

State Attorneys General Matter

AG Practice & Investigations

CLE SEMINAR FOR IN-HOUSE COUNSEL
CHICAGO | JUNE 2019

State Attorneys General

The role of state AGs is unique among elected officials in the U.S.

- the state's chief legal officer
- investigative powerhouse
- consumer protection arbiter and enforcer
- prosecutor
- multi- jurisdictional litigation
- policy advocate.

Each Attorney General has legal authority per state and federal law [parens patriae per 15 U.S.C. § 15c]

- Traditional Role of the State AG:
 - Day to Day counsel for the State and the executive branch of government
 - Federalism and preemption concerns
- Authority often includes:
 - Issuing legal opinions
 - Enforcing state Sunshine laws
 - Defending [or challenging] state and/or federal law and administrative actions
 - Handling capital criminal appeals and actions before the U.S. Supreme Court
 - Enforcing Medicaid Fraud, Cybersecurity/Privacy laws, environmental laws, antitrust laws and consumer protection laws
 - Revoking corporate charters

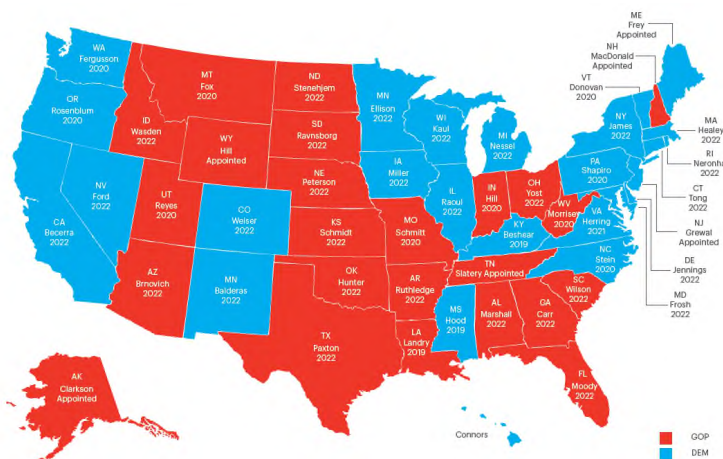
Expanded Role of the State AG:

- Aggressive [partisan] investigations and litigation
 - President Obama
 - Pro/anti federal statutes and regulatory action, e.g. EPA, CFPB, ACA
 - 1st Phase President Trump
 - Pro/anti federal and state statutes regulatory action, e.g. EPA, CFPB, ACA, marijuana, immigration
 - 2nd Phase President Trump
 - Emoluments clause
 - Emergency Declaration to fund border wall
 - Nation-wide District Court injunctions
- Aspiring Governors, Senators & Presidents
 - Arizona, California, Connecticut, Maine, New York, North Carolina, Ohio, South Carolina, Wyoming

State Attorneys General Political Landscape

State Attorneys General Political Landscape

The Democratic party flipped four seats previously held by Republicans during the midterm elections. Democrats now hold 26 seats (27 including Washington DC) and Republicans, 24.



Seats gained by Democratic party



Colorado: Phil Weiser (D) defeated opponent George Brauchler (R)



Michigan: Dana Nessel (D) defeated opponent Tom Leonard (R)

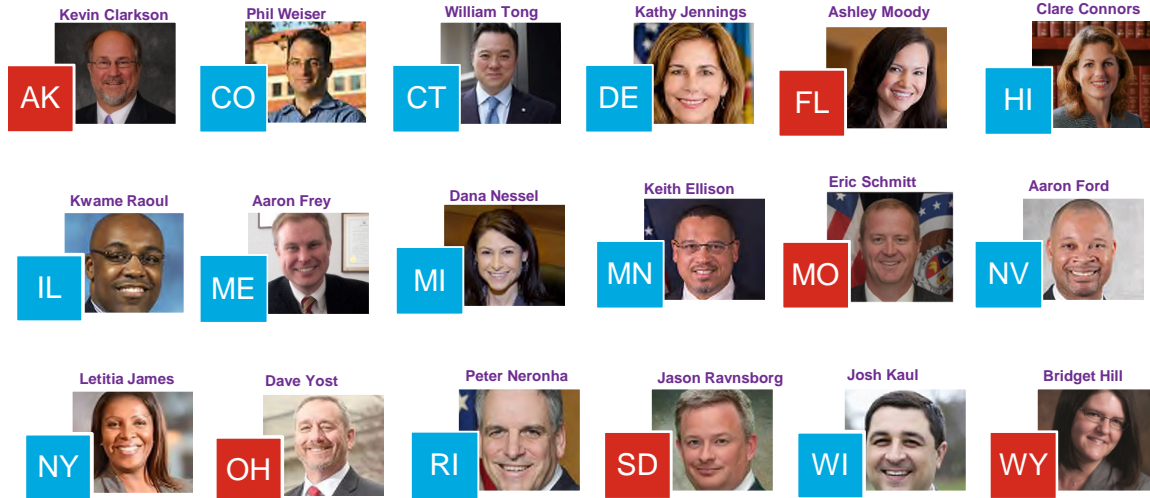


Nevada: Aaron Ford (D) defeated opponent Wesley Duncan (R)



Wisconsin: Josh Kaul (D) defeated incumbent Brad Schimel (R)

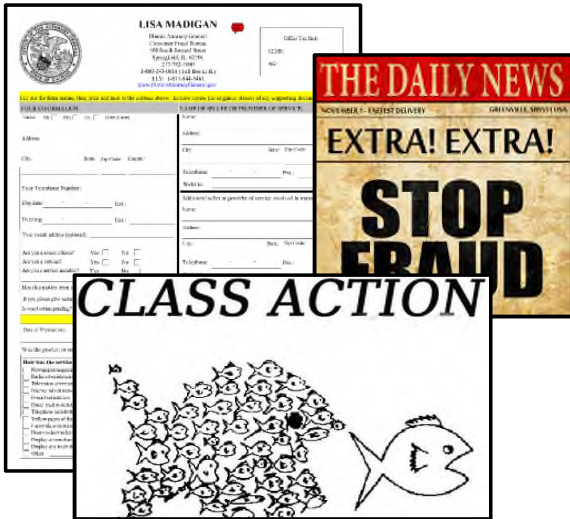
18 states have new attorneys general taking office in 2019








State Attorney General Investigations

State AG Investigations

What Provokes a State AG Investigation?



State AG Investigations: What's the Big Deal?

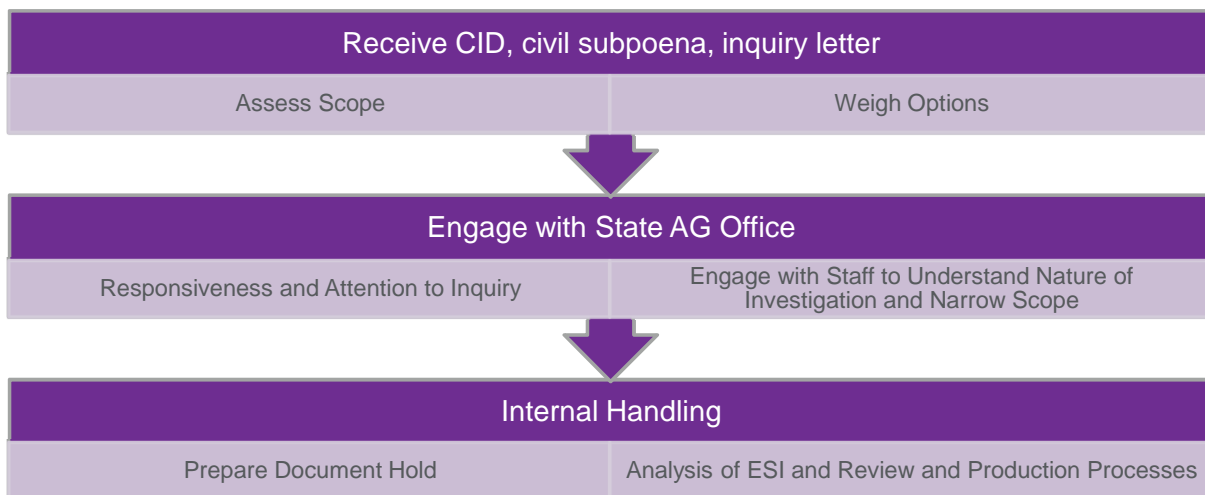
-  Broad discretion to investigate
-  Injunctions
-  Penalties
-  Power to shutter business operations
-  Shared resources

Frequent subjects of attorney general inquiries:

- Administered through:
 - Civil Investigative demands [CIDs]
 - Multi-state litigation
 - Federal and multi-state [DOJ, FTC, CFPB] litigation
- Consumer protection investigations and litigation [unfair and deceptive trade practices "UDAP"]
- Medicaid Fraud investigations and litigation - civil or criminal
- Environmental protection investigations and litigation
- Antitrust investigations and litigation
- Data privacy and data breach investigations and litigation

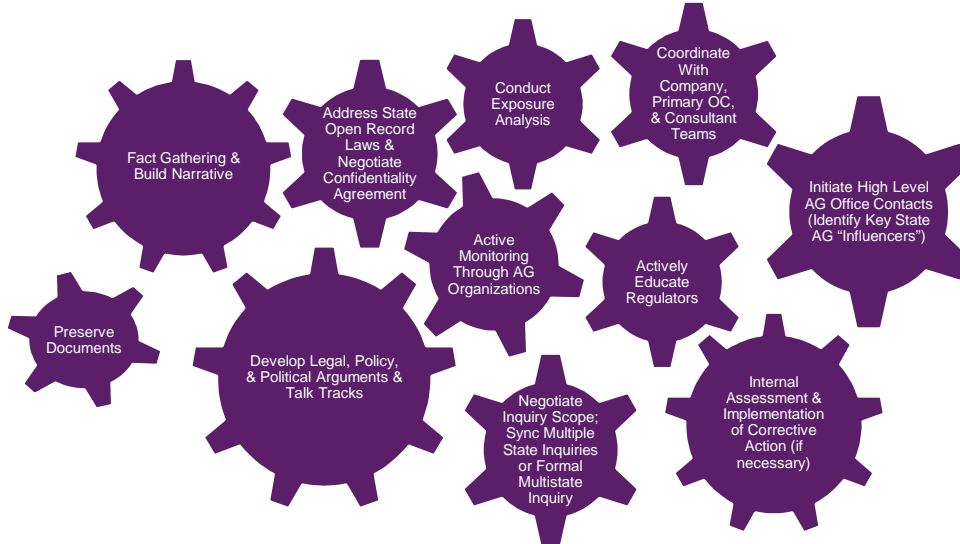
Strategy

Initiation of Investigation



Strategy

A complete process demanding high ethical standards



Roadmap to Success

Developing a plan when you are under investigation

Develop a Plan of Action

1 Document collection and review

2 Witness interviews

3 Analysis of evidence gathered

4 Internal reporting

5 Remediation

6 If appropriate, external reporting

Document Preservation & Collection

Step 1: Preservation

- Make sure all relevant documents are preserved
- Consider hiring outside technology company to preserve all existing electronic evidence, as well as on a going-forward basis
- Instruct all relevant employees not to delete/destroy emails, documents, voice mails, etc.
- If appropriate, make sure to preserve evidence located on **personal** devices: personal cell phones (text messages), personal email accounts, papers/documents stored at home, etc.

FAILURE TO DO SO CAN LEAD TO OBSTRUCTION OF JUSTICE CHARGES!

Document Preservation & Collection

Step 2: Collection

- Have employees sign disclosure when hired indicating they understand emails and texts sent/received over work email or phone accounts belong to the company
 - Have computer message remind them so every a.m. when booting up
- Work with outside counsel or technology company to upload preserved materials and search them
- Volume can be an issue
 - If so, work to isolate:
 - Pertinent locations of evidence (i.e. email accounts, hard drives, cell phones for text messages)
 - Pertinent custodians
 - Pertinent search terms

Consider Retaining a Consulting Expert Early in the Investigation

- Knowledgeable and experienced expert can make your job infinitely easier
- Experts are particularly useful when reviews of complicated materials are involved, i.e. financials, accounting records, computer forensics
 - Expert can help you find irregularities in accounting records or computer data you might not spot (or even know how to spot)
 - Can help you create internal controls to prevent improper payments/expenses from slipping through the company's accounting system
 - Consider having such an expert review company's accounting and banking records 1-2 times annually to ensure compliance
- If working with outside counsel, have the outside counsel retain the expert so can invoke attorney/client privilege/work product protections when appropriate
- Identity/existence of **consulting** expert not generally disclosed

Witness Interviews

- Pertinent documents/emails/text messages will lead to individuals you want to interview
- When hiring company employees, condition their employment on cooperating with internal investigations (including participating in interviews)
- For company employees, must administer *Upjohn* Warnings ("corporate *Miranda* warnings")
 - Warnings remind employee you (and/or outside counsel) are the company's lawyer, not employee's lawyer; the interview is covered by the attorney/client privilege, but the privilege belongs to the company, not employee; the privilege can be waived by the company at any time and information disclosed to anyone, including govt. authorities
- Failure to administer can damage quality of evidence gathered and impair prosecution down the road
 - **Can also result in company's failure to receive cooperation credit!**

Witness Interviews

- Generally interview in ascending order of importance, least important/culpable to most important/culpable, so can gather largest information set before conducting most critical interviews
- Interview should be attended by principal questioner and a prover/note-taker
 - Note-taker must thoroughly summarize the interview
 - No "off the record" comments permitted
- If you (in-house counsel) are not serving as the principal questioner, you probably should not attend the interview so you do not become a witness
 - Exception: if your presence will comfort the witness and/or help facilitate dialog and information flow
- Ask witness to keep interview confidential

What to Document in the Witness Interview Report

- Promptly write summary report of the interview
- **But carefully consider what to say!**
 - Summarize all factual information witness provided
 - But if possibility exists that interview report will be turned over to government investigators down the road, make sure to exclude attorney impressions/strategic considerations etc.
 - Document those elsewhere

Conflicts

- In-house corporate counsel represent the company
 - Their conversations with company employees are privileged, but the privilege belongs to the company; only company can decide to waive or not waive that privilege
 - Company does not need an individual employee's permission to disclose conversations, or to waive privilege
- Individual employees with criminal exposure may require separate counsel
- If outside counsel determines in-house legal department has criminal exposure, must arrange to report to separate audit committee, and not in-house counsel
- Those with criminal exposure must be walled-off from the investigation

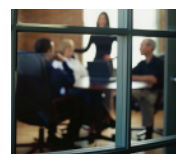
Recap: Pitfalls to avoid during an AG investigation

- Failing to properly prepare and having insufficient knowledge of the facts related to the case before your first contact with the investigating AG.
- Making the assumption that the investigating AG has inadequate information.
- Neglecting to place a litigation hold on any pertinent information, and to fully understand access points to the information.
- Failure to receptively enable and listen to the allegations.
- Not bringing a representative of the client with you who knows the data and the organization.
- Understanding the intrinsic value of a company's overall reputation. Just like “**location, location, location**” for real estate, it is now “**reputation, reputation, reputation.**”

What can companies do to avoid investigation?

Be Pro-active

- Avoid being subject of investigation - Pro-active
 - Educate AGs and staff
 - National AG Organizations as vehicles for discussion
- Best practices
- Timely recognize and correct problems
 - Respond to complaints, especially from an AG
- Engage state AG practice team to assist/advise



Attorneys General Organizations

Regulatory frameworks and policy and political contexts in which those authorities operate

- National Association of Attorneys General
 - Working Groups for Antitrust, Auto, Data Privacy
- Republican Attorneys General Association
- Democratic Attorneys General Association
- Conference of Western Attorneys General



Questions?

Thank you

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Speaker Biographies



Rachel M. Cannon
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Rachel Cannon is a member of Dentons' [Litigation and Dispute Resolution](#) practice and [White Collar and Government Investigations](#) practice. She focuses on trial work, investigations, complex civil litigation and white collar criminal defense. For example, she was part of the trial team that successfully prevented the US Commodity Futures Trading Commission from enjoining a Chicago trader in a recent high-profile "spoofing" case. Rachel also regularly conducts investigations at the request of senior management or boards of directors on matters ranging from sexual misconduct to financial fraud and bribery. She also advises entrepreneurs about regulatory issues surrounding initial coin offerings, cryptocurrencies and blockchain technology.

Prior to joining Dentons, Rachel served as an Assistant United States Attorney in Chicago, where she supervised the bankruptcy fraud program and worked in the Securities and Commodities Fraud Section. She also prosecuted a wide variety of fraud cases involving more than US\$100 million in losses, and has indicted corporations, executives, doctors, investment advisors, consultants, real estate developers and public officials, among others. Rachel received a number of awards during her time as an AUSA. She also served as a periodic trial advocacy instructor for the CFTC, the Department of Justice and the Securities and Exchange Commission. She has tried 19 jury trials and dozens of bench trials, and has briefed and argued numerous cases in the US Court of Appeals.

Experience

- **Igor B. Oystacher and 3Red Trading:** Successfully prevented the CFTC from enjoining a Chicago trader and his trading firm in a "spoofing" and market manipulation case. (*CFTC v. Igor B. Oystacher and 3Red Trading, LLC*, No. 15-c-9196, Northern District of Illinois)
- **Criminal defendant:** Representing, in a federal criminal case, a former managing partner of an AmLaw 100 law firm accused of embezzling US\$2 million from a client. (16 CR 99, Northern District of Georgia)
- **Talent agency:** Representing in a DOJ criminal antitrust probe.
- **Compass Lexecon and FTI Consulting, Inc.:** Successfully represented in a dispute with the state of Illinois over the disclosure of expert income in an antitrust case. (*Illinois v. AU Optronics Corp. et al.*, 10-CH-34472)
- **Numerous global and local companies:** At the request of senior management or the board of directors, led internal investigations into a wide variety of allegedly improper activities committed by employees and other affiliates.

Speaker Biographies



Sam Olens
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Samuel S. Olens is a counsel in Dentons' [Public Policy](#) practice and is a member of the firm's State Attorneys General group, based in the Atlanta office. His practice focuses on state attorneys general and local government affairs matters.

Sam was twice elected attorney general of Georgia, in 2010 and 2014. In that role he worked to strengthen the penalties for and protect the victims of sex trafficking, guided a comprehensive revision of Georgia's sunshine laws and led the effort to stem the epidemic of prescription drug abuse. Olens served as vice president of the National Association of Attorneys General in 2016, having previously served as chair of the 13-state Southern Region both in 2013 and 2015.

Prior to being elected attorney general, Olens was chairman of the Cobb County Board of Commissioners, serving from August 2002 through March 2010. He previously served as a county commissioner from 1999 through June 2002.

Sam is a registered mediator/arbitrator with the Georgia Office of Dispute Resolution. He has been admitted to practice law in Georgia and the District of Columbia.

Experience

- Negotiated an agreement between Cobb County and MARTA to link MARTA and Cobb County transit buses between NW Atlanta/Highway 41 and Cumberland Mall. Prior to this agreement, MARTA buses were unable to cross over from Fulton County into Cobb County and commuters had been walking more than a mile between bus stops.
- As chair of the Atlanta Regional Commission, Sam Olens worked to establish a Transit Planning Board to create a regional transportation plan and recommend a funding mechanism. Concept 3 as it was called is referenced in new O.C.G.A. as § 50-39-5. The Director of the Atlanta Regional Commission of the time, described this as "probably the biggest single accomplishment toward transit that we've had in this region since MARTA was created."
- **City of Atlanta:** In April of 2018, Sam Olens and Thurbert Baker were hired to represent the City of Atlanta against complaints filed with the Attorney General's Office by the *Atlanta Journal-Constitution* and WSB-TV, alleging violations of the Georgia Open Records Act. The two former Georgia Attorneys General, both known for advocating for the right to access public records, successfully worked with the city to reach an agreement with the *AJC* and WSB-TV.

State Attorney General Practice - About Us

For companies around the globe that do business in the US, state AGs can have broad influence and impact on a firm's profile and business strategy.

- Team including five former state AGs, former deputy AGs, assistant AGs and chiefs of staff from some of the most active offices in the nation.
- Deep subject matter knowledge in areas of law frequently the subject of AG inquiries: **financial services, technology, consumer protection, false claims, healthcare, antitrust and data privacy and data breaches.**
- Decades of experience **developing strategies to avoid becoming subjects of state AG investigations**, achieving resolution short of litigation, as well as defending litigation.
- Unmatched insight and counsel handling legal and policy matters with State AG offices across the country.



Bipartisan team of former AGs and key staff from across the country



Thurbert Baker
Former Attorney
General of Georgia
(D)



Bill McCollum
Former Attorney
General of Florida (R)



Sam Olens
Former Attorney
General of Georgia
(R)



Terry Goddard
Former Attorney
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Dan Gibb
Former Assistant
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Rachel Cannon
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