



Making the Case for Public Health Finance Policy

Advancing Public Health Obesity Policy Through State Attorneys General

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Obesity in the United States exacts a heavy health and financial toll, requiring new approaches to address this public health crisis. State attorneys general have been underutilized in efforts to formulate and implement food and obesity policy solutions. Their authority lies at the intersection of law and public policy, creating unique opportunities unavailable to other officials and government entities.

Attorneys general have a broad range of authority over matters specifically relevant to obesity and nutrition policy, including *parens patriae* (parent of the country) authority, protecting consumer interests, enacting and supporting rules and regulations, working together across states, engaging in consumer education, and drafting opinions and amicus briefs.

Significant room exists for greater attorney general involvement in formulating and championing solutions to public health problems such as obesity. (*Am J Public Health*. Published online ahead of print January 13, 2011: e1–e6. doi:10.2105/AJPH.2010.198697)

OBESITY IS A PUBLIC HEALTH

crisis that requires government action at multiple levels and across

disciplines. Approximately two thirds of the US adult population¹ and one third of children and adolescents² are overweight or obese. This problem exacts a heavy health and financial toll,³ requiring new approaches toward a solution. Many state and local legislatures and agencies are addressing obesity and food policy, but other public officials could play an important role.

State attorneys general have a scope of authority that lies at the intersection of law and public policy, creating unique opportunities that may not be available to other government officials. Attorneys general are independent public officials responsible for justice, protecting the public interest, counseling public officials, and serving as a liaison among states and between state and federal entities. Thus, state attorneys general can be leaders in formulating and effectuating obesity and food policy solutions.

AUTHORITY OF STATE ATTORNEYS GENERAL

There are 51 state attorneys general (including the District

of Columbia) and 5 territorial attorneys general. These officials possess a broad range of power over a wide variety of state and local matters. In 43 states the attorney general is elected; in the remaining jurisdictions the position is appointed by the governor, legislature, or state supreme court.⁴ An attorney general is both the chief legal advisor to the state government and the state's chief law enforcement officer.

Attorneys general represent the interests of many clients, including the state as an entity, state officials in their official capacity, state agencies and branches of government, and the public. Although their authority varies according to the state's statutory and constitutional mandates, their powers are quite broad and generally include the authority to enforce state and some federal laws, handle or supervise criminal prosecutions, act as public advocates in areas such as antitrust enforcement and consumer protection, propose legislation, institute civil suits on behalf of the state, represent the public's interests, issue formal opinions, and represent the state in court.⁵

State attorneys general can use their authority to make

a significant contribution to public health. Attorneys general were the major initiators of and actors in the landmark US tobacco litigation and ensuing master settlement agreement⁶; however, both before and since the tobacco litigation, attorneys general have played an important role in public health matters. In the early 1900s, attorneys general brought a series of cases across the states to successfully enjoin the activities of polluters.⁷ More recently, attorneys general have initiated investigations into misleading and deceptive labeling of food⁸ and beverage products,⁹ and they have brought lawsuits against pharmaceutical¹⁰ and food companies¹¹ to protect the public from dangerous products.

Through such individual and coordinated actions, attorneys general can and often do bring issues into the national spotlight in ways that prompt, support, or coincide with actions by federal officials. For example, in 2009 the Connecticut attorney general's investigation into the food industry's Smart Choices Program, which labeled questionable processed foods as healthy,⁸ occurred shortly before the Food and Drug Administration (FDA) initiated its own investigation into the program.¹²



The combination of the 2 actions prompted the food companies to shut down the program.¹³ Attorneys general can also support federal initiatives and work directly with Congress and federal agencies.

Because of their prominence, attorneys general can use their bully pulpit to bring media and public attention to important issues that might otherwise be overlooked. Additionally, attorneys general regularly interact with nongovernmental organizations, local officials, and government entities both inside and outside their states. Attorneys general can encourage these groups to view public health as a priority area and can provide the legal foundation for doing so.

ATTORNEYS GENERAL CAN SUPPORT NUTRITION POLICY

Attorneys general can play an integral role in the advancement of food and obesity policy by utilizing specific authorities available to them. The major relevant tools of attorneys general include the following: acting under their *parens patriae* (parent of the country) authority, protecting consumer interests, enacting or supporting rules and regulations, working together across the states, engaging in consumer education, and drafting opinions and amicus briefs.

Parens Patriae

The common-law doctrine of *parens patriae* forms the basis of the philosophy that permeates the offices of every attorney general. Although limited by specific

statutes in many states, *parens patriae* places upon each attorney general the responsibility to represent the state's interests, in general, and the state's interest "in the well-being of its populace" in particular.^{7(p602)} *Parens patriae* confers on states the ability to vindicate quasi-sovereign interests, which include "the health and well-being—both physical and economic—of its residents" and the state's "interest in not being discriminatorily denied its rightful status within the federal system."^{7(p600,602)}

Parens patriae can serve as the basis for litigation when an attorney general believes that a party's behavior adversely affects a substantial number of the state's citizens.¹⁴ Through an action filed by an attorney general, a state may seek declaratory relief or recover costs or damages incurred by behavior that threatens the health, safety, or welfare of the state's citizenry.¹⁴ Through this authority, attorneys general can redress wrongs when other remedies are lacking and can act to protect public interests in areas where other parties cannot.

Attorneys general used their *parens patriae* authority as part of their legal theories in the tobacco litigation. Through these lawsuits, the states sought reimbursement for the cost of medical care, including Medicaid, incurred for treating consumers with smoking-related illnesses.¹⁵ As experts in their states' laws, the attorneys general had a strong and valid basis for using *parens patriae* authority to seek recovery of tobacco-related costs. The states developed their *parens patriae* theories to varying degrees throughout the litigation,

but because the master settlement agreement terminated the lawsuits, none of the theories were fully tested in court.¹⁵

The cost of obesity for state and local economies is similarly imposing. In 2008, US medical costs related to obesity were estimated to be \$147 billion per year.¹⁶ Additionally, indirect costs such as absenteeism, disability, and workers' compensation directly involve economic interests within the states.¹⁷ As scientific advances and legal bases related to obesity continue to be more fully developed, *parens patriae* may be increasingly well suited to address the public health issues caused by products manufactured and marketed by industry.

Consumer Protection

Attorneys general are tasked with enforcing the states' civil laws. Every state and the District of Columbia have statutes that make it unlawful for businesses to engage in unfair and deceptive acts and practices (UDAP). Attorneys general often pursue consumer protection litigation when a company violates citizens' rights. UDAP statutes vary substantively and procedurally by jurisdiction, but all are designed to protect consumers and the public interest; therefore, they allow attorneys general to obtain penalties or injunctions against violators for that purpose.¹⁸ Many UDAP statutes are patterned after the Federal Trade Commission (FTC) Act, and some states require that judicial interpretation of the FTC Act apply to the state's statute.¹⁸ The authority of the attorneys general to pursue consumer protection actions includes

prelitigation powers, such as moving for restraining orders, subpoenaing documents and investigating company practices to obtain information such as the nature of the company's business and advertising practices, and guidance given to employees.

The most direct way in which attorneys general can utilize their litigation authority to address food and obesity issues is through their charge to protect consumers. In the food arena, particular marketing campaigns may fall directly within UDAP prohibitions. For example, in 2009 a children's cereal promotion encouraged children to continuously play games on the company's Web site for a chance to win cash prizes every 10 minutes.¹⁹ Once a child provided his or her name, e-mail address, parent's e-mail address, and a password to the Web site, the child was registered for the games. Then the parent received an e-mail stating that the information provided by the child would "only be used for the purpose of fulfilling a prize"; however, the child received e-mails purporting to be from an animated spokes-character, reminding the child that "there is a chance to win \$5 every ten minutes!" and that they should "[c]ome back to play again—up to 10 times a day!" by logging onto the Web site (<http://GeneralMills@eprizepromotions.com>, computer-generated communication, July 2009).

The Supreme Court has found that a lottery or gambling tactic that "encourages gambling among children" to induce sales of a product "exploit[s] consumers, children, who are unable to



protect themselves.”²⁰(p307–308) The Court previously upheld the FTC’s finding that such a practice was an unfair method of competition within the meaning of the FTC Act.²⁰ (This case was decided before Congress granted the FTC jurisdiction over deceptive acts and practices.) Acts and practices such as this one could likely qualify as unfair and deceptive under states’ UDAP statutes, and many attorneys general would be within their jurisdiction to bring such a claim under their authority to address such practices.²¹

Rulemaking

In most states, attorneys general have the authority to draft rules and regulations pursuant to their UDAP jurisdiction.¹⁸ Rulemaking is appropriate to address a widespread industry practice when litigation against a single entity will not abate the threat to the public. The rulemaking procedures of most states are similar to the one specified in the Administrative Procedures Act,²² which requires a public comment period. This procedure allows the attorneys general to learn the perspectives of both the businesses they seek to regulate and the public they seek to protect.

Although infrequently, attorneys general have drafted, promulgated, and successfully implemented a broad variety of UDAP regulations across the states.¹⁸ Regulations have included requiring factual disclosures, restricting methods of solicitation,¹⁸ and regulating conduct more directly to protect public health. For example, in Massachusetts, the attorney general utilized his UDAP regulatory authority²³ to

promulgate regulations to protect citizens from public health threats such as unsafe handguns²⁴ and self-service displays of tobacco products.²⁵

Even if attorneys general are reluctant to use their own rulemaking power, they can be influential in the promulgation of rules and regulations by their client agencies, such as the state health department.²⁶ Attorneys general can assist in drafting and advocating for rules proposed by state agencies. Similarly, attorneys general can participate in federal rulemaking. During the notice and comment period, the attorney general can submit his or her own comment on a promising public health regulation or provide input on a comment drafted by the public health community and circulate it among like-minded attorneys general. This represents an opportunity for multistate participation in federal rulemaking. Advocates can urge their attorneys general to support proposed measures by federal agencies that could have a positive effect on food and obesity policy.

Multistate Action

Attorneys general frequently work together across state lines through multistate litigation and advocacy, and they can also pursue multistate rulemaking. Multistate activity helps set national policy for the benefit of the public. For example, 29 attorneys general sent a letter of remonstrance to the manufacturer of caffeinated alcohol beverages,²⁷ and 18 of the attorneys general followed up with a letter to the FDA urging federal action on the issue.²⁸ Such coordinated advocacy brings issues to the

national forum and helps change policy for consumers nationwide.

During multistate litigation, coordination among states puts pressure on defendants to settle with as many states as possible, which can produce more uniform and equitable outcomes for the states and their citizens. Attorneys general may choose to coordinate across states if a company’s actions are deemed to threaten the health and safety of a broad range of citizens. Attorneys general can also seek injunctive relief to reform poor practices and monetary relief (costs or damages) when citizens or the state’s finances have been damaged.

The tobacco litigation is a prominent example of multistate legal activity. Much has been written about the similarities and differences between the tobacco and food industries and between tobacco and food as substances²⁹; however, the comparisons drawn in terms of potential litigation strategies for the future are meant to illuminate the power attorneys general have over problematic practices, rather than to compare the products and industries themselves. The Minnesota attorney general’s unprecedented effort to obtain previously undiscovered industry documents exposing decades of deception was critical to the success of the tobacco litigation.³⁰ Although similar documents may not exist in the food arena, the tobacco discovery reveals the benefits of attorney general involvement in litigation aimed at addressing public health problems that may stem from industry activity.

During the tobacco litigation, states argued that the industry manipulated nicotine content to

cause addiction, misled residents about the dangers of smoking, and targeted children, adolescents, and African Americans.³¹ Similar theories might apply in the food and obesity area. First, emerging research reveals that certain properties of food may be particularly addictive, and concerns have been raised about the potential manipulation of these properties to induce addictive responses and consequent overconsumption of these foods.^{32,33} This area may prove fruitful for attorney general involvement as the scientific evidence coalesces.³⁴

In terms of marketing, certain companies specifically target children, adolescents, and racial/ethnic groups with marketing techniques that may be considered unfair and deceptive.^{35,36} Food and beverage companies have been shown to exploit children’s psychological vulnerabilities in their campaigns^{37,38} to market the most unhealthy products to children and adolescents.^{39–41} Many of these tactics may violate states’ UDAP statutes.⁴²

Marketing in schools is especially problematic because it occurs within an educational context and can imply endorsement by the school. One marketer explained that school advertising

can be very effective, reaching a captive audience with little competition for students’ attention. . . . [S]chool campaigns have to earn the approval of local administrators, and that serves as something of an endorsement, whether intended or not. . . . Also, much of school advertising has an educational element to it, [such as] a poster celebrating Black History Month provided by the advertiser. That makes it seem less like advertising.⁴³



Marketing of unhealthy products in schools⁴⁴ can be seen as competing with the pedagogical aims of both health and physical education and with educational attainment overall.^{45,46}

Certain racial/ethnic groups are also disproportionately targeted by particular companies promoting their most calorie-dense, nutrient-poor foods and beverages. This marketing disparity is present in magazines,⁴⁷ on billboards,⁴⁷ on television,⁴⁸ and in retail outlets.⁴⁸

Because all such targeted marketing occurs across state lines, attorneys general could coordinate their efforts to address potential exploitation. Coordinated actions across states could encourage companies to discontinue their worst practices and work with attorneys general to modify future practices.

Another area that may merit multistate action is the matter of privacy concerns on the Internet. Food and beverage companies use Web site tracking and analytics to target marketing efforts toward individual Internet users, including children. Many companies ask for information such as e-mail addresses, cell phone numbers, and zip code, and they often share this information with third parties. Privacy protection is increasingly of concern in the United States, so any attempt to obtain personal information from children and to use that information to target marketing toward them is particularly alarming.⁴⁹ A recent survey found that two thirds of Americans object to online tracking⁵⁰; hence, there would likely be public support for attorney general intervention.

Consumer Education

Attorneys general engage in consumer education initiatives that are highly publicized and can have a positive impact. Attorneys general disseminate information about deceptive, misleading, or fraudulent practices so consumers can protect themselves.⁵¹ Consumer education can include both practices exposed by the attorneys general themselves and those brought to light by federal agencies such as the FTC and the FDA. Attorneys general also seek to educate consumers about their rights and interests so consumers can make informed decisions in the marketplace.⁵²

Recently, the National Association of Attorneys General teamed up with the FTC and other federal, state, and local government agencies and consumer advocacy organizations to support a coordinated campaign intended to educate consumers on topics including fraud, identity theft, and money management.⁵³ The issues discussed above (i.e., privacy protection and targeted marketing of nutrient-poor foods and beverages) could be topics for future education campaigns.

The attorneys general also have the power to convene meetings and initiate projects to protect and educate consumers. For example, in February 2010 the attorney general of Vermont created an obesity initiative to identify and develop potential actions to reduce obesity in Vermont, complementing similar work being done by the state departments of health and education.⁵⁴ Through this initiative, working groups were founded to address such topics as obesity and

land use, retail environments, and children and families. The groups issued a final report in late 2010 on the current landscape of the state's progress, recommendations from the groups on how to improve obesity in Vermont, and economic and legal analysis pertinent to the recommendations.

Opinions

Attorneys general can issue formal written opinions to answer questions of law posed by state agencies and officials. Such opinions generally address questions pertaining to an agency or official's legal duties, ambiguities of the law, questions of legality in advance of the passage of a law, or answers to questions where the law is clear but the outcome is unpopular, to protect the agency or official who must carry out the law's intent.⁵⁵ The legal effect of formal opinions varies from state to state, but government officials can use this assistance when confronted with questions of legality while enacting public health policies. Through these opinions, the attorneys general can provide the legal foundation for responses to questions pertaining to anything from the legality of taxing calorically sweetened beverages^{56,57} to addressing social determinants of health,^{58,59} and these opinions can help support legislative or regulatory efforts on this front.

Beyond formal opinions, state and federal policymakers regularly solicit the views and opinions of attorneys general. This bully-pulpit power can be critical to the success of policy initiatives championed by these officials. Attorneys general are active players in their state legislatures and can

testify or advocate for and against bills pending in the legislature. When health-related legislation is proposed, the public health community should encourage their attorneys general to participate on the side of public health throughout the process.

Amicus Briefs

An amicus (friend of the court) brief helps courts decide cases by offering for their consideration interests and perspectives that are not necessarily presented by the parties but that arise out of the facts of the case and that are crucial to the outcome of the litigation. In the context of litigation, state attorneys general have the right to file amicus briefs in the US Supreme Court⁶⁰ and in federal courts of appeal.⁶¹ No similar provision exists in the federal district courts, and the rules of state courts vary, but for a judge not to accept an amicus brief from a state attorney general would be rare. Acceptance of an amicus brief is even more likely in state court in which the state is not already a party.

The ability of an attorney general to weigh in on litigation on behalf of the public's interest is an important power. Changes in our country's food and obesity policy have already resulted in litigation. The voice of an attorney general could be important or decisive to the outcome of future lawsuits. It is thus beneficial for public health groups to enlist the support of attorneys general in such litigation and for the advancement of food and obesity legislation, regulation, and policy initiatives in their communities.



CONCLUSIONS

Attorneys general have a broad and impressive range of authority over matters specifically relevant to obesity and food policy. The public health crisis of obesity can only be reversed with concerted efforts among multiple levels of government, across states, and including stakeholders and local organizations.

Attorneys general have a significant role to play on the basis of their legal authority and their status within their states, among all the states, and relative to the federal government. Although attorney general engagement with the issue of obesity has begun, there is much room for greater attorney general involvement in formulating and championing solutions to this public health problem. Obesity may not be on the radar of every attorney general as a topic for their attention, so state and local advocates should contact and work with their attorneys general to support public health measures at every level.

Like other officials who are elected or who answer to an elected official, attorneys general may face political constraints. However, the health and financial toll of obesity affects all states and should motivate attorneys general to get involved and even lead the charge in this area. Attorneys general should explore the boundaries of their authority to ensure that they play the most constructive role possible. ■

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