

# State Attorneys General: A Roadmap for In-house Counsel

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CLE Seminar for In-House Counsel Webinar Series  
2021

## State Attorneys General

The role of state AGs is unique among elected officials in the US:

- 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 USC. § 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 US Supreme Court
- Enforcing Medicaid Fraud, cybersecurity/privacy laws, environmental laws, antitrust laws and consumer protection laws
- Revoking corporate charters

**Frequent Non-Partisan Subjects of Attorney General Inquiries:**

- Administered through:
  - Civil Investigative demands [CIDs]
  - Multi-state litigation
  - Federal and multi-state [DOJ, FTC, CFPB] litigation
    - National injunction requests in District Court
- 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

## 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

- **President Trump**

- Pro/anti federal and state statutes regulatory action, e.g. EPA, CFPB, ACA, marijuana, immigration/DACA
- Emoluments clause
- Emergency Declaration to fund border wall
- Nation-wide District Court injunctions

- **President Biden**

- Pro/anti federal and state statutes regulatory actions, e.g. EPA, CFPB, ACA, immigration/DACA, DOE re CRT, Sec. 230 of the CDA, "Election Integrity," Religious liberty

- **Aspiring Governors, Senators and Presidents**

- Arizona, California, Connecticut, Maine, New York, North Carolina, Ohio, South Carolina, Wyoming

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## Department of Justice forming task force to be 'driving force' behind Biden competition order

### Federal & Multi-state investigations and litigation

- Federal Trade Commission & Department of Justice - President Biden's Task Force on Competition
  - Tech re Sec. 230 CDA - Facebook, Google
- Antitrust / Mergers
- UDAP [Unfair & Deceptive Trade Practices]
- Non-compete agreements
- Consolidation of healthcare [drugs, hospitals, agriculture]



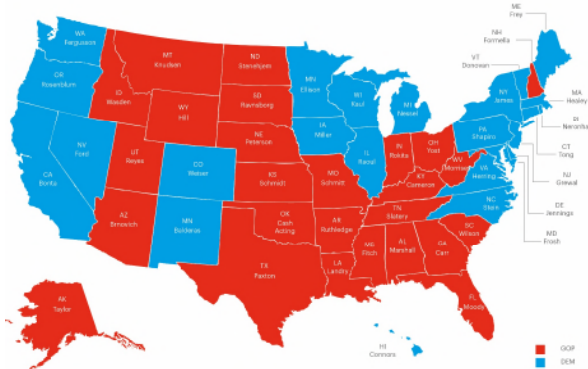
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## State Attorneys General Political Landscape

Governor Kevin Stitt appointed a new Oklahoma AG who plans to run in 2022. There is one AG race in Virginia this year and 30 next year.



## State Attorney General Investigations






## State AG Investigations

### What Provokes a State AG Investigation?



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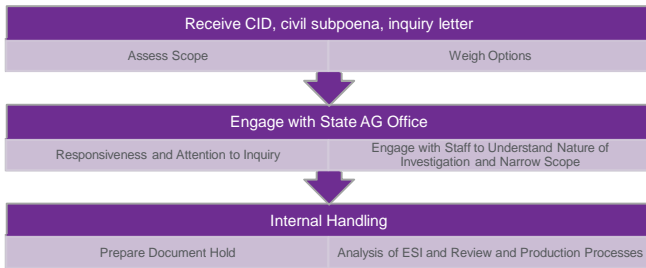
### State AG Investigations: What's the Big Deal?

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

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## Strategy

### Initiation of Investigation



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## Strategy

### A complete process demanding high ethical standards



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## Roadmap to Success

Developing a plan when you are under investigation

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### 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

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## Document Preservation and 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 and 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.
  - Experts 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 is 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 employees 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 dialogue and information flow.
- Ask witness to keep interview confidential.

## What to Document in the Witness Interview Report

- Promptly write a summary report of the interview.
- **Carefully consider what to say!**
  - Summarize all factual information witness provided.
  - Note that 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

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## Conflicts

- In-house corporate counsel represents the company.
  - Their conversations with company employees are privileged, but the privilege belongs to the company; only the 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

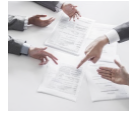
- Avoid being subject of investigation - Pro-active
  - Educate AGs and staff
  - National AG Organizations as vehicles for discussion
- Best practices
- Timely recognize and correct problems
  - Respond to complaints, especially from an AG
- Engage state AG practice team to assist/advise



## 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
- Attorney General Alliance



# Questions?