

An overview of the Office of State Attorney General

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1. Welcome to AG 101:

My name is Jim Tierney and I am a Lecturer on Law at Harvard Law School where I teach classes, counsel students, and direct the State Attorney General Clinic.

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 about AGs, confidentially consulted with AG and AAGs in well over half the states, and every two years I participate in the orientation for all of the newly elected AGs.

The purpose of this presentation is to share an overview of the office of state attorney general.

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

These remarks are accompanied by materials found at the StateAG.org at the “AG 101” portal at my personal website, <http://www.stateag.org> And you can always turn to <http://www.naag.org> where there is a wealth of valuable information.

2. Overview:

Between 12 and 13,000 lawyers currently serve their states working in AG offices. In doing so, these career lawyers provide legal advice, prosecute criminal and civil cases, and defend state agencies on issue that impact almost every citizen.

But AG offices are not democracies. At the top of every office is the elected AG who has the final word on what the office will — and will not — do.

3. 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 1600's 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 also 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 designed as a deliberate limit on the power of government to exceed its constitutional and statutory authority. In other words, the AG is to make sure all of us – including our own government – put the law first.

The states' decisions were a deliberate 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. This approach has been rejected in all but two states — Alaska and Wyoming.

All state AGs therefore have some degree of independence. They are institutionally designed to create friction within state government and within our federal system.

But that independence is far from absolute. AG offices have government clients that greatly influence what AG offices can do, and AGs are also limited by budgets, legislative and judicial oversight, specific statutes and case law, and governmental laws dealing with ethics.

All of this means that the historic and cultural independence of AGs is circumscribed by any number of factors even before considering political restrictions. In short, because an AG is independent does not mean that an AG can do whatever he or she wants.

So, let's go a little deeper.

4. Perspective:

At its core, the personal and institutional commitment of an AG and his or her Office is to uphold the law even when that law may not reflect the personal views of the AG. Unfortunately, from time-to-time some AGs ignore that commitment, which, in my view, tarnishes the office.

The law should always come first.

But enforcing the law requires countless nuanced decisions that inherently involve judgment, and so are the decisions of AGs marked by their personal views? And life experiences? Of course!

AG offices therefore exist at the intersection of law and public policy.

And, where public policy meets politics is in the eye of the beholder.

5. I will divide this talk into three areas:

What are AGs supposed to do?

What resources do they have available for them to do it?

And finally, how to they get the job done?

6. What AGs do:

AGs are the lawyers for state government and generally are responsible for all litigation. On the civil side, AGs advise state agencies, who also often have in house counsel who advise but are not allowed to litigate, defend the state when it gets sued, bring actions on behalf of state agencies, and bring enforcement actions on behalf of the state, particularly in the areas of consumer and antitrust.

They also issue legal advice to other levels of government and the public by way of formal opinions.

On the criminal side three have AGs have exclusive criminal jurisdiction and almost all have some that is often concurrent with local prosecutors and increasingly involves investigating allegations of police misconduct.

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

In other words, because they are the state's chief law enforcement officer they are often expected to articulate positions sometimes regardless of their office's actual legal role. AGs may 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 it 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 jurisdiction takes a leadership role on an issue it doesn’t 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.

They are there to do something.

7. Resources:

Do attorneys general have the resources to do their jobs?

The largest state - California - has about 1200 civil service lawyers and some of the very smallest states have about 100. Most come in between 180 and 220 lawyers and many state 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 may come and go and even though most serve “at the pleasure” of the AG, i.e., they have no job protection, the reality is that most 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, etc.).

Increasingly, some attorneys general are controversially reaching out to private firms or even advocacy groups for assistance on “hot button” issues on major cases. Others authorize contingency counsel on potential fee generating litigation. Tobacco and opioids are two prominent examples.

Notwithstanding this trend for outside counsel, the vast majority of litigation work done by state government is by full time AAGs.

8. How they do it

Although the size and jurisdiction of the offices vary significantly, their organizational structure is actually remarkably functionally similar.

AGs make the final decisions themselves, 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.

And the wise AG will check with all six of these individuals before making any significant decision.

Take a look at the chart here at stateag.org, and follow along.

Attorney General - 43 are elected, all are partisan and all but two cannot be removed by the Governor. All are “political” in the sense they need to make decisions that have public policy or political implications.

Chief Deputy - The Chief Deputy is responsible for the day-to-day operations of the entire office by making sure that all of the pieces fit, that public positions are internally consistent, the budget followed, and that the AGs has all the information necessary to make the right final decision. Chief Depts are often the “brake” in an AG office. The Chief Deputy is the person most likely to not only to say “no” to line AAGs, but is also the person who tells the AG that he or she cannot do something

Chief of Staff - The COS is often a non-lawyer (or non-practicing lawyer) with extensive political and policy skills. The COS often arrives direct from the campaign, and is in charge of media, 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 the legal responsibilities, and often do not understand or appreciate the role of the COS.

Solicitor General - The Solicitor General is the person responsible for the Office’s the most sophisticated legal analysis. This person is responsible for supervising or handling the state’s appellate work, amicus briefs, and AG opinions. Although formerly they had a low profile but recent national litigation has dramatically changed this profile. Because states appear before the 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.

Civil Deputy - States get sued all the time, and someone has to defend. Always the largest part of any AG office, the Civil Deputy leads the “government bureau” that advises and defends state agencies. The Civil Deputy often tells other senior staff that they cannot do what they want to do either because of resource limitations or because it would contradict legal positions taken in defense of the state. The Civil Deputy also must say “no” to agencies that want to exceed their authority, that want to bring or not settle weak cases, and that badger the AG for the right to hire outside counsel. Because the Civil Division is usually funded from the budgets of “client” agencies, they do not appreciate “their” lawyer telling them “no”.

Criminal Deputy - Almost all AG offices have some criminal jurisdiction. While in a three states it is exclusive (RI, DE, AK), almost everywhere else it is shared with District Attorneys. Sixteen AGs run statewide grand juries, many handle all criminal appeals, and they often provide prosecutor support to rural areas or upon DA conflict. In the last dozen years almost half of the AGs have been pressed into investigating — and where appropriate prosecuting — police misconduct cases.

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 some 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.

It is in these areas an AG is most likely to work together with other AGs and 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 and on cases operating as a single law firm. For more information, see: <https://attorneysgeneral.org/>

Public Protection generates 95% of AG publicity with less than 10% of the staff.

Summary

So, there you have it — the six people the AG may want to 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, they all know each other across state lines. All of the Chief Deputies know the other Chief Deputies, the Public Protection lawyers know each other, etc. Information is therefore exchanged across state lines is increasingly not just from AG to AG, but also on staff levels who often 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 all 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 its training arm of NAAG — NAGTRI — 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 is funded by annual dues from each state and from multistate settlements. NAAG also oversees the dispersal of funds from the historic tobacco settlement.

Importantly, NAAG accepts no corporate funding

Electoral Politics

There is no such a thing as a non-partisan attorney general.

All AGs are either Republicans or Democrats. AGs are not immune from the polarization that increasingly marks our political discourse, and this leaves them in serious disagreement with half of their colleagues on some major issues that arise within their jurisdiction.

All AGs are members of either the **Republican Attorney Association (RAGA)** or the **Democratic Attorney General Association (DAGA)**. Both organizations are led personally 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 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 private settings. Attendance at these meetings is a major time commitment by 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 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.

Yet in the midst of this polarization the vast majority of AG staff continue to do their jobs. Elections have consequences at the top of every AG office, but for the vast majority of AAGs life goes on unchanged.

Federal government

All AGs cooperate with the federal government on a non partisan basis on many, many issues. AG offices receive federal funding, and pursue numerous joint federal and state cases especially in the area of consumer protection and antitrust where state and federal cooperation is often 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 so the common narrative is that AGs are political opponents of whoever controls the White House.

Conclusion

This is my 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!

