

Want to Know State AGs' Priorities? Just Look at Their Settlement Agreements, Says Troutman Pepper's Ashley Taylor

Taylor's team has coined the phrase the "common law of settlements" to describe how his team scours settlement agreements to parse the policy priorities of state attorneys general.

By Ross Todd
November 16, 2021

Ashley Taylor Jr., one of the leaders of the state attorneys general practice at Troutman Pepper, served as assistant attorney general in Virginia early in his career around the turn of the millenium. His team regularly represents data brokers, debt collectors, manufacturers, insurers and other consumer-facing companies in investigations and litigation spearheaded by the states. "We have a focus on state attorneys general because they have become the primary enforcer in many of these primarily consumer protection areas in places like privacy," Taylor said.

Late last week, the Litigation Daily caught up with Taylor to discuss how the firm has built the practice and why he advises clients to closely read settlement agreements the state AGs reach with competitors. "I tell people all the time...it will save you so much money," Taylor said. "That's how we give great advice, because we can say to your compliance officer, 'Here's your business practice. Here's how they will view it based on the priorities they're taking.'"

The following has been edited for length and clarity.

Litigation Daily: Give me the details of how you've built the state AGs practice at Troutman Pepper. How many lawyers do you have engaging with those folks?



Courtesy photo

Ashley Taylor, a partner with Troutman Pepper.

Ashley Taylor: So now we have nine partners, two of counsel and eight associates in our core state AG team. And our state AG team is embedded within our larger regulatory team. We have three former solicitor generals, two deputies, and a number of former assistant attorney generals. So we have experience in offices around the country, which gives us a national perspective. If you look at our roster, we have more senior lawyers like myself. Although I think of myself as a young lawyer, I'm not a young lawyer anymore. We also always add fresh, young talent from AG's offices every couple of years because

you have to have that perspective of the front line staffer, and the elected official. So we structure our teams so that we can both communicate and understand how the bureaucracy is analyzing our client's case, at every level.

So do all nine of those partners like you have experience in a state attorney general's office?

They actually don't, by design. Six do. Three don't.

Why is that important? You don't want to become myopic, right? So I was trained as a commercial litigator, and then I went to the AG's office. So when I came back to private practice in 2001, I wanted to blend the commercial litigation experience with the regulatory experience. But I immediately realized that when I am negotiating a case, when I'm arguing about whether a confidentiality provision would be embraced by a court, whether we need a protective order before we provide information, all of those touch on the litigation pieces that I used to do as a commercial litigator. So I found myself finding commercial litigation associates to bring into my cases.

Then I realized as we grow the team we always have to keep a balance. You'll never find our team working on a case with three people who've all been in AG's offices because, again, that's a little myopic. I'll incorporate someone who is a pure commercial litigator, usually a mid-level associate, with someone who has AG experience. And usually, we are including technical experts. So if it's a privacy case, I'm not a technical expert. I've worked on privacy cases since ChoicePoint back in 2004. But I wouldn't consider myself a technical expert. I rely on someone. I'm a forum and venue expert in terms of understanding how the agencies make decisions, understanding how to effectively position a client's case. But that's different than being someone who can do a deep dive into the technology. So we try to combine those three talents, knowledge of the AG's office, the subject matter expertise, along with the litigation expertise that you need to ground the team.

Why is that the approach?

For a couple of reasons. One, if you're arguing about something and negotiations reach an impasse and you need to go to court, you have to have the experience of having been in court to understand how to negotiate. Like me, you have to have been yelled at by a federal judge. You have to have that experience in order to say to the other side, "I'm confident what I'm telling you will be upheld by the court" or "I'm confident that what you're demanding of me would not be viewed favorably by a court, therefore, I'm rejecting your request." You can't do that unless you have some experience having litigated cases.

So, especially in regards to the consumer financial services industry, where you practice, where have the state agencies been the most active over the past two or three years? And has there been a shift with the change in federal administration?

The AGs are focused on the financial markets to the extent they touch consumers. It's always consumer-facing. So if you look at what we have handled as a law firm over the past few years, it's both usury rate cases, where the AGs claim that the interest rate charged is beyond usury or now you're finding more focus on the state False Claims Act cases.

Those to me sound like the kind of cases that would be very state and state law specific and wouldn't be the kinds of cases where the state agencies are coming together. Am I right on that front?

Well, yes and no. They are grounded in state laws. And this is frankly, what I find most interesting about our practice and why we're better, frankly, than law firms who claim to have the practice who haven't really been doing it for 20 years like we have. So think about this concept: You have these claims that are grounded in state law. But if you have Nebraska, Massachusetts, Illinois, all coming together to send a subpoena to a company,

there's an inconsistency there. If it's grounded in state law, how do they send one subpoena? That's because it's both. There is an element of state law. But if you're in Illinois, or you're Vermont, or you're Massachusetts, at some level, you have to give up certain details around your state law to buy into the broader state policy concerns that'll be prioritized by all of the states that are coming together. You can't simply say, "I want to look only at my state law." There is value to the regulator relative to the leverage and pressure they can put on the client by coming together. But that means they have to give up at some level some state-specific arguments and really push the company on a broader policy level.

We understand that when states are coming together in a multi-state action, they're doing so to advance a broader public policy goal. That's why they're doing it. Otherwise, they do it individually. They come together to create what we have coined the "common law of settlements." So there's a statute, there's a regulation, and then, as we tell clients in the compliance space, if you really want to know the priorities, you should read settlement agreements. It's the common law of settlements. That's the practice tip. I tell all the companies if you really want to never have to hire us, that's the key. You should actually look at every settlement in your industry because the settlement tells you where the regulators are going. In many ways, the statute tells you what's historically been important. And that's the key to our practice. It's not something you can do by just putting up a website and saying "I have an AG practice." You have to have people grounded in the practice. You have to have a broad enough practice like we do based in Philadelphia and New York and DC and Richmond, multiple offices. You have to have people that have contacts across the country. Most importantly, you've got to have a deep team, where people are actually working against AGs offices every day.

So how can I speak with confidence if a client were to call me and say, "Hey, we have a matter in

Illinois"? I've got a broad team. And I can tell you within the past few days, we've been on the phone with that office, talking about its priorities in the context of one industry or another. We've got our finger on the pulse, but that's because we have a deep broad team, as opposed to one or two people who claim to have an AG practice or know how to handle a case. And those are the key pieces and differentiators I think we've been able to share with more clients to explain, frankly, why we're better.

So in the political cases where things sort of break down, by party, we've seen a lot of activity from the state AGs. But as somebody who has been watching them for a long time, I'm wondering if there are issues where those lines get crossed, and you see coalition's being built, especially as it applies to consumer protection?

Yeah, so I would say most folks, when they pick up the newspaper, read about what state AGs are doing in the context of Republican AGs suing the Biden administration. Or with President Trump it was the reverse, right? That's how most people think of it. We have very little work in that area. Our work is actually bipartisan. The coalitions that form relative to the consumer protection issues are bipartisan. It's not a political issue.

I guess there's nothing political about that data privacy, right?

Exactly. So what we're working on now in the data privacy space, it's a bipartisan coalition of 40 states led by an R & D together. And there's never any political overtones to any of that.

So if you go back 25 years ago when I was in the [Virginia] AG's office, my AG ran as a law and order top cop. You see over the years on migration to a much more nuanced view of the office. Why is that important? Even if you are a Republican in the most red state in America, the consumer expectation or your constituents' expectation is that, at some level, you will be a consumer protection AG. That's new, relatively speaking.

The best example I can give you is Mississippi. If you just Google the Mississippi AG, she's been very active. I tell clients all the time, who oftentimes may think, "Well, this is a political issue" that you have to take that completely out of your mind. The analysis is not a political analysis. It is when the Republicans come together to sue Biden, but that's not what we do. You need to understand that this is not a political analysis. This is understanding the role of a State Ag in today's new regulatory regime. That's different. You need to understand that they come together on a bipartisan basis on data privacy issues, or environmental issues, on water issues. Those are all bipartisan.

The other way I would explain this is that I was in the office for the Master Settlement Agreement in the tobacco cases. So that again, is my frame of reference, right? I had clerked for a federal judge, was a commercial litigator, went to the AG's office, and was dropped into the national settlement agreement for tobacco representing Virginia. So I come out of that back to private practice, and I think "Okay, what will the marketplace need?" I thought if AGs became more active, the marketplace would need someone with commercial litigation expertise, who understands the regulatory dynamic.

Here's what most people forget: Remember the Commerce Committee with Senator McCain? Remember the National Tobacco Bill? The first path to a national tobacco settlement wasn't the state AGs. It was Congress. And the bill couldn't get out of committee. That's what happened. And then when a bill couldn't get out of committee, people said, "Well, we still need a national settlement. How do we do it?" That's where the AGs stepped in.

I tell that story from '97 to explain, for example, in data privacy the absence of a national bill has resulted in multiple state bills giving state AGs the authority to enforce data notification requirements. What do you see? California with the CCPA.

Colorado. Virginia. It's the same principle. It's the lack of the ability of Congress to put together these broad national, single regulatory regimes that's created a regulatory vacuum into which the state AGs have stepped. That was the bet 20 years ago. Wayne Gretzky said, "You skate where the puck is going not where it is." The bet was: "Wait a minute. If the federal government's not going to be able to address these large regulatory issues, that power is going to go somewhere. And clients are going to need a team that has the ability to operate both nationally and communicate at the highest level of seniority in an office and with the first line-level Assistant Attorney General." And so we've structured our team to accomplish that at every level.

How has your firm's merger affected the scope or the size of your practice?

Pepper Hamilton historically had a number of people that had AG experience, but they didn't have the AG team. So frankly, it has been a godsend, because they're talented people that were able to plug right into our team and fill gaps. It was like having three or four good players for a basketball team and you need to put five on the floor. Suddenly these players walk into the gym, and they integrate with the team. It's been great for two reasons. One: technically the historically Pepper Hamilton people are very good lawyers. But culturally, they were similar. Smart but practical. At the end of the day, my clients don't care if I'm the smartest guy in the room academically. You don't win points for that. You win points for being practical, giving high-quality advice, and helping clients steer through problems. We're problem solvers.

The best way we shine is when we help a client understand, here's your product, here's your state-ment, here's the statute, here's the reg, here's what the AG's office is going to say about your practice. And here's why how we should engage with them in a way that allows you to move forward as a business.