

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Office of the Attorney General




ATTORNEY GENERAL  
KARL A. RACINE

Legal Counsel Division

**MEMORANDUM**

**TO:** Elizabeth Wilkins  
Chief of Staff  
Office of the Attorney General

**FROM:** Janet M. Robins   
Deputy Attorney General  
Legal Counsel Division

**DATE:** November 10, 2016

**SUBJECT:** Legal Analysis – OAG’s Common-Law Authority to Bring Actions  
(AL-16-419)

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On July 8, 2016, you asked this office for summary advice on the scope of OAG’s authority to bring claims that no statute specifically authorizes OAG to bring or forecloses it from bringing. No local court has squarely addressed this issue. In our view, however, the broad authority vested with the Attorney General empowers OAG to bring actions in the public interest to the extent consistent with applicable statutes, in order to protect the health, safety, and welfare of District residents.

The most recent statutory definition of the Attorney General’s authority assigns this office broad responsibility:

The Attorney General for the District of Columbia (“Attorney General”) shall have charge and conduct of all law business of the said District and all suits instituted by and against the government thereof, and shall possess all powers afforded the Attorney General by the common and statutory law of the District and shall be responsible for upholding the public interest. The Attorney General

shall have the power to control litigation and appeals, as well as the power to intervene in legal proceedings on behalf of this public interest.<sup>1</sup>

This authority includes all of the powers of the Attorney General under District common law,<sup>2</sup> such as the authority (and responsibility) to uphold the public interest,<sup>3</sup> except to the extent that this authority has been limited by statute. The reason for this, as the Council's Committee on Public Safety and the Judiciary explained, is that the Attorney General "serves not only as a counselor to the government but as an advocate of the public interest," and has an "obligation to represent and defend the legal interests of the public."<sup>4</sup> That responsibility is to the public as a whole, rather than to one particular individual or even to any majority,<sup>5</sup> and "the attorney general has wide discretion in making the determination as to the public interest."<sup>6</sup>

The National Association of Attorneys General's ("NAAG's") report on the powers and duties of state attorneys general,<sup>7</sup> which the Committee Report relied on,<sup>8</sup> lists several of the Attorney General's common-law powers. They include the "duty to appear for and to defend the state and its agents,"<sup>9</sup> the "right to control litigation and appeals,"<sup>10</sup> the "power to determine the state's legal policy,"<sup>11</sup> and the "right to intervene in legal proceedings on behalf of the public interest."<sup>12</sup>

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<sup>1</sup> D.C. Official Code § 1-301.81(a)(1) (2014 Repl.).

<sup>2</sup> The District's common law incorporates the common law of Maryland as of 1801. See An Act concerning the District of Columbia, § 1, approved February 27, 1801 (2 Stat. 104) ("the laws of the state of Maryland, as they now exist, shall be and continue to be in force" in the part of the District ceded by Maryland – the entire present District); D.C. Official Code § 45-401 (2012 Repl.) ("The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code"). And in 1801, the common law of Maryland included the common-law authority of the Attorney General. See *Murphy v. Yates*, 348 A.2d 837, 840-842 (Md. 1975) (from 1776 to 1817, "the Attorney General had those powers and duties vested in him by the common law of England").

<sup>3</sup> See Committee on Public Safety and the Judiciary, "Report on Bill 18-65, 'Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009'" ("Committee Report") at 4 Dec. 16, 2009, available at <http://lims.dccouncil.us/Download/2029/B18-0065-COMMITTEEREPORT.pdf> (last visited July 11, 2016) (an attorney general's common-law powers "includ[e] the right to act on behalf of the public interest"); Wayne Witkowski, *Who Is the Client of the Municipal Government Lawyer?*, 209 Prac. L. Inst. Crim. 117, 130 ("in most states the attorney general retains so-called common law powers, including the right to initiate and intervene in suits on behalf of the people and the public interest") (quoted in Committee Report at 4).

<sup>4</sup> Committee Report, *supra* n.3, at 1.

<sup>5</sup> See *id.* at 3.

<sup>6</sup> *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268-269 (5<sup>th</sup> Cir. 1976).

<sup>7</sup> See n.9 for full citation.

<sup>8</sup> See Committee Report, *supra* n.3, at 3:

The historical development of the position of attorney general has been extensively explained in a publication of the National Association of Attorneys General (NAAG), an organization dedicated to facilitating the enhanced performances of attorneys general and their staffs. In *State Attorneys General, Powers and Responsibilities*, the authors of this publication provide detailed information about the development of the attorney general from its inception . . . through its . . . evolution to the position it is today.

<sup>9</sup> National Association of Attorneys General, *State Attorneys General Powers and Responsibilities* ("Powers and

The common law also empowers the Attorney General to “bring an action on behalf of [the state’s] citizens in order to protect its quasi-sovereign interest in their health, comfort, and welfare” – a type of litigation known as *parens patriae*.<sup>13</sup> As the Supreme Court explained in *Alfred L. Snapp & Son v. Puerto Rico*, a state – and therefore an attorney general – seeking to bring such an action must establish an “interest[] that the State has in the well-being of its populace” as a whole that is “sufficiently concrete to create an actual controversy between the State and the defendant.”<sup>14</sup> Courts have likewise held that the remedy sought in such cases must be something that will redress the State’s own injury rather than merely redressing individual private injuries.<sup>15</sup>

Most *parens patriae* cases “have been brought under anti-discrimination, consumer protection, environmental, antitrust, charities and securities laws.”<sup>16</sup> One significant example of *parens patriae* litigation is a consumer protection case from Maryland. Maryland resident John Edmond was found liable for violating Maryland’s consumer protection law, and in *In Re Edmond*, the Fourth Circuit held that doctrine of *parens patriae* authorized the Consumer Protection Division in Maryland’s Office of the Attorney General to sue Mr. Edmond in bankruptcy court to prevent him from discharging his assets and thereby blocking recovery on that judgment.<sup>17</sup> A major component of the court’s reasoning was that Maryland’s consumer protection statute “confer[red] on the Division an interest apart from that of any individual injured consumer,” and made the Division responsible for “protect[ing] and promot[ing] the welfare of consumers.”<sup>18</sup>

Another example comes from Oregon. Its Attorney General brought a class-action suit against Debt Reducers, Inc., a company that “adjusted and paid off debts,” for fraud and other violations of law.<sup>19</sup> In *People v. Debt Reducers, Inc.*, the Oregon Court of Appeals held that pursuing

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*Responsibilities*”) 44 (Emily Myers & Lynne Ross eds., 2007) (emphasis removed).

<sup>10</sup> *Id.* at 45 (emphasis removed).

<sup>11</sup> *Id.* at 46 (emphasis removed).

<sup>12</sup> *Id.* (emphasis removed).

<sup>13</sup> *Id.* at 102. *Parens patriae* “means literally ‘parent of the country.’” *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 600 (1982). We note that this type of *parens patriae* litigation is distinct from “the State’s stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves,” *id.* at 600, in contexts such as neglect.

<sup>14</sup> *Snapp*, 485 U.S. at 602. Although local courts in the District are not bound by the strict standing requirements in Article III of the federal Constitution, the D.C. Court of Appeals “has followed consistently the constitutional standing requirement embodied in Article III.” *Grayson v. AT&T Corp.*, 15 A.3d 219, 224 (D.C. 2011). The only local case we have identified that discusses standing requirements for this type of *parens patriae* litigation applies the Supreme Court’s criteria. See *Dist. of Columbia v. Exxon[M]obil Oil Corp.*, 2014 D.C. Super. Lexis 7, 20 (Sup. Ct. 2014) (applying the federal criteria).

<sup>15</sup> See, e.g., *People by Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) (“A State that sues as *parens patriae* must seek to redress an injury to an interest that is separate from the interests of particular individuals”).

<sup>16</sup> *Powers and Responsibilities*, *supra* n.9, at 102.

<sup>17</sup> 934 F.2d 1304, 1305, 1313 (4th Cir. 1991).

<sup>18</sup> *Id.* at 1310. The court also noted that other courts have reached similar conclusions. See *id.* at 1311 (citing cases).

<sup>19</sup> *People v. Debt Reducers, Inc.*, 484 P.2d 869, 870 (Or. Ct. App. 1971).

litigation against that company was consistent with the Attorney General's common-law authority.<sup>20</sup>

The common-law precedent discussed above indicates that the Attorney General has common-law authority to bring actions on behalf of the public interest, in support of the District's quasi-sovereign interests in District residents' health, comfort, and welfare. At the same time, the Attorney General's common-law authority may be limited by statute.<sup>21</sup> Therefore, determining OAG's authority to pursue any particular matter will require examining the statutes, regulations, and case law relevant to that matter, and we are prepared to offer any advice that may be helpful.

If you have any questions, please contact Assistant Attorney General Joshua Turner at 442-9834, or me at 724-5524.

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<sup>20</sup> *Debt Reducers*, 484 P.2d at 872 ("the state derives from the common law the power, in general, to bring a suit such as this, *parens patriae*"). The court was skeptical about whether a *class action* suit by the Attorney General was appropriate.

<sup>21</sup> *See, e.g., Shevin*, 526 F.2d at 268 ("There is and has been no doubt that the legislature may deprive the attorney general of specific powers").