and achieve success.

Synopsis: The National Association of Attorneys General (NAAG) has many years of helping attorneys general to collaborate on important public safety, consumer protection, supreme court advocacy, justice, and public policy initiatives. This session will feature NAAG staff and current or former attorneys general recounting

these successes to underscore what attorneys general can accomplish when they work together in a bipartisan way.

Potential Speakers: NAAG staff; current or former attorneys general.

10. The “Yes Man” – How to build a balanced professional team in a political world.

Synopsis: At least 43 state and territorial AG’s are politically elected, with the remaining AG’s undergoing some form of appointment process that is not devoid of politics. As a new attorney general transitions in to office, he or she may find varying political loyalties among career staff in the attorney general’s office. In addition, most attorneys general are tasked with filling politically-appointed positions within the office. Some attorneys general over the years have faced internal problems when they inherit career staff that are of different political persuasions. Still other attorneys general must make hiring decisions that implicate both professional qualifications and loyalty issues. The panel will explore how management style can avoid internal loyalty issues, and how appointing political activists to attorney general office positions without due regard to qualifications can get an attorney general into trouble. The panel might use case studies of particular attorneys general who either successfully made a transition into office, or who did not, to illustrate the do’s and don’ts of transitioning into office as a new attorney general.

Potential Panelists: current or former attorneys general, particular those who followed an outgoing attorney general of a different political party.

11. The Elephant and the Donkey in the Room. Maintaining professional and collegial relationships in a partisan world.

Synopsis: Many commentators suggest that partisanship in and among the ranks of attorneys general has risen, particularly during the administrations of President Obama and President Trump. Some commentators also believe that the partisan activism of attorneys general threatens the bipartisan relationships that have proven so successful through the efforts of NAAG. Other commentators believe the system of checks and balances that arise from partisan attorney general activism has been helpful to advance such things as consumer protection, state's rights, the rule of law, and federalism. This panel will explore the rise of political organizations that participate in attorney general elections and other political developments in the relationships between Republican and Democrat attorneys general.

Potential Panelists: Anthony Johnstone, Alexander Blewett III School of Law at the University of Montana; Paul Nolette, Klingler College of Arts of Sciences at Marquette University; James Tierney, Harvard Law School; Mark Totten, Michigan State University College of Law; James McPherson, Counsel General of the United States Army; Elizabeth Brumleve; Jonathan David Shaub.

12. Understanding and Respecting Political Differences – How Geography and Political Cultures Shape Our Perspectives.

Synopsis: One of the challenging dynamics of promoting collaboration, bipartisanship, and even collegiality and friendship among attorneys general is the

concept of political culture and of how the politics of an attorney general's jurisdiction effect that attorney general's actions, rhetoric, and beliefs. Understanding and respecting the prevailing political culture of an attorney general's jurisdiction can help to promote collaboration or to at least avoid misunderstandings. This panel will explore the varying and diverse political cultures of Nation in order to promote an understanding and respect for why individual and collective attorneys general believe what they belief, and why they act like they do in office.

Potential Panelists: Sara Rinfret, University of Montana; attorneys general from different states to explain the politics (red, blue or purple) of their state.

POTENTIAL KEYNOTE SPEAKERS –

Michael Beschloss – Author of “Presidential Courage: Brave Leaders and How They Changed America 1789-1989.”

Jon Meacham – Author of “The Soul of America: The Battle for Our Better Angels.”

Colin Powell – Author of “It Worked for Me.”

Jonathan Haidt – Author of “The Righteous Mind: Why Good People are Divided by Politics and Religion.”

Terry Newell – Author of “Statesmanship, Character, and Leadership in America.”