

REPORT ON POLICIES AND PRACTICES OF STATE ATTORNEYS GENERAL

IN INITIATING AND CONDUCTING INVESTIGATIONS AND LITIGATION

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Abstract

It has been observed that at least some State Attorney General offices (“State AGs”) have, in recent years, taken on increasingly active roles in targeting alleged wrongdoing, including matters that cross state lines.¹ It is perhaps less clear what specific policies and procedures are – or are not – in place that govern such activities, as well as how much variability exists across states. This study, sponsored by the U.S. Chamber Institute for Legal Reform (“ILR”), aims to illuminate these issues as it relates to the policies and practices of State AGs in initiating and conducting investigations and litigation. To accomplish this objective, we surveyed the 51 State AGs. Approximately 27 percent (14) provided responses.

Based upon the responses received, this report indicates that:

- (1) Most participating State AGs do not have set standards governing whether to launch an investigation, but do have an official process for initiating an investigation.
- (2) No State AGs were able to cite to state laws, regulations, office policies or ethical rules that require notice be provided to a defendant company prior to bringing criminal charges, though a minority of participating State AGs have state laws requiring notice prior to bringing civil charges. A majority of participating State AGs do have an office policy requiring such notice.
- (3) The majority of participating State AGs indicated having state laws or regulations governing public statements by their office regarding a pending investigation or ongoing litigation. All participating State AGs stated that office policies or applicable ethical rules govern their public statements.
- (4) All participating State AGs have participated in one or more multi-state litigation matters, though only a minority have initiated a multi-state case.² All participating State AGs have been involved in one or more settlements involving multi-state litigation.

¹ See e.g., Reason, Tim, “The Spitzer Backlash,” *CFO Magazine*, March 2006: 44. (http://www.cfo.com/article.cfm/5598485/c_5620756?f=magazine_coverstory)

² The relevant time period addressed in the questions covered the period of January 1, 2003 to the present, or from the time the current State Attorney General has been in office.

- (5) Almost half of participating State AGs have hired outside counsel on a contingent fee basis – typically citing specialized expertise as the justification. The contingent fees ranged from one percent³ to 25 percent of potential awards / settlements. All participating State AGs reported having an office policy addressing potential conflicts of interest that could arise when hiring outside counsel; some State AGs cited regulations governing such matters.
- (6) All participating State AGs cite to laws, and a majority of State AGs also have office policies or ethical rules, that dictate, in at least some circumstances, the manner in which funds from settlements, penalties, fines and awards are distributed when not determined by court order. The majority of participating State AGs indicated that, in at least some cases, they exercise discretion in determining the disposition of funds (*i.e.*, cases not covered by state law, regulation, office policy, or ethical rules). The specific causes to which such funds are directed vary on a “case by case” basis, although participating State AGs contend that such determinations are made “rationally” (*e.g.*, in a manner intended to benefit consumer groups allegedly harmed).

³ One respondent noted that its contingent fee arrangements are as low as 0 percent. It may be the case that a contingency fee of 0 percent reflects the result of an unfavorable outcome.

Section I – Introduction

As chief legal officers of the United States, State Attorneys General serve as counselors to state government agencies and legislatures, and as representatives of the public interest.⁴ Most State Attorneys General are elected through state-wide voting, though in a few states the appointment is made by the Governor, State Legislature, or State Supreme Court.⁵

It has been observed that at least some State AGs have, in recent years, taken on increasingly active roles in targeting alleged wrongdoing, including matters that cross state lines.⁶ It is perhaps less clear what specific policies and procedures are – or are not – in place that govern such activities by State AGs, as well as how much variability exists across states.

By surveying the 51 State AGs,⁷ we hoped to gain insight into these issues, including the relevant statutes and policies governing the initiation and conduct of investigations and litigation, the extent to which State AGs have policies governing public statements related to investigations or litigation, and the delineation of responsibilities / authority within the State AGs. The State AGs use of contingent fee counsel and the extent of their participation in multi-state litigation were identified as other areas of interest.

It is our understanding that in August 2006, the ILR undertook a survey addressing these same general issues; however, we understand the level of participation to have been very low. In March 2007, the ILR retained Navigant Consulting, Inc. (“NCI”) to administer a revised survey.

⁴ See web site for The National Association of Attorneys General (http://www.naag.org/about_naag.php).

⁵ State Attorneys General are governor appointments in Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming. In Maine, the Attorney General is selected by secret ballot of the legislature, and in Tennessee, by the State Supreme Court. In the District of Columbia, the Mayor appoints the Attorney General. See web site for The National Association of Attorneys General (http://naag.org/how_does_one_become_an_attorney_general.php)

⁶ See *e.g.*, Reason, Tim, “The Spitzer Backlash,” *CFO Magazine*, March 2006: 44. (http://www.cfo.com/article.cfm/5598485/c_5620756?f=magazine_coverstory)

⁷ The State AGs for the 50 states plus the District of Columbia. A complete listing of the 51 State Attorneys General, as well as the date he/she took office, is included as Appendix A.

The rest of this report is structured as follows. Section II describes the survey instrument used. Section III details the administration of the survey. Section IV presents the results of the survey, and conclusions are presented in Section V. Appendix A lists the 51 State Attorneys General and identifies the 14 State AGs that participated in the survey. A copy of the actual survey instrument is included as Appendix B, while Appendix C details the number of responses to each survey question (not all respondents chose/were able to answer all questions).

Section II – The Survey Instrument

The survey was designed to identify the extent to which certain laws, policies and practices guide each State AG as it relates to initiating and conducting investigations and litigation. Many of the questions also focused on the distinction between governing state laws and regulations versus office policies and applicable ethical rules. The survey itself, which has been included as Appendix B, contained 55 questions and was divided into seven sections:

- I. Initiation of Investigations
- II. Notification Prior to Initiating a Lawsuit
- III. Public Statements About an Investigation or Litigation
- IV. Participation in / Initiation of Multi-State Litigation⁸
- V. Use of Contingent Fee Counsel
- VI. Handling of Settlements, Penalties, Fines and Awards
- VII. Opportunity to Provide Other Comments

These topical areas were identified by the ILR, which sponsored this report. The survey instrument was developed by NCI and was based on a questionnaire originally created by the ILR.

Section III – Administration of the Survey

This section describes the specific manner in which the survey was administered. On May 23, 2007, subsequent to the ILR's retention of NCI, a letter was sent to

⁸ The relevant time period addressed in the questions covered the period of January 1, 2003 to the present, or from the time the current State Attorney General has been in office.

each of the 51 State AGs by Lisa Rickard, president of the ILR, announcing that the survey would be forthcoming, indicating that it would be administered by NCI, and requesting participation by the State AGs (“Notification Letters”).

The Notification Letters were followed by e-mails sent by NCI in early June 2007, to the extent e-mail addresses for the State AGs could be identified.⁹ In total, NCI sent e-mails to 31 State AGs. The e-mail contained electronic copies of both the survey¹⁰ and a confidentiality agreement.¹¹ The remaining 20 offices were contacted by telephone in the days that followed, which led to the survey being delivered to 17 more State AGs either by e-mail or fax, depending on the preference of each individual office.¹²

Following attempted delivery of the survey instrument and confidentiality agreements to all 51 State AGs, we contacted each of the State AGs, on average, over six times (no office was contacted fewer than three times¹³) through a variety of methods including mail, e-mail, telephone and fax to follow up on the status of the survey. When NCI made contact, we specifically requested that we be forwarded to the appropriate individual(s) in the office who could speak to the issues described in the survey. The specific titles and roles of the individuals with whom we were put in contact varied by office.

As shown in Figure 1 below, 14 State AGs (27 percent) completed the survey, 19 State AGs (37 percent) expressly stated they did not wish to participate in the survey,¹⁴ and the remaining 18 State AGs (35 percent) did not respond to our repeated requests. A list of the State Attorneys General, along with an indication as to whether their office responded to the survey, can be found in Appendix A.

⁹ When available, e-mail addresses for the State Attorneys General were used. Otherwise, when available, e-mail addresses generic to the office were used.

¹⁰ See Appendix B for a copy of the survey instrument.

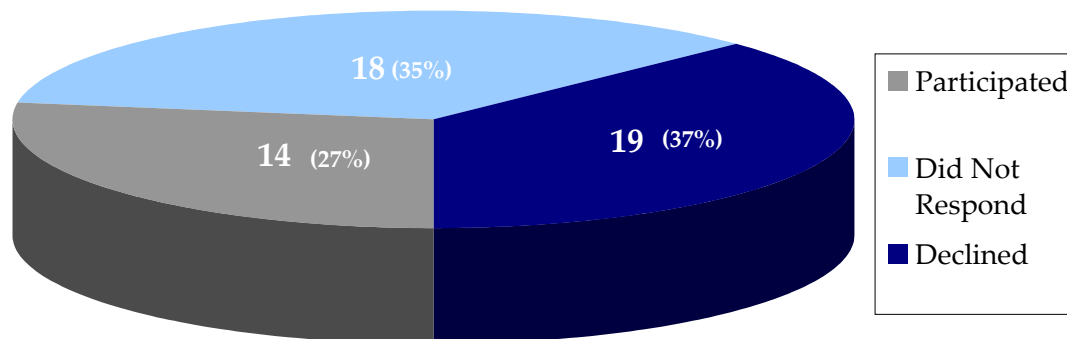
¹¹ The confidentiality agreement specified that responses of State AGs would not be shared with any third party, including the ILR, and that survey results would be presented only in the aggregate or in some other anonymous form. Several State AGs chose not to return the confidentiality agreement and a few expressly waived the offered confidentiality. Nevertheless, NCI has not disclosed any specific responses to any third party nor have we attributed responses to any particular State AG.

¹² The survey was not delivered to three State AGs who verbally declined to participate prior to receiving the survey.

¹³ Excludes three offices that verbally declined to participate prior to receiving the survey.

¹⁴ For the 19 State AGs that declined to participate in the survey, we attempted to learn why. While the majority of these State AGs chose not to divulge their reason(s), four offices replied they did not have time and two offices stated it is their policy not to respond to surveys.

Figure 1



Of the 14 State AGs that provided responses, nine offices (64 percent) are affiliated with the Republican party and five offices (36 percent) are affiliated with the Democratic party.¹⁵

State AGs were instructed they could fill out the survey in writing or that they could provide verbal responses pursuant to a telephonic interview. Of the 14 responses received, three were provided via telephone and 11 were provided in written form. Of the 11 written responses, three offices responded in the form of a letter rather than completing the survey instrument. For these three, we had to map the responses to the corresponding questions in the survey.

¹⁵ Of the 51 State AGs, 19 (37 percent) are affiliated with the Republican party and 32 (63 percent) are affiliated with the Democratic party. See web site for the Democratic Attorneys General Association. (<http://www.democraticags.org>)

Section IV – Survey Results

The survey results are set forth below. The numbers corresponding to the questions in the survey instrument appear in the left margin (the actual survey instrument that was sent to the State AGs is included as Appendix B). Some State AGs did not respond to certain questions in the survey.¹⁶ As a result, percentages reflected in this section were determined based on the number of State AGs that responded to that specific question (“participating State AGs”). See Appendix C for the number of responses provided for each question.

I. Initiation of Investigations

Questions
I.A.1-4

The majority of survey participants do not have a standard governing the determination of whether to launch an investigation.

Fifty-four percent (7 of 13) of State AGs stated there is no established standard governing the determination of whether to launch an investigation. Generally speaking, these states make the determination as to whether to launch an investigation by evaluating each matter on a “case by case” basis. Standards that do exist include requiring states to have “good cause,” “probable cause that the law has been violated” or “reasonable cause... that a violation has occurred.”

Of the six State AGs that cited to an official standard, all six require the State Attorney General or Assistant State Attorney General to personally conclude that the standard has been met, although one of the six specified that this only pertained to “large or high profile matters”. Four participants indicated that their office formally memorializes this approval with a memorandum or in some other form.

Questions
I.B.5-6

The vast majority of participants have an official process for the initiation of an investigation.

Seventy-three percent (8 of 11) of State AGs have an official process for initiating an investigation. Processes vary from state to state, but include:

¹⁶ Some questions were skipped by design based on negative responses to antecedent questions. For example, participants were able to bypass the majority of Section V if the office did not use contingent fee counsel. In other cases, despite our attempts to followup, some State AGs opted not to answer some of the questions either in whole or part.

- “[S]creening protocol [applied] by chief deputy and/or screening committee”;
- Preparing memoranda;
- Getting the “approval of Division Director” or “Deputy Attorney General”;
- Once the investigation has been approved, the case is “assigned [a] case number” and “entered into [the state’s] case management system.”

Questions
I.B.7-9

Individuals within the State AG with authority to open an investigation vary from state to state and range from investigators and staff attorneys to the Deputy Attorney General, the Director of the Division, or the Attorney General personally.

Fifty-five percent (6 of 11) of State AGs indicated that either the Deputy Attorney General, Chief Deputy Attorney General, or the Director of the Criminal Division, Consumer Division, or Civil Division has the authority to open an investigation. These individuals are generally not required to get approval from some higher authority, but “in some cases,” an investigation must be approved by either the Chief Deputy Attorney General or the State Attorney General. Thirty-six percent (4 of 11) of State AGs reported investigators or staff attorneys may initiate investigations; however, they must request authority to do so from either a Section Chief or, in “major investigations” or “high-profile cases,” the State Attorney General. The remaining office replied that only the State Attorney General him/herself can open an investigation.

Question
I.B.10

State AGs are made aware of the issues meriting an investigation through a variety of sources.

Participating State AGs noted that issues meriting investigation typically come to the attention of the State AGs through various sources, including a pattern of consumer or business complaints, news reports, referrals from government officials, and/or action by the federal government. On average, participating State AGs (9) replied that 53 percent of issues meriting an investigation are brought to their attention through consumer complaints. Other methods through which participating State AGs are made aware of issues meriting an investigation are the following: recommendation from someone inside state government (18 percent), news reports (9 percent), federal government actions (7 percent), and recommended by a private law firm (3 percent). Other sources of information, comprising 10 percent in the aggregate, included local law enforcement, district attorneys’ offices, and insurance companies.

II. Notification Prior to Initiating a Lawsuit

Questions II.A.1-4

None of 11 participating State AGs cited state laws, regulations, office policies or ethical rules requiring that notice be provided to a defendant company prior to bringing criminal charges.

Questions II.B.5-8

A minority of participating State AGs cited state laws or regulations requiring that notice be provided to a defendant company prior to bringing civil charges. The majority of participating State AGs do have an office policy governing the initiation of civil charges.

Twenty-nine percent (4 of 14) of State AGs indicated that, “in some matters” or “in specific causes of action,” there are state laws or regulations requiring notice be given to a defendant company prior to filing a civil complaint. One office reported having existing laws with built-in exceptions for cases where a delay in bringing civil charges “could cause irreparable harm.”

Fifty percent (6 of 12) of State AGs have a policy of notifying a potential defendant company prior to the filing of a civil complaint. Five of those six offices replied that this notification is generally followed by some type of negotiation. Specifically, State AGs reported that notification is provided “in order to resolve [the matter] without litigation,” in an effort to “ask for explanation and/or attempt to settle,” and that “most cases are resolved through informal efforts, and generally only when those efforts have failed will civil litigation ensue.” One State AG replied that defendant companies are typically aware that they are the targets of a civil investigation because virtually all civil complaints follow a period of formal investigation.

III. Public Statements About an Investigation or Litigation

Questions III.A.1-4

The majority of participating State AGs have state laws or regulations, and all have office policies or applicable ethical rules, that govern public statements by the office regarding a pending investigation.

Seventy-five percent (9 of 12) of State AGs have strict laws governing public statements about pending investigations, and all participating State AGs reported having office policies or applicable ethical rules governing such statements. Specifically, six State AGs cited their state’s rules of professional conduct, and five State AGs responded that they have an office policy that precludes them from making any public statements about pending

investigations. One office indicated that public statements about pending investigations are made “rare[ly],” while another office reported that “only the [State] AG and the [] Public Information Officer and her designees are authorized to speak about ongoing investigations.”

Questions
III.B.5-8

The majority of participating State AGs cited to their state’s rules of professional conduct when asked what governs public statements made by their offices during litigation.

When it comes to litigation, sixty-nine percent (9 of 13) of State AGs cited to their state’s rules of professional conduct as governing public statements made by their offices during litigation. Two offices reported having state laws/regulations other than the rules of professional conduct, while all participating State AGs reported having some office policy or ethical rules governing public statements about such cases. These policies are generally intended “to not shape public opinion or sway the case,” and include “limit[ing] comment prior to conviction to what is contained in [the] public record.”

Questions
III.B.9-12

The majority of the participating State AGs differentiate between statements that can be made pre- and post-indictment and 90 percent differentiate with respect to pre- and post-trial statements.

Fifty-six percent (5 of 9) of State AGs reported that they differentiate between statements that can be made pre- versus post-indictment, with two offices specifying that, as a general rule, no statements are made pre-indictment.

Ninety-one percent (10 of 11) of State AGs reported that they differentiate between statements that can be made pre- versus post-trial. Seven offices specifically referenced their state rules of professional conduct as their guidepost. One State AG replied that statements made pre-trial are “more strictly constrained” while another office replied that “pre-trial limit as much as possible, post-trial announce results of trial.” Another State AG responded that “it is unethical and unprofessional to discuss the merits of a case pending before the judiciary.” The State AG that reported not differentiating between pre- and post-trial statements replied that “by and large, comments are restricted to events [that have] occurred and comments [that have been] filed.”

While half of participating State AGs have laws or regulations providing for disciplinary action against making an unauthorized public statement, all participating State AGs reported having office policies or ethical rules to such effect.

Fifty percent (5 of 10) of State AGs cited state laws or regulations providing for disciplinary action against making an unauthorized public statement. Three of these offices cited Grand Jury Secrecy Statutes, while another office stated, “to disclose a criminal investigation prior to indictment can give rise to criminal sanctions by law.” All 11 participating State AGs cited to office policies or ethical rules providing for disciplinary action against making an unauthorized public statement. One office stated that inappropriate comments “would be treated as a form of employee misconduct which could result in suspension, or termination in extreme cases.”

IV. Multi-State Litigation

The questions in this section relate to the period since January 1, 2003, or since the State Attorney General was elected/appointed if it was after January 1, 2003.¹⁷

Question
IV.1

All participating State AGs reported having participated in multi-state litigation. On average, each office has participated in 35 multi-state cases.

Of the 12 participating State AGs, all reported having participated in multi-state litigation, though four offices were unable to specify how many.¹⁸ The involvement of the remaining eight State AGs in multi-state cases ranged from five to 106, with a median of 22.¹⁹

Question
IV.2

Thirty percent (3 of 10) of State AGs reported having initiated multi-state litigation. Of those three offices, the number of multi-state cases initiated ranged from two to five.

Question
IV.3

All participating State AGs reported having participated in multi-state settlements. On average, each office has taken part in 14 multi-state settlements.

Of the 12 State AGs responding to this question, all reported having participated in multi-state settlements, though four offices were unable to specify how

¹⁷ Forty-two percent (5 of 12) of participating State AGs took office prior to January 1, 2003.

¹⁸ These State AGs reported being unable to provide complete answers to the questions in this section because their offices do not track these statistics.

¹⁹ The number of multi-state litigation matters in which State AGs participated varied greatly, due in part to length of tenure.

many.²⁰ The involvement of the remaining eight State AGs in multi-state settlements ranged from four to 34, with a median of ten.²¹

V. Contingent Fee Counsel

Questions V.A.1-3

Almost half of participating State AGs reported having hired outside counsel on a contingent fee basis.

Forty-three percent (6 of 14) of State AGs have hired outside counsel on a contingent fee basis. Only one of the participating State AGs appears to have hired contingent fee counsel on more than a half-dozen occasions. Most participating State AGs that have not hired contingent fee counsel cite various state laws, office policies, and/or ethical rules as the reason; however, another office that had not hired contingent fee counsel replied it was “not against [hiring] contingent fee counsel, but believe it should be used only as a last resort, as it could undermine the office’s role as a consumer advocate.” One State AG cited its practice of appointing Special Assistant State Attorneys General rather than contingent fee counsel.

Question V.A.4

The majority of participating State AGs that provided an explanation for hiring contingent fee counsel cited the need for expertise as a justification.

Eighty-three percent (5 of 6) of State AGs reported the need for expertise as warranting the hiring of contingent fee counsel. Additional reasons provided were “insufficient staff,” limited resources, and “where upfront costs are high and outside counsel covers those costs.” The State AG that did not cite the need for specialized expertise replied that hiring contingent fee counsel was warranted “when the AG deems it appropriate to protect the interests of the state.”

Questions V.A.5-8

Twenty-nine percent (2 of 7) of participating State AGs cited state laws or regulations and one-hundred percent reported having an office policy addressing potential conflicts of interest raised by the hiring of outside law firms, including the completion of conflict waiver forms, conducting interviews, “waiv[ing] insignificant conflicts,” or “requiring outside counsel to eliminate significant conflicts as a condition of contract.”

²⁰ These State AGs reported being unable to provide complete answers to the questions in this section because their offices do not track these statistics.

²¹ The number of multi-state settlements in which State AGs participated varied in part due to length of tenure.

Question
V.B.9

Contingent fee contracts negotiated by participating State AGs (4) have ranged from one percent²² to 25 percent.

Questions
V.B.10

Participating State AGs take into account several factors in determining appropriate contingent fee percentages.

Three participating State AGs indicated that the “size of claim” and the “amount of effort likely required by counsel” were factors taken into account in setting the contingent fee percentage. Two of the three State AGs also identified the “probability of success” and the “customary percentage in the marketplace” as relevant factors in determining such percentages. The other State AG noted that there was an “expectation of a discount for governmental clients.”

Question
V.B.11

Some participating State AGs require contingent fee counsel to provide time and expense detail.

Half of the participating State AGs (4) reported that outside counsel must provide the State AGs with an accounting of time spent on a matter as well as associated expenses. One office only requires documentation for expenses, while the remaining office requires neither time nor expenses to be documented.

Questions
V.B.12-13

All of the participating State AGs require the approval of the State Attorney General (or a representative) prior to entering into contingent fee contracts.

Of the seven participating State AGs, five reported requiring the approval of the State Attorney General him/herself, while the other two State AGs indicated that either the Deputy State Attorney General or a representative for the Attorney General could also approve contingent fee contracts.

VI. Handling of Settlements, Penalties, Fines and Awards

Questions
VI.1-4

All participating State AGs cited to laws, and several also cited to office policies or ethical rules, that dictate, at least in some circumstances, where funds from settlements, penalties, fines and awards are directed when not determined by court order.

One-hundred percent (13 of 13) of State AGs replied that state law or regulation

²² One respondent noted that its contingent fee arrangements are as low as 0 percent. It may be the case that a contingency fee of 0 percent reflects the result of an unfavorable outcome.

dictates how settlements, fines and awards are distributed, at least in some circumstances. While specific statutes differ from state to state, five states reported that settlement proceeds are generally deposited in the state's general fund. One state has a law dictating that "fines, penalties and forfeitures are remitted for the benefit of the state's public schools." Meanwhile, fifty-six percent (5 of 9) of State AGs have office policies or ethical rules dictating how such funds are distributed when not specified by law. The only state to elaborate on their policy reported that it "allows money recovered that cannot be reasonably distributed back to the actual victim(s) to benefit the class of consumers and/or businesses that were harmed."

Question
VI.5

The majority of participating State AGs indicated that, in at least some cases, they exercise discretion in determining the disposition of funds (i.e., cases not covered by state law, regulation, office policy, or ethical rules).

When state law, regulation, office policy or ethical rules do not cover the disposition of funds from settlements, penalties, fines and awards, the specific causes to which State AGs direct such funds varies on a "case by case" basis, although participating State AGs contend that such determinations are made "rationally" (e.g., benefiting consumer groups allegedly harmed). Specifically, when discretion applies, eighty-three percent (5 of 6) of State AGs distribute funds based on *cy pres* ("next best") distribution, their "best judgment," or "generally" giving to "needy projects" or charities. The remaining State AG reported directing such funds toward the State AG's "indicated primary focus" areas (i.e., law enforcement and public safety).

Section V – Conclusions

Based upon the responses received, this report indicates that:

- (1) Most participating State AGs do not have set standards governing whether to launch an investigation, but do have an official process for initiating an investigation.
- (2) No State AGs were able to cite to state laws, regulations, office policies or ethical rules that require notice be provided to a defendant company prior to bringing criminal charges, though a minority of participating State AGs have state laws requiring notice prior to bringing civil charges. A majority of participating State AGs do have an office policy requiring such notice.
- (3) The majority of participating State AGs indicated having state laws or regulations governing public statements by their office regarding a pending investigation or ongoing litigation. All participating State AGs stated that office policies or applicable ethical rules govern their public statements.
- (4) All participating State AGs have participated in one or more multi-state litigation matters, though only a minority have initiated a multi-state case.²³ All participating State AGs have been involved in one or more settlements involving multi-state litigation.
- (5) Almost half of participating State AGs have hired outside counsel on a contingent fee basis – typically citing specialized expertise as the justification. The contingent fees ranged from one percent²⁴ to 25 percent of potential awards / settlements. All participating State AGs reported having an office policy addressing potential conflicts of interest that could arise when hiring outside counsel; some State AGs cited regulations governing such matters.

²³ The relevant time period addressed in the questions covered the period of January 1, 2003 to the present, or from the time the current State Attorney General has been in office.

²⁴ One respondent noted that its contingent fee arrangements are as low as 0 percent. It may be the case that a contingency fee of 0 percent reflects the result of an unfavorable outcome.

(6) All participating State AGs cite to laws, and a majority of State AGs also have office policies or ethical rules, that dictate, in at least some circumstances, the manner in which funds from settlements, penalties, fines and awards are distributed when not determined by court order. The majority of participating State AGs indicated that, in at least some cases, they exercise discretion in determining the disposition of funds (i.e., cases not covered by state law, regulation, office policy, or ethical rules). The specific causes to which such funds are directed vary on a “case by case” basis, although participating State AGs contend that such determinations are made “rationally” (e.g., in a manner intended to benefit consumer groups allegedly harmed).

Appendix A – Listing of 51 State Attorneys General Offices

	State AG Office	Current Attorney General	Took Office	Participated in Survey
1.	Alabama	Troy King	2004	X
2.	Alaska	Talis J. Colberg	2006	
3.	Arizona	Terry Goddard	2003	
4.	Arkansas	Dustin McDaniel	2007	
5.	California	Edmund G. "Jerry" Brown Jr.	2007	
6.	Colorado	John Suthers	2005	X
7.	Connecticut	Richard Blumenthal	1991	
8.	Delaware	Joseph "Beau" Biden	2007	
9.	District of Columbia	Linda Singer	2007	X
10.	Florida	Bill McCollum	2007	
11.	Georgia	Thurbert E. Baker	1997	X
12.	Hawaii	Mark J. Bennett	2003	
13.	Idaho	Lawrence Wasden	2003	
14.	Illinois	Lisa Madigan	2003	
15.	Indiana	Steve Carter	2001	X
16.	Iowa	Tom Miller	1995	
17.	Kansas	Paul Morrison	2007	
18.	Kentucky	Greg Stumbo	2004	
19.	Louisiana	Charles Foti	2004	
20.	Maine	G. Steven Rowe	2001	
21.	Maryland	Douglas F. Gansler	2007	
22.	Massachusetts	Martha Coakley	2007	
23.	Michigan	Mike Cox	2003	
24.	Minnesota	Lori Swanson	2007	
25.	Mississippi	Jim Hood	2004	X
26.	Missouri	Jeremiah W. (Jay) Nixon	1993	
27.	Montana	Mike McGrath	2001	
28.	Nebraska	Jon Bruning	2002	
29.	Nevada	Catherine Cortez Masto	2007	
30.	New Hampshire	Kelly Ayotte	2004	
31.	New Jersey	Stuart Rabner	2007	
32.	New Mexico	Gary King	2007	
33.	New York	Andrew Cuomo	2007	
34.	North Carolina	Roy Cooper	2001	X
35.	North Dakota	Wayne Stenehjem	2001	X
36.	Ohio	Marc Dann	2007	
37.	Oklahoma	W. A. Drew Edmondson	1995	
38.	Oregon	Hardy Myers	1997	X
39.	Pennsylvania	Tom Corbett	2005	X

	State AG Office	Current Attorney General	Took Office	Participated in Survey
40.	Rhode Island	Patrick Lynch	2003	
41.	South Carolina	Henry McMaster	2003	
42.	South Dakota	Larry Long	2003	
43.	Tennessee	Robert E. Cooper, Jr.	2007	
44.	Texas	Greg Abbott	2002	
45.	Utah	Mark Shurtleff	2001	X
46.	Vermont	William H. Sorrell	1997	
47.	Virginia	Bob McDonnell	1996	X
48.	Washington	Rob McKenna	2005	X
49.	West Virginia	Darrell V. McGraw Jr.	1993	
50.	Wisconsin	J.B. Van Hollen	2007	X
51.	Wyoming	Pat Crank	2003	

STATE ATTORNEYS GENERAL SURVEY POLICIES AND PRACTICES

ABOUT THE SURVEY

- » The survey contains 55 questions (many are yes/no) and should take approximately 45 minutes to complete.
- » Your responses will be held in confidence by Navigant Consulting, Inc. (“NCI”) and will not be shared with any third-party. Survey results will be presented only in the aggregate or in some other anonymous form. NCI reserves the right to identify those offices that do not participate in the survey.
- » Section VII (“Other Comments”) is provided at the end of the survey in the event you need more room to respond to a question, or would like to make any additional comments.

I. Initiation of Investigations

A. Standard(s) Governing Initiation of Investigations

1. Is there a standard that governs the determination of whether to launch an investigation?

YES _____ NO _____

2. If yes, what is it? (If no, skip to Question 5)

3. Must the AG conclude the standard has been met?

YES _____ NO _____

4. How is such a finding memorialized, if at all?

B. Process of Initiating Investigations

5. Is there an official process for the initiation of an investigation?

YES _____ NO _____

STATE ATTORNEYS GENERAL SURVEY
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6. If yes, please briefly describe the process.

7. Who within your office is authorized to open an investigation?

8. Are those persons required to obtain approval?

YES ____ NO ____

9. If yes, from whom?

10. How does an issue meriting an investigation come to the attention of the AG's office?
(Please indicate approximate percentage each is applicable.)

Recommended by someone inside state government _____%

Recommended by a private law firm _____%

Begun based on news reports _____%

Begun based on or following action by the federal government _____%

Other (please describe below) _____%

II. Notification Prior to Initiating a Lawsuit

A. Criminal Charges

1. Does state law / regulation require that notice be given to a defendant company prior to bringing criminal charges?

YES _____ NO _____

2. If yes, please describe.

3. Does office policy or applicable ethical rules require that notice be given to a defendant company prior to bringing criminal charges?

YES _____ NO _____

4. If yes, please describe.

B. Civil Complaint

5. Does state law / regulation require that notice be given to a defendant company prior to filing a civil complaint?

YES _____ NO _____

6. If yes, please describe.

7. Does office policy or applicable ethical rules require that notice be given to a defendant company prior to filing a civil complaint?

YES _____ NO _____

8. If yes, please describe.

III. Public Statements About an Investigation or Litigation

A. Investigations

1. Are there state laws or regulations that govern public statements by your office about a pending investigation?

YES _____ NO _____

2. If yes, please describe.

3. Are there office policies or applicable ethical rules that govern public statements by your office about a pending investigation?

YES _____ NO _____

4. If yes, please describe.

B. Litigation

5. Are there state laws or regulations that govern public statements by your office about a case in litigation?

YES _____ NO _____

6. If yes, please describe.

7. Are there office policies or applicable ethical rules that govern public statements by your office about a case in litigation?

YES _____ NO _____

8. If yes, please describe.

9. Does your office differentiate between statements that can be made pre-indictment vs. post-indictment?

YES _____ NO _____

10. If yes, please describe the nature of the differentiation.

11. Does your office differentiate between statements that can be made pre-trial vs. post-trial?

YES _____ NO _____

12. If yes, please describe the nature of the differentiation.

C. Disciplinary Action

13. Are there state laws or regulations providing for disciplinary action against someone in your office making an unauthorized public statement?

YES _____ NO _____

14. If yes, please specify.

15. Are there office policies or applicable ethical rules providing for disciplinary action against someone in your office making an unauthorized public statement?

YES _____ NO _____

16. If yes, please specify.

IV. Multi-State Litigation

The questions in this section relate to the period since January 1, 2003, or since you became AG if it was after January 1, 2003.

1. In how many multi-state cases has your office participated?

2. How many multi-state cases has your office initiated?

3. In how many multi-state settlements has your office participated?

V. Contingency Fee Counsel

A. Retention

1. Has your office hired counsel on a contingent fee basis?

YES _____ NO _____

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2. If no, why not?

_____ State law / office policy

_____ Opportunity has not presented itself

_____ Other (please describe below)

(Please now skip to Section VI)

3. If yes, for how many separate cases has your office hired contingent fee counsel?

4. Under what circumstances do you view the hiring of contingent fee counsel to be warranted?

5. Are there state laws or regulations in place concerning potential conflicts of interest raised by the hiring of outside law firms (e.g., entering into contracts with firms that have made political contributions to the AG's campaign)?

YES _____ NO _____

6. If yes, please specify.

7. Are there office policies or ethical rules in place concerning potential conflicts of interest raised by the hiring of outside law firms?

YES _____ NO _____

8. If so, please specify.

B. Structuring of Contingent Fee Contracts

9. What has been the range of contingent fee contracts (as a % of settlement) entered into by your office?

____% to ____%

10. What factors are taken into account in setting the contingent fee percentage in a contract? (please check all that apply)

____ Size of claim

____ Probability of success

____ Amount of effort likely required by counsel

____ Customary percentage in the marketplace

____ Other (please describe below)

11. Does your office require outside contingent fee counsel to provide your office with an accounting of time spent on a matter and associated expenses?

YES ____ NO ____

12. Do contingent fee contracts require approval by the Attorney General?

YES ____ NO ____

13. If no, please describe the approval required, if any.

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VI. Handling of Settlements, Penalties, Fines and Awards

1. If not determined by court order, does state law / regulation dictate the specific manner in which settlements, penalties, fines and awards are distributed?

YES ____ NO ____

2. If yes, please describe.

3. If not determined by court order, does office policy or applicable ethical rules dictate the specific manner in which settlements, penalties, fines and awards are distributed?

YES ____ NO ____

4. If yes, please describe.

5. If disposition of discretionary funds is not covered by state law / regulation, office policy or ethical rules, what criteria are used by the Attorney General to inform his or her discretion?

VII. Other Comments

Appendix C – Number of Responses to Each Survey Question

Section I

A.

- 1) 13
- 2) 10
- 3) 8
- 4) 7

B.

- 5) 11
- 6) 4
- 7) 11
- 8) 10
- 9) 7
- 10) 9

Section II

A.

- 1) 11
- 2) 0
- 3) 10
- 4) 1

B.

- 5) 14
- 6) 4
- 7) 12
- 8) 6

Section III

A.

- 1) 12
- 2) 9
- 3) 14
- 4) 14

B.

- 5) 13
- 6) 7
- 7) 13
- 8) 13
- 9) 9
- 10) 7
- 11) 11
- 12) 11

C.

- 13) 10
- 14) 5
- 15) 11
- 16) 9

Section IV

- 1) 12
- 2) 10
- 3) 12

Section V

A.

- 1) 14
- 2) 7
- 3) 5
- 4) 6
- 5) 7
- 6) 2
- 7) 7
- 8) 7

B.

- 9) 4
- 10) 3
- 11) 4
- 12) 7
- 13) 3

Section VI

- 1) 13
- 2) 13
- 3) 9
- 4) 3
- 5) 6