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**REGULATORY OVERSIGHT – S02 EP1, THE EVOLUTION OF STATE ATTORNEYS GENERAL  
RECORDED DECEMBER 2022****Ashley Taylor:**

Welcome to another episode of *Regulatory Oversight*, a podcast that focuses on providing expert perspective on trends that drive regulatory enforcement activity. I'm Ashley Taylor, one of the hosts of this podcast. This podcast features insights from members of our practice group, including our nationally ranked state attorneys general practice, as well as guest commentary from business leaders, regulatory experts, and current and former government officials on a range of topics affecting businesses operating in highly regulated areas.

Before we get started today, I want to remind all of our listeners to visit and subscribe to our blog at [regulatoryoversight.com](https://regulatoryoversight.com), so you can stay up to date on developments and changes in the regulatory landscape.

Today I'm joined by Professor Paul Nolette from Marquette University to discuss the evolution of state attorneys general. Professor Nolette is the chair in the department of political science at Marquette and focuses his teaching and research on the dynamics of contemporary American federalism and the interplay between law and politics.

Professor Nolette has written a book, *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America*, that examines how state litigators have used lawsuits against large corporations and the federal government as a way to influence national policy.

Professor Nolette is also responsible for maintaining the National Association of Attorney General's multi-state litigation database, which is a resource that contains comprehensive information related to multi-state settlements between attorneys general and private entities from the early 1980s to the present.

Professor Nolette, thank you for joining us today. I really look forward to our conversation.

**Paul Nolette:**

Thanks for having me.

**Ashley Taylor:**

Professor Nolette, let's start with what attracted you to the study of state attorneys general?

**Paul Nolette:**

Well, I think the thing that really interests me about this office and this position of state attorney general is just how wide ranging their activities are and really how interesting their place within American politics and law is because they are an executive official that in most states is elected independently of the governor and the legislature, but they also have a lot of other roles that directly affect policy too and regulatory policy through everything from issuing opinions in many states to engaging in sometimes highly political lawsuits versus the federal government, but then also conducting numerous investigations of various sectors of the American economy. So I think the thing that really just interested me is just how wide ranging their actions are across a wide range of policy issues.

**Ashley Taylor:**

Historically, the office of attorney general has been an office that serves as a capstone to one's career. So if you go back certainly before the '80s and you looked at a profile of an attorney general, it would often be someone who was in their mid to late 50s, someone who had been a prominent attorney in that state. As the last chapter, again, a capstone of their career, they would run and serve as attorney general. Talk to us about the modern AG using the office as a platform or as a stepping stone rather than as a capstone to one's career.

**Paul Nolette:**

The office has changed quite dramatically, including how ambitious politicians look at that office. And they have looked at that over the last few decades as a way to get media attention, to get the attention of their fellow partisans in a political primary. And we've seen a number of AGs across the country use the position to eventually run for governor or senator or even vice president with Kamala Harris currently. It's a position that because of its newly high profile within state and national politics, I think really is an important stepping stone.

And I should also mention that in addition to being a stepping stone for higher office, it's become an office which for politicians that want to affect policy, that really want to make a difference in that area, it's a really attractive position.

I'll mention the example of Xavier Becerra, for instance, who stepped down from a leadership role in the U.S. House, I think he was number four in the U.S. House to take the, at the time open position as California attorney general. Decades ago, that would've been a backwards move, going from the U.S. House leadership to an attorney general office. But nowadays, the position is so important that it's become a real destination in itself.

**Ashley Taylor:**

Your story reminds me of a comment from the attorney general I served under who was a member of the state Senate before he became attorney general, and he said shortly after taking the office when he was in the Senate, he had to persuade his committee members to put a bill on the floor, then the entire Senate to vote for it, then the other chamber to support it, then a governor to sign it. And he was famous for saying, "When I wake up as attorney general, if there is an issue, I have the ability to impact change on that issue immediately."

I'd like you to comment on something that I always say to clients when we're talking about the state attorney general, and that is, it's an office that has a unique blend of politics, the practice of law and policy. Comment about that blend if you would, and specifically as I see it, how I see different AGs having a different percentage mix of those three elements of the job.

**Paul Nolette:**

The law part of the job perhaps is the most longstanding and the most obvious. They are the chief legal representative of their states. They have the opportunity to represent their state in litigation and also to defend the state against a number of lawsuits. But at least in 43 states plus DC, these AGs are elected officials and they have to run typically every four years in a political primary and then a general election, and they all have a party identification, Republican or Democratic.

And so I think inevitably since they have to run for office in most states, political considerations, that's always on the mind when they're making decisions about what they're going to prioritize in their office and what decisions they're going to make.

We have seen that, I think become even more prominent just in the last few years as AGs have gotten even more aggressive in pushing back against the federal government and federal government regulatory policies and statutory policies on a partisan basis over the last 10 years or so. That politics and policy piece is very much part of the story along with the traditional legal role.

**Ashley Taylor:**

Your comment about AGs pushing back on the federal government makes for a nice segue into a conversation around your book. I'd like you to comment on two things. First, when people see the term federalism, they often immediately associate it with the Republican Party and not both political parties. So I'd like you to discuss how it applies to both parties, and I think it's applying to both parties in equal measure here. And also discuss your reference to national policy making because I think a lot of our listeners may be surprised with respect to how effective AGs can be and have been in affecting change at the national level.

**Paul Nolette:**

And you're right, federalism and state's rights I think is typically associated with Republicans, the more conservative side of the political spectrum. However, Democrats, liberal AGs over the years have also used their office to pursue policy on the state level as well as the national level, and they've invoked federalism, they've invoked state's rights.

I mean, even going back to the George W. Bush administration, there were a number of AGs who said, "Hey, liberals can do state's rights too, and liberal states have the right to push back against federal policies that they think are harmful to their citizens."

Just to take one example of that in a very prominent, perhaps the most important environmental regulatory case, *Massachusetts v. EPA*, which was decided by the Supreme Court back in 2007, that was brought by a coalition of Democratic AGs who were pushing back on regulatory policies of the Bush administration that they thought would ultimately harm their states.

Massachusetts saying, "We believe in climate change and we think that climate change is going to affect our economy and rising sea levels will affect Massachusetts and so forth." They were making federalism claims, state's rights claims saying the Bush administration isn't taking that into account. So over the years we've seen even liberal and Democratic states, blue states making these sorts of state's rights claims.

**Ashley Taylor:**

Let me ask you about your effort to track settlement agreements. What caused you to start that process? What surprised you and what have you learned?

**Paul Nolette:**

This was actually the origin of me getting interested in AGs in this office, which is now about 15 years that I've been on the AG beat and researching them. I think the thing that really triggered my interest is

when I really was digging into the tobacco settlements of the late 1990s, which to me was really interesting.

I'm a political scientist, I'm interested in politics, and that was not only the biggest civil settlement of all time, so just a ton of money, but it really restructured the entire tobacco industry. It involved just about all the major players and all of the states.

And so it had this national impact on a major important industry, and yet the federal government wasn't actually involved. Congress considered passing laws approving settlements and that sort of thing, but they ended up not acting. It was the AGs acting themselves to create this national policy. And this was before the FDA was even regulating tobacco and had the authority to do that.

I just found it really interesting that you had these state level officials that had this national impact, and this was around 2006, 2007, so it was still in recent memory, the tobacco settlement, but I was kind of like, "Well, what are they up to now?" And at least on the academic side, there weren't a whole lot of people looking at this. A lot of the interest in fact was from the legal community who understood the impact that AGs can have, but there weren't many political scientists, people involved in politics that were looking at this and seeing what they were doing.

So I started digging into a lot of settlements that AGs had with pharmaceutical companies, which was very prominent, still is, but very prominent in that first decade of the 2000s, and looking at the way that they settled with various parts of the industry, sometimes just with one big corporation or sometimes with a few.

And cumulatively, it had a major impact on how pharmaceuticals were priced, how they were advertised and marketed. And this again, was often without the federal government getting involved. It was states doing this, and yet it had a national impact that reverberated across entire industries.

**Ashley Taylor:**

So, the developments you have just described have had a major impact on how companies have had to think about the office of attorney general. And I'd like you to comment on, you're observing this from the perspective of a political scientist and the issues that we handle in our day-to-day practice are very traditional legal issues, but they all arise against a political backdrop. And I know you are a reformed lawyer now, formerly practicing, so talk about the blend of the legal issues and politics as you think about the AGs.

I'm wondering how you view it because for many companies, they're used to dealing with the legal issue, but understanding how the backdrop of politics may impact that, for example, in a consumer protection matter is something that's difficult for many companies to understand.

**Paul Nolette:**

I think the difference in perspective there is that from a company's perspective that might be under investigation by a state AG or involved in active litigation, then they're focused on the case and the people working on it are focused on the case, of course, their clients.

But the way that AGs have increasingly thought about their role is transforming policy and transforming regulation nationwide. And so they're not just thinking about the case, but they're thinking about how this case fits into a bigger puzzle of how they're reforming, say the pharmaceutical industry or the tobacco industry or on data privacy or a number of other issues.

And so I think it's important for companies and others involved in the AG investigations to know that it's part of a bigger picture. It's not just a one-off sort of thing. With a lot of these cases, AGs are thinking about, okay, we hear from consumers a lot on this particular issue. We want to nudge policy in a particular direction overall that the industry as a whole changes.

So sometimes settlements, and they're very explicit about this AGs are, will send a message to the rest of the industry saying, "If you don't want to be investigated or sued, then you should change in this way that we're requiring a particular defendant to do." That's how the policy politics piece really fits into it. It's like they're thinking about things at a 10,000 foot level, the big picture when they engage in a lot of this activity.

**Ashley Taylor:**

I was going to save this, Professor Nolette for a closing question, but your comments again make a nice segue into moving it up in the batting order, so to speak. And that is, and I've explained this to a number of clients, that AGs are known as enforcement officials. They can file lawsuits, but they are also regulators relative to changing policy. And to your point, this is a legal issue that we see brewing right beneath the surface that I think is going to come to the surface here soon. I'd like you to comment on it.

If you have a lawsuit filed by the government, there are certain communications within the government that you can't obtain because they're acting in their prosecutorial and or enforcement function. But when an agency acts as a regulator, they have a public comment period, the public has a chance to participate in the process.

And so we're seeing more cases, as you've just described it, which are a mix where the AG's office, they see a policy that they want changed, and if you look at certain aspects of their communication and their conduct, it looks more like a regulatory body that you would otherwise have access to by way of public records request. Give me your thoughts on that mixed position that AGs tend to occupy.

**Paul Nolette:**

It's really interesting and when I first started digging into AGs back in the mid-2000s, I was really struck by how many of the settlements didn't even necessarily look like legal documents as they looked like regulatory documents, specifying future requirements for conduct and how much the AGs, like I mentioned before, were intending these documents to be really sending a message to the whole industry, so other potential defendants or other parts of the industry down the road.

And you're exactly right, I mean, they have an enforcement role in a particular situation, often responding to consumer complaints or otherwise being apprised of these issues that impact their states. But yeah, these settlements are meant to really be part of policy themselves. And each one of them, if you think of them as puzzle pieces, again, it makes the whole puzzle of policy settlement after settlement and the AGs really have that as one of the strategies moving forward.

Those in the regulatory realm familiar with regulation, are very familiar with your typical notice and comment rulemaking, but might not be as familiar with the ways in which AGs are really another type of regulatory policymaking that is parallel to the more familiar notice and comment rulemaking or agency adjudication.

I think it's really important to think about this as a newer category of regulatory policy making, but one that is really important and increasingly involves not just the states, but the state AGs also sharing information and collaborating with federal agencies as well to move policy in certain directions.

**Ashley Taylor:**

Your comments reminded me of a practice tip, and that is we regularly advise our clients when they are developing compliance protocols to use the settlement agreements that you have collected, more like regulatory guidance. It gives you insight into what the regulator — in this case the AG's offices — is thinking around the country.

And multi-state settlements can be particularly useful in that regard because it does give you a framework if you are a company that you can use to both think about your issue and anticipate what states will think regarding a certain regulation and or business practice.

**Paul Nolette:**

Absolutely, and you can really think about these as being an important source of precedent, but it's really business precedent as opposed to a judicial precedent. Most of these cases, these settlement agreements are settled even before there's any active litigation after maybe a year or two of investigations. Sometimes there's some initial legal activity before getting to a settlement, but a lot of the underlying issues involved aren't actually adjudicated by a court. So you don't have official court precedents that are out there.

But nevertheless, when the settlements are, as they typically are, filed in court, either federal court or state court, cumulatively, they create something of a business precedent, almost like an unofficial precedent or guidance that can serve to be an important insight into how state AGs are thinking and what their priorities are and how they expect the industry to act vis-a-vis consumers and the public.

**Ashley Taylor:**

One indicator of the growing importance that the judiciary is seeing in AG settlements is that ... And we're celebrating our 20th year as a state AG team, so my comments are a reflection of the trend I've seen over that 20-year period.

Early in the practice, you would file an order in state court to resolve a case, and it was an administrative filing. If the statute required you to file it in court, it was purely an administrative filing. You wouldn't have a hearing to explain anything to the judge. It would be accepted, filed.

We are seeing more and more settlements that once filed, the judge in the state is asking for a hearing to explain the purpose and the underlying conduct involved in the settlement. And I have been advising clients that that's a reflection in our view of the judiciary recognizing that, to your point, this is becoming precedent, not precedent in the way that they have thought about it, but people are governing their companies, are governing their future conduct.

The AGs are taking positions grounded in what the parties had agreed to in other matters, and courts are recognizing that. And now you're starting to see courts saying, "Wait a minute, before I accept this settlement, I need the AG's office and defense counsel to go on the record explaining some aspects of the settlement to me as the judge who hasn't been involved in the two-year negotiation."

And that transcript is becoming part of the record and becoming part of that precedential package that I know we have advised companies you should use, again as part of your compliance review process.

**Paul Nolette:**

And like you say, that's a recognition of the importance and impact of these settlements. In some ways, when you think about private class action litigation, for instance, and the settlements that typically have

to be approved by a judge, and you have essentially fairness hearings and the courts have to determine whether a particular class action settlement, that the fees are reasonable and that it's fair to the consumers, to the class.

Well, in some ways AG litigation has evolved in something of a similar way where you have judges providing a bit more oversight of the process knowing that this isn't just a number of states who have a one-off settlement with a particular company, but instead have this overarching picture of where they want to move regulation. And as the judiciary understands that a bit more and sees how this process has developed over time, I think they've been more assertive in having some oversight of that.

**Ashley Taylor:**

We've talked about this, my term will be ecosystem of state AGs, and there is one player in this ecosystem that we have not discussed and we should, and that is the National Association of Attorneys General. For those in our listening audience who may not be familiar with the group, why don't you talk about what the group does and its current relationship with AGs, which I know is somewhat strained, at least with respect to a few states.

**Paul Nolette:**

The National Association or NAAG is a bipartisan association that all AGs of the states and jurisdictions including DC are invited to be part of. And the organization's been around for a long time. I think it might have been 1907, something like that. So over 100 years now that it's been in operation and they've helped to be something of a umbrella organization to help organize AGs.

I think at the very beginning, in the early 20th century, there was a lot of antitrust action, Teddy Roosevelt and trust busting and all that, and the state AGs were getting involved then, and that was a forum for which they could collaborate. And in many ways, part of their role is still the same today, that it's a forum in which AGs across party lines can talk about regulatory issues that affect multiple states or even all the states.

So they talk about what kind of consumer issues like robocalls come up all over the place, what sort of data privacy issues are there, what antitrust issues thinking about the tech industry, for instance, might need to be a focus of all the AGs. They've served as this forum for those communications and those discussions.

But they have played a more, in many ways, assertive role in the regulatory space, particularly since the tobacco settlements of the late 1990s. NAAG was very much involved in that. They still have important tobacco practice where they oversee the payments that are still coming into states from that settlement. And they've created a lot of training and other opportunities for AG staff to get everybody on the same page with a lot of this stuff, the emerging issues as well as the long-standing issues like tobacco that AGs deal with.

One other thing that you alluded to is that there have been some tensions, particularly Republican AGs have been concerned about NAAG in some degrees. And this goes back again to the tobacco settlement when even at the time, even some of the Republican AGs that ended up joining the settlement had criticized it as what they termed regulation through litigation, trying to move policy through the judiciary, through lawsuits. And there have been a number of AGs who have criticized NAAG just in the last few years for facilitating that to too great a degree.

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So there've been states that have in fact left NAAG and others that have threatened to do so. So some of that bipartisan agreement that had been so long standing for over 100 years now, there are some cracks in that. I will say that most AGs are part of NAAG Republican and Democratic alike, and they do work on numerous bipartisan issues, whether it's opioids or data privacy, many other issues as well.

**Ashley Taylor:**

You are unique in that you have one of the few courses nationally that focuses on state AGs. Why don't you share with the audience how you have structured your course and what you emphasize in your course with your students?

**Paul Nolette:**

I think for a lot of what I do, teaching politics and political science as opposed to teaching in a law school is to get students to understand the interplay between law and politics. And so in many ways, as we talked about earlier, the state AG office is that really interesting and important blend of law and politics. And so really in my courses, what I try to do is have students understand how those interact, that law and politics are connected in many ways, but they're different at the same time, and AGs and their staff have to wrestle with that.

When I do talk about AGs in my courses, I try to really emphasize how, yes, this is part of the civil litigation process. And so bringing that, the pieces of civil litigation and the investigations that lead to it and get them to understand how that works, but then also always have an eye on the big picture of what AGs are trying to do in the regulatory space.

You have to look at the big picture and understand the big picture of how notice and comment rulemaking, the traditional way of making regulatory policy, how that works on the federal level, but then how AGs are really extending that in many ways, particularly as the federal government and AGs work closer together to deal with numerous big picture issues and policy and regulatory issues.

So it's a lot to cover, but that's the thing, it may have been viewed in the past like, oh, having a course just on state AGs, that seems very specific, but in fact it's not because they are so active in so many areas now that you can really get some insights, not just about how the legal process works, but about how American politics works in many ways. It's really given an opportunity to talk a lot about a fascinating and important office of state AGs, but also more generally about how American politics, law and regulation works.

**Ashley Taylor:**

Well, I'm going to take a point of personal privilege here and ask you in the context of your comments about the states and the federal government to engage in a thought experiment with me around an article our team has written related to the federal government and its relationship with the state AGs.

We know that state AGs think through the impact of their activities relative to the federal government's actions or in some cases, inaction. And our article discusses whether or not state AGs should be considered a recognized fourth form of federal agency action for purposes of the Federal Administrative Process Act and related issues since we know from our team's perspective, and we put this in the article, that the agencies seem to be using states to expand their regulatory reach and advance their mission, and we outline it in various ways.



I wonder, would you comment on our theory in terms of how we see these two forces moving together to really create something new that should be recognized by courts?

**Paul Nolette:**

Yeah, and I definitely encourage the listeners to read that article because I think it really nicely puts AG activities in perspective, really outlining how what AGs are doing in the regulatory policymaking space is really a distinctive and important form of policymaking in addition to the typical notice and comment, adjudications and other forms of agency policy making.

And the reason for this is that in the last 10 to 15 years in particular, AGs have worked closely with the federal government on some really big issues that affect entire industries. During the Obama administration and thinking about banks, a number of settlements there, now with a lot of data privacy and tech issues.

There are some broader industry changes that are happening that again, with a lot of these settlements, it looks like regulation, even when you look at the settlements themselves and what the AGs and increasingly agencies as well as the U.S. DOJ are trying to pursue. I think that article puts that in perspective, and I think it is worth thinking about AGs as a relatively new form of regulatory policy making, but one that arguably is at least as important as the traditional ways of making policy.

**Ashley Taylor:**

Right, and that has all types of implications. Once you recognize the state AG coordinated activity as regulatory policy making, that has all types of implications relative to what type of information is public or accessible to the public, what type of information a company that is trying to comply with the law should be able to access.

For example, a number of these settlements involve monitors and assessors post settlement, and that really lays out the guidepost that states are using to determine whether or not companies are complying with the law as they lay it out in their settlement agreements. And the question is, should that become part of the public discussion? Because if it's guiding the regulator, should it be something that companies can see and understand so that they can craft compliance policies?

Again, it has all types of broader implications once you separate the enforcement function from the regulatory function that a state AG can engage in. It just has all types of interesting implications.

**Paul Nolette:**

It does, and the point about monitors is an interesting one too. And I think that might help really frame this and put this in perspective about how AGs are not just enforcers, but there's something of a regulatory agency themselves. Because these monitors, first of all, they've become a lot more common in AG settlements as well as federal settlements, and sometimes they act jointly and have a monitor who's overseeing compliance down the line with a settlement. That's AGs having oversight about implementation too, which is what we think about agencies doing, and those monitors can last years.

So it can be a way for AGs to have an impact not just on shaping corporate conduct through a one-off settlement, but having that continuous oversight of a company and industries that continues well beyond the signing of a settlement. In that sense, they look a lot like regulatory agencies.

**Ashley Taylor:**

In one of our earlier podcasts this year, we had a guest who focuses on monitoring and assessment, and he described the benefits to the state AGs as you've described it, and he also described the benefits to the companies. It's a function that's worked for both entities and has really become more of a routine tool that's been used to move a matter forward in a way that benefits all parties.

Let me take our last couple of minutes and ask you to look into your crystal ball and comment upon what you think we should be looking for over the next couple of years in the state AG world.

**Paul Nolette:**

I think a lot of their attention to major consumer concerns and perceived problems in various industries, again, whether it's the pharmaceutical industry, financial sector, various large sectors of the American economy, I expect AGs to be very much still major players. I would expect additional collaboration between AGs and federal agencies, including establishing these monitors that, as you mentioned, can have benefits for both sides, and that's going to become more common as well.

One thing to look out for, again, putting my politics and political science hat on here a bit, is looking at how many new tensions there are between AG offices. We've mentioned a little bit earlier about how there's been some tension between particularly Republican AGs and the National Association of Attorneys General.

In our highly polarized politics these days, AGs are no exception and they've become very prominent. Some of their most prominent actions are pushing back against the federal government, suing the federal government. And you have a lot of Republican AGs who say, "I don't like what's coming out of Washington. I don't like what the Biden administration's regulatory priorities are, so we're going to sue early and often." And you have Democratic AGs who sometimes even in the same lawsuit, will oppose their Republican AG colleagues.

Now, that's a little bit different than the more bipartisan regulatory space that we've been talking about here, but I am curious to know how they're going to affect one another. I mean, a lot of this regulatory space, its staff work on a bipartisan basis, but to what extent are these increasing tensions politically going to affect things in the future years is something that I'm looking out for too.

And I think for corporations, industries, businesses that are potentially being investigated or in active litigation with AGs, those are all relevant concerns because it does shape how they think about what they're doing on all their levels, including in civil litigation.

The politics of all that, going back to one of the big themes here about AG offices being a blend of politics and law, as AGs have gotten more split on partisan lines, how does that affect the whole regulatory space moving forward, I think will be a really interesting question over the next two to five years.

**Ashley Taylor:**

Well, you've given us a number of things to watch, and I hope you're open to coming back as these trends develop and perhaps commenting on them, and we can gauge how well you were able to see into your crystal ball.

**Paul Nolette:**

I really enjoyed this conversation and happy to keep tracking this activity as we move forward and see what sort of new trends emerge in what is a really important and a really interesting office of the state AG.

**Ashley Taylor:**

Well, I want to thank you again, Professor Nolette for joining us today, and I know our listeners enjoyed your insights as much as I did.

I want to thank our audience for tuning in today. Please make sure to subscribe to this podcast via Apple Podcasts, Google Play, Stitcher, or whatever platform you use. And we look forward to next time. Thank you.

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