

**2024 - An Overview of the Office of State Attorney General
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Welcome to AG 101: The purpose of this presentation is to present an overview of the office of state attorney general.

My name is Jim Tierney. I had the honor of being the Attorney General of my home state of Maine for 10 years. For the last 30 years, I have taught and lectured about AGs at several law schools and consulted with AGs and AAGs of both political parties in well over half the states. I also lecture on ethics at convenings of the National Association of Attorneys General (NAAG).

For the last dozen years, I have been a Lecturer on Law at Harvard Law School where I teach classes, counsel students, and direct the State Attorney General Clinic. I have previously taught at both Columbia Law School and Yale Law School.

The views are mine and not designed to give legal or policy advice, every state AG is somewhat different and there are those who will disagree with me!

These remarks are attached and update a video 2020 video.

<https://www.stateag.org/ag-101/intro>

You can always turn to <http://www.naag.org> which is the best source for information about attorneys general and I also have a personal website StateAG.org at the “AG 101” portal.

Overview: We are the United *States* of America and since our founding it has been the *states* that provide the core building blocks for how we govern ourselves.

Attorneys general are the lawyers for our states. Every state has always had an Office of Attorney General and between 13 and 14,000 lawyers currently work in AG offices.

While jurisdictions and practice can vary widely, the lawyers who work for attorneys general provide legal advice, prosecute criminal and civil cases, and defend state agencies on issues that impact the lives of all of us. The reason most of these lawyers have chosen to work for their attorney general is that they appreciate the opportunity to make our government work in an honest and ethical manner.

They aren't in it for the money.

AG Politics: AG offices are not democracies. 43 AGs and the AG of the District of Columbia are elected in partisan, statewide elections. This means that at the top of every office is a partisan AG who has the final word on what the office will — and will not — do. And there can be no question that the

decisions of AGs are influenced by their personal partisan beliefs and those of their supporters.

Indeed, recent election results in some states have resulted in dramatic and unprecedented changes in some AG offices. Yet most of the day-to-day operations of all AG offices continue pretty much regardless of partisanship or who is the AG.

I will discuss both the top of the office and the core of the office in these remarks.

The History: Let's get some history. Offices of state attorneys general did not appear overnight. They evolved from the common law of England in the 1600s and were brought to our shores during our colonial times. Every colony, and after our revolution, every state, had an AG. From the very beginning, the state AG was separate from other private lawyers and separate from the state executive authority.

Our new states were suspicious of the unrestrained executive power of the King. Their new state constitutions took the separation of powers seriously, and the office of attorney general was created to not only represent government on legal matters but also to be a deliberate limit on the power of federal and state government when it exceeds its constitutional and statutory authority.

The states' decisions were an express rejection of the federal model where the Attorney General of the United States is appointed by the President and may be removed at any time.

The federal approach has been rejected in all but two states. Only in Alaska and Wyoming can a Governor fire an AG.

In other words, the state AG is constitutionally designed to make sure that the law always comes first even when that law does not reflect the personal views of the AG.

AGs are therefore institutionally designed to create friction within state government and within our federal system, and that friction has increased exponentially in recent years.

An AG's independence is therefore limited. AG offices have government "clients" that restrict what AG offices can do. AGs are also limited by budgets, legislative and judicial oversight, specific statutes, and case law, and the bar rules where AGs are increasingly accused of ethics violations.

In short, and even though AGs are loathe to accept it, an AG being independent does not mean that an AG can do whatever he or she wants to do.

This is why enforcing the law intersects with politics and is often in the eye of the beholder.

So, let's go a little deeper.

I will divide this presentation into three areas: What **AGs** do, what **resources** are available for them to do it, and finally, **how do they get the job done**.

What AGs Do: AGs are the lawyers for state government.

On the **civil** side, AGs advise state agencies who may also have in-house counsel. In most states and by statute and tradition, agencies are not allowed to litigate so it falls to the AG to defend the state agency when it gets sued.

Today's partisan reality, however, is that AGs increasingly act in accordance with their personal and political views - especially on high profile issues - which may or may not line up with other branches of state government.

This, in turn, has resulted in dangerous a trend whereby AG's forfeit their historic role as the exclusive legal voice for state government. After all, if an AG is representing only his or her personal views then Governors and legislatures and agencies feel the need to appoint private counsel to provide them legal advice and even represent them in government litigation. In some matters, even the legislature itself may appear in court without the permission of the AG or even in opposition to the AG.

This is not the way the statutory structure was designed to operate and a growing problem.

The AG brings and settles civil enforcement actions on behalf of state agencies and also have independent authority in the areas of consumer and antitrust and in some state's civil rights and labor enforcement.

AGs also issue legal advice to other levels of government and to the public by way of formal and informal legal Opinions.

On the **criminal** side, in three states, Alaska, Delaware, and Rhode Island, the AG has exclusive criminal jurisdiction. In almost all other states, AGs have some criminal jurisdiction that is often concurrent with local prosecutors. AGs also are also increasingly tasked with investigating allegations of police misconduct.

And all AGs have a statewide presence that is larger than their precise jurisdiction.

In other words, because AGs are considered the state's chief law enforcement officer, they are often expected to articulate legal positions regardless of their office's actual legal role. AGs stand in a "bully pulpit" and take positions on a myriad of issues where they may not actually be able to take legal action.

Example: Let's say that an AG has no direct criminal jurisdiction over domestic violence because in their state the crime is the responsibility of local prosecutors. Does the lack of direct prosecutorial authority mean that the AG has no responsibility regarding domestic violence?

Hardly! The AG advises state agencies, trains, and oversees police officers, and works with legislators, district attorneys, and the Governor. The AG could also appoint a Domestic Violence Task Force, conduct public education initiatives, speak at high schools, hold press conferences in support of District Attorneys and advocacy groups, testify in Congress, and participate nationally with AGs of other states that do have jurisdiction.

In my view, if an AG without express jurisdiction takes a leadership role on an issue it does not necessarily mean that he or she is playing politics. It is just an AG doing the job that the AG believes should be done.

AGs by nature are activists. Regardless of their political beliefs, they generally all believe that they are there to do something and solve problems.

Resources: Do attorneys general have the resources to do their jobs?

The largest state AG office – California – has about 1300 civil service lawyers and some of the very smallest states have about 150. Most have between 200 and 250 lawyers and some AG offices have expanded their staffs to include economists, technologists, highly specialized support staff, and my favorite, the law librarians.

The vast majority of these lawyers are career lawyers. AGs come and go, even though most AAGs serve “at the pleasure” of the AG. Although they have no legal job protection, the reality is that most AAGs serve through many different AGs of both parties.

Although it varies, many AG offices are funded directly by legislative appropriations for no more than 30% to 40% of their budget. The rest comes from the budgets of client agencies, tort defense funds, federal grants, or settlements.

All AGs authorize outside counsel for some purposes. Usually, it is for routine matters and attracts no attention. (Bill collecting, conflict of interest, representation in rural areas far from the State House, agency request, etc.).

Increasingly, some attorneys general of both parties are controversially reaching out to private firms or even advocacy groups for assistance on “hot button” issues. Others authorize contingency counsel on potential fee generating litigation. Tobacco, opioids, and ground water pollution are prominent examples, but there are many others.

Notwithstanding this trend for outside counsel, most of the litigation work done by state government remains with full time AAGs.

How they do it Although the size and jurisdiction of the offices vary significantly, their organizational structure is

functionally similar. The AG may make the final decision, but this decision making demands an office structured in ways that funnel the decisions into the top of an office.

For that reason, almost all offices have a Chief Deputy, Chief of Staff, Solicitor General, Civil Deputy, Criminal Deputy, and Public Protection Deputy. Named differently in some states, they all have individuals who perform these functions.

The wise AG will check with all six of these individuals before making any significant decision. The unwise AG decides without checking with his or her office structure and this is where the serious mistakes are made.

Take a look at the chart here at <https://www.stateag.org/ag-101/intro> and follow along.

Attorney General — Forty-three AGs are elected. All are partisan and all but two cannot be removed by the Governor. All AGs are “political” in the sense they need to make decisions that have public policy or political implications. All have held political positions before becoming AG and almost will hold political decisions when they are no longer AG.

Chief Deputy — The Chief Deputy is responsible for the day-to-day operations of the entire office by making sure that all the pieces fit, that legal positions are internally consistent, that the budget is followed, and that the AG has all the information necessary to make the final decision.

The Chief Deputy is always politically aligned with the AG but is also the person most likely to say “no” to line AAGs and to the AG personally that they cannot do what they want to do.

Chief of Staff — The Chief of Staff is often a non-lawyer (or non-practicing lawyer) with extensive political and policy skills. The COS may arrive direct from the campaign, and oversees media and legislative relations, and outside constituencies.

The Chief of Staff is responsible for carrying out the AG’s stated public agenda, and consequently may go head-to-head with the Chief Deputy or the AAGs who are more focused on shorter term legal responsibilities, and who may not understand or appreciate the role of the COS.

Solicitor General — The Solicitor General and the SG staff have are responsible for assuring the Office speaks consistently and with quality before state and federal appellate courts. The SG is therefore responsible to the AG for supervising or handling the state’s appellate work, amicus briefs, and AG opinions. The SG is often tasked with the Office’s most sophisticated legal analysis.

Because states appear before the U.S. Supreme Court more than any party other than the federal government, and because AGs increasingly challenge federal authority, SGs now often argue the most important legal issues of our time.

Although formerly SGs had a low profile, recent national litigation has dramatically changed the visibility and responsibility of the SGs as the size of SG offices in many states has significantly increased.

Civil Deputy - States get sued all the time, and it is up to the AG's Civil Division to defend. It is therefore this "government bureau," led by the Civil Deputy, that is always the largest part of any AG office. Its duty is to advise and defend state agencies.

The Civil Deputy must serve as defense counsel and in doing so must often tell government agency clients and other AG office senior staff that they cannot do what they want to do either because their position is legally untenable, there are serious resource limitations or because it would contradict legal positions taken in defense of the state in other matters.

Of particular importance, the Civil Deputy also must say "no" to agencies that want to exceed their authority or who want to bring or not settle weak cases.

Because the Civil Division is usually funded from the budgets of "client" agencies who often do not appreciate "their" lawyer telling them "No," and therefore request or demand outside counsel.

Criminal Deputy — Virtually all AG offices have some criminal jurisdiction. In only three states (RI, Ak. De.) does the AG have exclusive authority. A number of AGs handle all criminal

appeals, and AG criminal divisions often provide prosecutor support to rural areas or upon a District Attorney (DA's) conflict. Given the starkly differing prosecutorial philosophies currently found among elected DA's the relationship of the AG with DA's is in transition.

In the last dozen years, almost half of the AGs have been tasked with investigating and prosecuting police misconduct cases. And 16 AGs have the authority to convene statewide grand juries that are often able to issue reports.

Public Protection Deputy — The Public Protection Deputy supervises those divisions that allow for direct action by an AG in areas such as Consumer Protection, Antitrust, Charities, and in half the states, Civil Rights and Labor. These responsibilities — sometimes funded by settlements — allow an AG great flexibility and are most apt to reflect an AG's personal governmental philosophy. There are no agency clients.

Public Protection is the area where AGs are most likely to work together with AGs from other states and with federal agencies by bringing very large cases that can result in billions in damages and restitution to consumers who have been damaged. The AAG's who handle these cases tend to specialize and work with their colleagues in other states with similar specialties. On multistate cases they essentially operate as a single national law firm.

Public Protection historically been non-partisan and generated significant AG publicity and have grown larger and are growing. Yet today even very large consumer protection and antitrust cases can go virtually unnoticed by the public.

Summary: There you have it — the six people the AG should have in the room when making an important decision because they have different perspectives. Together they give the advice to the AG who ultimately makes the decision alone.

And remember, these core leaders all know each other across state and partisan lines. All the Chief Deputies know the other Chief Deputies, the Public Protection lawyers know each other, the SGs know each other. The information that is exchanged across state lines is increasingly not just from AG to AG, but also on staff levels who on a particular matter will operate as single multistate national law firm.

National organizations: There are several national organizations that deal with attorneys general, and I will discuss just three of them.

National Association of Attorneys General (NAAG): NAAG serves as the non-partisan organization that represents attorneys general. NAAG hosts several national, regional, and substantive conferences for AGs and their staffs. NAAG and its professional staff provide the operating infrastructure for many AG initiatives.

NAAG is especially active at the AAG level where it provides high quality training to AG offices in every state. NAAG.org is the ultimate website for finding out what AGs are doing including a compendium of information on AG powers and duties. <https://www.naag.org/>.

NAAG oversees the dispersal of funds from the historic tobacco settlement. Importantly, at present NAAG accepts no corporate funding. NAAG is funded by dues from each state and from multistate settlements.

Now let's just discuss a bit on the politics of being an AG.

Like all of us, AG's hold personal beliefs that impact their decisions, and these beliefs are coupled with partisan electoral pressures. The result is that AGs increasingly march in partisan lockstep on a myriad of major issues making it increasingly difficult for AGs to not go along with their national political compatriots and supporters.

Both parties have organizations that reflect their core believes.

All AGs are therefore members of either the *Republican Attorney Association (RAGA)* or the *Democratic Attorney General Association (DAGA)*.

There is no such a thing as a non-partisan attorney general. All AGs are either Republicans or Democrats and are therefore not immune from the polarization that marks our political

discourse. This leaves AGs in serious disagreement with half of their colleagues on many major issues.

Both RAGA and DAGA are led by committees of AGs and exist to serve the political needs of their members including polling and strategy. Each is well staffed and raises substantial funds – millions of dollars - from a wide variety of entities, including corporations and “dark money” political action committees.

Both RAGA and DAGA host at least six meetings a year attended by donors who are subject to the jurisdiction of AGs. Some of these donors are in actual litigation with the AGs they meet in these private settings.

Attendance at these meetings is a major time commitment for AGs and has resulted in AGs now spending far less time with colleagues of the opposite party than they have in the very recent past.

RAGA and DAGA are also committed to supporting their partisan federal counterparts and attorneys general now sign on to letters and amicus briefs circulated not through NAAG but through either RAGA or DAGA and thus contain no signatories of AGs from the opposite party.

The vast majority of AG staff continue to have no contact with either RAGA or DAGA. Elections have consequences at the top of every AG office, but for thousands of AAGs their non-partisan work for state government goes on unchanged.

Federal government

All AGs cooperate with the federal government on a nonpartisan basis on most issues. State governments receive trillions in federal funding in ways that are approved by AG offices. AGs also pursue numerous joint federal and state litigation especially in the area of consumer protection and antitrust where state and federal cooperation is specifically authorized by federal statute.

That being said, the AGs of the political party not controlling the White House increasingly push back on federal initiatives the “other side” is promoting. The current expectation is for AGs not of the party of the President to be very public political and legal opponents of whoever controls the White House.

As the importance of these issues rise – election integrity, abortion, climate change, gun safety to name but a few – the tension among the AGs has risen. Because AGs now often campaign against other AGs, confidential communication within the AG community is far more guarded and rarer than it was only a few years ago.

Conclusion

This is my personal view of the current state of state attorneys general as they play a much larger role on national issues than

they did 30 years ago. Discussion of these trends and predictions for the future are best left for another day.

Class dismissed, and thanks for listening!