

Regulatory Oversight – S01 Ep12, A Look at the Unique Features of State AG Investigations and What Companies Should Consider in Selecting Outside Counsel

Stephen Piepgrass:

Welcome to another episode of Regulatory Oversight, a podcast that focuses on providing expert perspective on trends that drive regulatory enforcement activity. I'm Stephen Piepgrass, one of the hosts of the podcast and leader of the firm's Regulatory Investigations, Strategy and Enforcement Practice Group. The podcast features insights from members of our practice group, including its nationally ranked state attorney's general practice, as well as guest commentary from business leaders, regulatory experts, and current and former government officials. We cover a wide range of topics affecting businesses operating in highly regulated areas.

Before we get started today, I wanted to remind all of our listeners to visit and subscribe to our blog at regulatoryoversight.com, so you can stay up to date on developments and changes in the regulatory landscape. Today, I'm honored to be joined by Nevada First Assistant Attorney General, Kyle George, and by my good colleagues, Mike Yaghi and Ketan Bhirud to discuss the use of separate litigation and settlement counsel for AG Investigations.

Kyle serves as the top legal advisor to Nevada Attorney General, Aaron Ford. In that role, Kyle, oversees 10 division chiefs and over a 100 attorneys, providing legal counsel to state agencies and regulatory agencies. Before serving as first assistant AG, Kyle worked as a special assistant attorney general and in that role served as the liaison between General Ford's office and law enforcement agencies across the state. Prior to his time in the AG's office, Kyle served as chief deputy district attorney for Mineral County and Nevada and worked for two members of the Nevada Congressional Delegation as an advisor and counsel. Kyle, Mike, and Ketan, thank you so much for joining us today.

Ketan Bhirud:

Well, Stephen, thank you for that wonderful introduction and it's always great doing these podcasts with you. And thank you so much for host and we really appreciate it. Kyle, thank you for giving us some of your time today. We really appreciate it. We know how busy you are in the Nevada Attorney General's office. I wanted to ask you a little bit about your background, but after that, I wanted to discuss using separate counsel for settlement as litigation in the context of Attorney General Investigations. And then, I was going to turn it over to my colleague Mike Yaghi. He was going to discuss the unique nature of attorney general investigations, how they differ from traditional litigation.

Before we do that, I just wanted to ask you a little bit about yourself. I've known you for about five years and I can see you're a great friend. I have wonderful things to say about you. I think you're a wonderful lawyer. I think you're a wonderful person and you're at this point, one of the most experienced people in the AG space, having served with General Ford as his chief deputy for the last four years. But can you tell our audience, for those of them who don't know you yet, a little bit about yourself and how you became a lawyer?

Kyle George:

First of all, Ketan, thank you for organizing this. Thanks to your team for putting it all together. I think my background as lawyers, fairly typical as lawyers go. I was a research chemist before going off to law school, which I think is a normal path for people going to law school if I'm correct. Unfortunately, as a research chemist, our funding tends to ebb and float depending on a lot of considerations. Most of my

research, if not all of it was grant funded. So there are times we are very well funded. We had lots of money to pay salaries, pay for our research, and there other times that the money dried up as the economy dried up or slowed down.

So it wasn't a very stable way to operate. I greatly enjoyed my research, but at some point decided I really wanted to do something else. And I had been interested in the practice of law specifically for long period of time. And I recognized that it was a really good opportunity to take my expertise as a chemist into law, particularly in the public law space. At that point, I was in a PhD program, decided to leave that program and went off to law school.

Ketan Bhirud:

Thanks for that explanation of how you became a lawyer. I agree, very typical research chemist right to law, not political science or economics or anything like that, or one of those useless majors where you have nothing else to do but go to law school. No, but all joking aside, I think we do need more people from the art sciences and other areas in the law. It's good to have diversity of all different kinds, whether it's what people think of traditionally, but also coming from different subject matter. You told us a little bit about how you became a lawyer. Can you kind of just walk us through how you became AG Ford's first assistant? I think that would be kind of interesting for a lot of people because there are people who will be listening who maybe never worked in an AGI office and they're like, "Oh, how do you end up being the number two person in AG's office?" Or "What's the traditional path there?"

Kyle George:

Unfortunately, I don't know that my experience getting to this point is going to translate well for everyone else. I think a lot of me being here was based on personal relationships. I first met AG Ford when he was running for the state senate, I don't even know how long ago. It was a long time ago and we stayed in touch over the years. He was a bit of a mentor at different periods as I went through law school and after that. But once he was elected to office as attorney general, I reached out to him. I really admired him as a person. I respected him as a lawyer and I knew what his vision was in his role as attorney general and I was hoping that I could bring some my experiences as a lawyer to the office to make sure that he was successful. That's a very specific path, certainly not the path that a lot of my colleagues, my peers across the country have taken to get there.

So mine specifically was based on knowing him, knowing who he was and what his vision was and asking if I can help implement that vision. When I came into the office, originally I was brought in as the special assistant, so my title was special assistant attorney general and I did that for about six months. That was largely a law enforcement type role. I was liaison to the office and law enforcement agencies across the state and at the federal level. And after doing that for about six months, the position that I'm now in opened up and he asked me to assume that position and I was promoted to first assistant.

Ketan Bhirud:

Oh, that's great. And so can you tell us a little bit about what it is that a first assistant does? I know that's the title in Nevada for the number two in the office. Everybody has a difference. Sometimes it's a deputy attorney general, sometimes it's a chief deputy. Everybody has different titles and some office deputy attorney general means the highest position in the office and sometimes it means entry level attorney. But that aside, but what do you do as a first assistant?

Kyle George:

That's a good point to highlight. The title is different from office to office, so I think it's really good to understand who exactly you're talking to when you want to have these conversations. Chief deputy is a title, assistant attorney general and others may be deputy attorney general. So there's a wide variety of titles, but generally speaking, we have a similar role. I think the best way to really explain that role is for attorneys in private sector is we are very much like a managing partner. We manage a team of lawyers, we manage the office to some extent. So for me, particularly, I supervise 10 teams of lawyers, 10 divisions across a wide sector of legal spaces. So for example, in Nevada, Gaming Law is big, so that's one of my visions. I advise all the constitutional offices for the state of Nevada. So, it really runs the spectrum ranging all the way from litigation to regulation.

Ketan Bhurud:

That's a very interesting role representing the constitutionally elected officers. And depending on how elections go, sometimes it wouldn't be necessarily the person you or the governor the attorney general would choose to work with, but you have to find a way to make that relationship work. What advice do you have about doing that?

Kyle George:

I don't think it's too different than any other attorney and their clients really. We don't always get to choose our clients. We don't choose the circumstances that our clients come to us with. So in that regard, it's very similar to any attorney client relationship. In the end, we serve the state of Nevada. I think we all haven't shared and common interest in doing so. And my job in my role is to make sure that I give the best possible legal advice for whatever policy decision my clients make. In the Office of Attorney General, I don't set policy, I don't necessarily advise the policy, I advise the law. So that makes my job a little bit easier no matter who my client is or which individual is serving in that role.

Ketan Bhurud:

That makes a lot of sense. And when I was in this similar role, that's how I tried to approach the job as well. We're there to provide legal advice, not to set the policy direction for the state. I'm glad to see that Attorney General Ford takes the same position, you're helping him execute that. So I want to talk to you today about companies using separate counsel and enforcement actions and litigation with attorney generals and separate counsel to negotiate a settlement in those matters. And kind of get your thoughts as a senior member of an Attorney General staff on the benefits and the drawbacks. And let's start with kind of the benefits. What do you think are some of the benefits of taking that approach?

Kyle George:

We'll start off with the disclaimer that we haven't done a lot of that in the Attorney General's office. We haven't had the opportunity to do that, but I think there's some tremendous upsides and some downsides to that approach. First of all, as litigators we tend to be very passionate about the matters we litigate and we're protective of our clients. Sometimes it's easy to get into a mindset that we aren't right. So, we'll litigate this to finality through jury verdict or any other form of finality and we lose sight a larger picture that for our clients, it's difficult to be in a position where you're engaged in a lawsuit. We perhaps could lose sight in the fact that it is onerous on parties, because we as lawyers exist at an abstract level perhaps above freight. We are certainly involved in it, but we're not the ones whose names are on caption.

It's difficult for us to really understand sometimes or to remember sometimes how it feels to be a client being sued, to be a client in that position. So I think we have to be really careful as litigators to make sure that we aren't necessarily litigating for the sake of being right. We aren't litigating to prove a point or we aren't litigating to win. There are times where win is a per victory, where the cost of winning is so high that we would've been better off settling at some earlier stage, because there are times it's more cost effective to settle than to win. To be clear, there are times that settlement is not an option, especially in the attorney general's practice space. There are times that settling would force us to concede a policy issue that we aren't able or willing to concede. And in that instance, we have settled all the way through.

So the value of settlement counseling cases like this is that they can bring in some objectivity that may be lost in the course of litigating over a long period of time. They may value settlements in a way that's different than the way we can from our perspective. They may have more specific subject matter expertise on how to value a settlement and that outside perspective or that outside input could be really helpful in it. And then, I think the last value of bringing an outside settlement counsel is that sometimes over the course of litigation, things get so rancorous that we aren't really able to communicate effectively with opposing counsel

And bringing a fresh team, a fresh set of bodies might help reopen conversations with opposing counsel that then, can facilitate settlements or at the very least, facilitate litigation in a more productive and fruitful manner. We're fighting over every little thing, but really kind of narrow the scope of our litigation to truly contest the matters. So left part side to set up on counsel, like these are just some of them, I'm sure you can probably think of some others we are happy to discuss if you think of other ones. But I see the potential. I wish it was a little bit more prevalent, a little bit more common than it is right now.

Ketan Bhirud:

Well, that's really helpful. I want to touch on one of the last things you talked about and trying to effectively navigate that settlement process. What does that mean to effectively navigate the settlement process? How is that done effectively? What do you think are the things that effective settlement counsel needs to be aware of or whoever it is, whether it's the company or their outside counsel and their traditional litigation counsel? What should businesses and their counsel be looking at when trying to navigate that process effectively?

Kyle George:

That's an excellent question and perhaps a little bit challenging to answer. I think in short, it's always a cost benefit analysis. What is the cost of litigating versus the benefit of settling or even the benefit of litigating to completion? As I think I said passingly in my previous answer, there are times that settlement will create precedents. You settle this matter and all of a sudden, it opens the gates to other litigants coming and say, "Oh, well, they're settled for X amount or they're settled an undisclosed sum, maybe we'll do that and we'll get something out of it." So, there are times that settlements will create a precedent that we don't want to be stuck with.

Ketan Bhirud:

What do you think they should be considering and how do they navigate that process effectively when dealing with an attorney general as opposed to a traditional litigation?

Kyle George:

I think by that point you have to understand what the attorney general's goal is and in the case of an elected Attorney General, what they actually care about, right? Attorneys general are elected officials in most states who are beholden to the voters and have promised and thinks they're voters. So I think it's really important in that settlement counsel understand what this attorney general can agree to, what they're willing and agree to. What they will compromise on and what issues you just cannot compromise on at all. It's really a matter of where they want to make a statement. Sometimes there are hard lines that must be drawn based on what's important to the state and to its citizens. And sometimes, it's a matter of the actual financial aspects. How much can we recover going to litigation versus how much can we recover by settling. Is the settlement amount commentary with what we believe is the scope of the entry retail states into our citizens?

Ketan Bhirud:

That will make sense. And I think you've touched on this a little bit already. There are some potential drawbacks, the use of separate counsel to negotiate with the AG's office and separate counsel to handle the contested portion of the matter. What do you think are some of the more significant drawbacks or when it might not be appropriate?

Kyle George:

From where I sit, one of the things that I would have difficulty with is now managing two teams of lawyers, right? I have my litigation team and I have my settlement team who may have some slightly different objectives who may both be advocating to me for a different outcome. So now, I'm navigating multiple teams of lawyers and that's challenging. We have to make sure that they're clear lines of authority as to who's in charge of which aspects, which firm deals with which specific aspects of either settlement litigation. And certainly, it creates a little bit of a cloud as to who controls the litigation strategy. So obviously, the litigation strategy is generally controlled by the client. The lawyers obviously have a lot of input in that, but now perhaps having two separate legal teams means that they're two separate sets of decisions that we have to make as we go about doing this.

And to make sure that the two decisions we make are not incompatible, inconsistent with each other. So team A may ask a question, I give an answer, make a decision, and sometimes later the team B asks a question and I answer that in a vacuum, not perhaps realizing that it has implications on the decision I made with the original team. So that's, potential downside. It has to be navigated very carefully. The other issue is that there are times that the trial litigators are in a setting where they have to answer questions about settlement. They may be in a courtroom and a judge asks what's the status of settlement discussions? And if they're not as tightly involved in it or as closely tied in as settlement team, if there's a gap between those two teams, they may not be able to answer that intelligently, honestly or productively on a fly.

So that's another challenge that will have to be navigated if you have multiple teams doing litigation and settlement. And then, I think there's a bit of a timing issue too. At what point do you send in the settlement team? Theoretically, they would always be involved at some level, but there are times that having settlement discussions may weaken your standing. As a litigation team, we don't want to show weakness for example. There is a perception, there are times that settlement discussions can come across as signs of weakness. So how do we go about sending in that settlement team, pulling them out, how involved are they going to be with the trial team and so on. All of this can be summarized as an issue of deconflicting multiple teams with different ultimate objectives.

Ketan Bhirud:

That's really interesting. And so, I think my final question on this part of the discussion is, are there times where you think it makes sense not to employ settlement counsel at all, where it makes sense to just use one law firm for everything? Obviously, that might be a cost issue too.

Kyle George:

Yeah, certainly, cost is a big part of it. I think the scale and scope of the matter plays into it. A small matter for example, may not necessitate having two teams of lawyers, one to litigate the matter and another settle it. If it's small enough, you just don't need that. I think I touched on some of the other aspects. It doesn't make sense where it's going to be really complicated managing two separate teams with perhaps divergent goals. One to litigate to completion, the other settle prior to litigation. There are times that you have to look at the administrative cost, right? And administrative cost is not just a financial cost, but also the overhead of time.

How much time are we really devoting towards making sure that both teams are playing nicely together, working together, conflicting it. There's a tremendous amount of administrative overhead involved in using an outside settlement team or secondary team, settlement specifically. So the calculus doesn't always work. There are times it just makes sense to do it in a more traditional way, having litigation team have an eye towards settlement as well. And certainly the well qualified to do that. That's the way it's historically been done. I think the notion of using a separate settlement team is a more recent development law.

Ketan Bhirud:

That all makes sense to me. I'm going to pass it along to my colleague Mike Yaghi, to talk about whatever he wants to talk about.

Michael Yaghi:

Hi, Kyle. Thank you again, for taking the time to speak with us today. We greatly appreciate it. I think a perfect segue is focusing in on when having counsel that truly knows the AG offices and the AG space versus normal litigation counsel. And I think it ties into what you've been discussing so far in terms of helping facilitate, let's just say resolution right? And being prepared to proceed with enforcement/litigation. It seems that there's always a goal that benefits all parties to come to some mutually agreeable resolution. Nobody likes the uncertainty of litigation or litigation outcome. Or the long and protracted costs and drain on resources for litigation. So the other thing we wanted to talk about is the unique nature of matters involving AG's and how they differ from traditional matters, including traditional litigation matters, even though it's litigation involving the AG's. So we were wondering if you could opine on some of the differences for what businesses should be looking for when they select attorneys in contested matters involving AG's and how that differs from traditional litigation with private parties.

Kyle George:

That's an excellent question. I think I can best answer that from my own experiences dealing with these law firms coming in and approaching my office, approaching my clients and difference it makes between having a sophisticated AG practice group as the opposing counsel versus run a familiar firm, if you will. I think one of the things that happens is that the attorney general practice is such a small closed space.

They're 51 AGs at the state level, 50 states plus the District of Columbia. Then we have territories as well. And it's a closed community. I work with just about all of these offices at different points. And when I work with law firms that have a dedicated state AG practice, I also start working with the same lawyers repeatedly. And over time, what that ranks is first of all a meaningful relationship with these attorneys. It helps me develop some trust in these attorneys.

So I know that when they come to me and say, "Hey, we have an issue," I know that it's not frivolous. First of all, there're some merits to them approaching me with a concern. I know this person's reputation. So if they raise the alarm and they claim it's a significant issue, I can take that at face value. I can say, "Oh, I understand that this is a matter of deep concern because you represented and as such." I can only do that at face value when I have trust with that attorney, with that firm. Because otherwise, everyone's going to say the sky's falling every single time the client has an issue. The other thing that comes with a firm that's dedicated is a level of sophistication to understand exactly where the problem lies, right? Is the problem a policy problem? In which case, I'm probably not the best person to speak to you. For my viewpoint, there's a big difference between a policy issue, a decision to do this because we think this will lead to better outcome and an issue that's a matter of law.

Most regulators, many of my clients are not attorneys. So if you go to them and say, "Hey, I think if you interpret the law correctly, you will get this outcome." That may but up with their understanding of what their policy objectives are. And it's really important that we have legal conversations with the lawyers, with me and my team, and we have policy discussions with regulators. And a sophisticated player will understand exactly what the stumbling block for their client is, so they can best start those conversations in the most productive manner and with the people in the best position to resolve the issues.

Michael Yaghi:

That's very helpful. And we actually agree on when we're on the opposite side, working with state attorney's general on behalf of our clients, that the relationships and the sort of you bringing the integrity and the authenticity because you know each other. There's essentially, I would say almost like there's no gamesmanship, right? It's more okay, we could talk to each other, frankly, candidly, we could explain how our respective clients see an issue where we may agree or disagree and really hone in on where we could find common ground. And it seems like those strong relationships bring that closer together. And so, I guess, I'd like to see what your thoughts are on, from our perspective, it seems like it's not just the relationship with, let's say the attorney general and senior staff.

We find we get a lot more done when we have strong relationships with the frontline staff lawyers that are really running cases. And I just wanted to know your thought as a senior leadership member of your office, how you perceive that as well. Because from the industry side, we see that as very valuable and we've, like I said, have had a lot of success for clients just knowing and working with frontline staff lawyers. And I'll tell you, we're still adversarial, but we're able to accomplish a lot. So I was just curious what your thoughts were in sort of the frontline staff and how important those relationships are.

Kyle George:

What an excellent point. And let me just follow up on one last thing you said, we can be adversarial and collegial, right? And that's really important to be productive. Having that relationship with frontline staff is probably one of the most important things that attorneys can do in my opinion. And here's why. If you play me against my staff, you've burned that relationship forever. If you and my staff are working on an issue and you catch me in a setting and raise this issue, and this is the first time I'm hearing of it and you make an ask that you've already discussed with my staff, you've just attempted to undermine that

person that works for me. And I tell my employees, my attorneys, that I will always go to back them. I may disagree with them and in that case, I can have that conversation with them privately. But I will never do it in front of opposing counsel or in a setting where the outside will be aware of that.

That relationship is really critical for you, because you can start question that out. And there are times that you might say, "You know what? We have a fundamental disagreement. Can we bring Kyle in here? You mind if we have this discussion with him?" Because then I can play a mediator between, okay, I know what my attorney is trying to accomplish here, what my deputies are trying to accomplish. I understand what they're saying and where they're coming from and what the client wants. But I also see your side because I'm a little bit more removed from it, right? I understand your concerns. Are there opportunities defined middle ground by me being involved? So it is absolutely important that these conversations take place first with the front office attorneys, with the line level deputies who are more closely tied to the client than I am, who work with the client literally on a daily basis and understands all the nuances that I may not be privy to at my level.

And then, if necessary, we can have that conversation. "Okay, I understand these policy positions and we do this. Would this help you achieve the objective?" Because sometimes what you're looking for your clients, can be accomplished a completely different way than what we are discussing. If I understand what your end goal is, "Oh, well perhaps that's not the right license for you. You're not eligible for this license for this reason. Would this other license allow you to achieve your client's business goals?" There's a possibility that it may, So these conversations are valuable, but they must originate with the front office attorneys.

Michael Yaghi:

Yes, we agree. And sort of a nuance on what I wanted to ask about what you were discussing with my colleague Ketan, earlier, which was settlement counsel that knows State AGs and their front staff while working closely with litigation counsel. And I think what we find a lot of clients or companies not understand is that it doesn't have to be even an adversarial piece on our end. In other words, it's not like State AG Counsel is fighting with litigation counsel. It's hey, litigation counsel has its objectives and the client's objectives, but the overall objective is mutually agreeable resolution really, right? I mean that's in any conflict.

And it seems to me what you guys were talking about earlier is, and we found this to be the case with a lot of our clients where they'll come to us and say, "We're litigating with the state. We want you to come in and help facilitate some of the settlement discussions." And it's not any kind of negative reflection on litigation counsel, it's just, "Hey, you're sort of the venue experts who know the line attorneys, the senior staff and the AGs themselves, himself or herself." I guess my question is in that context, do you find there's less tension when you have those two firms working on behalf of a company where you're looking at an issue and it helps facilitate that softening of whatever differences the parties may have and to help facilitate resolution? Because on the private side, we've seen that work very effectively.

Kyle George:

The short answer is yes, it's very effective. There are things I can say to someone I have a good relationship with that I wouldn't say to an attorney, I just met. For example, "Mike, I cannot do that. You know our position on this issue, that's just a non-startup. What else can I give you?" I may not put all my cards on the table like that with an attorney I'm not familiar with because I don't know how he's going to leverage it. Working with you over time, I know that you're a straight dealer. I know that you can take

my objections at face value without trying to nitpick and say, "Well, what about this? What about that?" I think that's really important. I'm trying to be really diplomatic here about how I say this.

I think you cannot overstate the value of the personal relationship enough, because in the end, that's what's going to distinguish your services from any other law firm, right? Any law firm can make the same legal arguments where one is more effective than the other. Is the fact that they can communicate it in a manner that they know based on knowing my personality, based on knowing my office, based on knowing my office's missions and our overarching principles. If you recognize what those are and you can frame your arguments in the context of those objectives, then you're going to be more successful than a lawyer comes in and says, "Well, the law says this and I'm right, you're wrong."

Michael Yaghi:

Very well said. I think that hits the nail on the head. We have a lot of that dialogue with our clients and they recognize that the more sophisticated they are, the more they tend to recognize that as well. I guess, we're ready to wrap up, Kyle, if you have any closing thoughts or comments. We wanted to let you have the last word here.

Kyle George:

Mike. I think the last point you made is really a good place to wrap up, you talked about the sophistication of your client. But the sophistication of your client is perhaps less important than the sophistication of the attorneys representing that client, right? Because the client can have all understanding in the world about the issue, the actual details of the business, the operations. But if the attorney represented that client can communicate that or the lack sophistication to discuss the nuance of it, it's ineffective. So for me, I take great enjoyment in working with someone who really knows their stuff. Someone who can approach me at a really high level and even debate me outright at a really high level, because it's an intelligent conversation that usually leads to resolution. So yes, it's really good to have sophisticated clients, but I think it's perhaps a little bit more important to have sophisticated attorneys representing their clients. And for me, it's more productive that way.

Michael Yaghi:

Thank you, Kyle. Really appreciate. I'll close with seeing if Ketan has any final comments.

Ketan Bhirud:

No, nothing from me other than, thanks, Kyle.

Kyle George:

Oh, my pleasure. It's good chatting with you. Thank you for inviting me to do this.

Stephen Piepgrass:

Kyle, Mike, and Ketan, I want to thank you again for joining us today. I know our listeners very much enjoyed your valuable insights, as did I, and I want to thank our audience for tuning in today as well. Please make sure to subscribe to this podcast through Apple Podcast, Google Play, Stitcher, or whatever platform you use, and we look forward to talking with you next time.

Copyright Troutman Pepper, Hamilton Sanders, LLP. These recorded materials are designed for educational purposes only. This podcast is not legal advice and does not create an attorney client relationship. The views and opinions expressed in this podcast are solely those of the individual participants. Troutman Pepper does not make any representations or warranties, express or implied regarding the contents of this

podcast. Information on previous case results does not guarantee a similar future result. Users of this podcast may save and use the podcast only for personal or other non-commercial educational purposes. No other use, including without limitation, reproduction, retransmission, or editing of this podcast may be made without the prior written permission of Troutman Pepper. If you have any questions, please contact us at troutman.com.