

With Rising State AG Action, BigLaw Responds By Beefing Up

By **Aebra Coe**

Law360 (March 11, 2024, 11:58 AM EDT) -- This year Covington & Burling LLP formalized its government litigation practice group, following others in what appears to be a race by large law firms to formalize, market and grow their state attorney general practices as the nature of the office has shifted in recent years.

Covington joined a number of fellow large law firms that have made similar moves since 2020 as state attorneys general have become more active, with a broad consensus among practitioners that state-level enforcement with regard to corporations has picked up in recent years and will not let up anytime soon.

Antonio Dias, chair of Jones Day's state AG practice, said he'd watched the practice area transform from his early days in the late 1980s, with Jones Day formalizing its group in 2021.

"Absolutely there's been an increase in the amount of state AG work that's out there, driven by the increased number of investigations, depth of those investigations, and litigation," Dias said.

According to Dias, the recent increase in work is at least in part a result of growth in state AG offices over the years as they've tackled the nation's largest consumer protection issues, starting with tobacco in the late '80s, the financial crisis in the aughts, and most recently the opioid epidemic. In fact, in some states, the state AG office is the largest legal employer.

"I've watched how the presence of state attorneys general and the expansion of what they do has really had an impact on the way law firms look at providing services to their clients, particularly those serving major business interests," he said. "What we're seeing now is a real explosion in the novel use of legal theories and tactics by state attorneys general, both individually and as a group."

The move by Covington follows decisions made by a number of other BigLaw firms in recent years, often bringing together internal resources that already existed to market to clients the firms' abilities to defend against state-level investigations and litigation. Hogan Lovells launched a state AG practice in 2023; a year before that Armstrong Teasdale started up a practice. DLA Piper, Jones Day and Nixon Peabody all launched practices in 2021, and Holland & Knight started up its state AG practice in 2020.

Beyond launching new groups, law firms are also actively hiring in the area. And, according to William Shepherd, Holland & Knight's state AG practice leader, lateral candidates are now more often touting their state AG experience as they look for a new firm.

According to Shepherd, in addition to making "opportunistic" lateral hires, his law firm has worked to identify who has skills that would be useful to the group and reallocated resources to ensure everyone can work together to serve clients on state AG issues as a team, particularly after Holland & Knight's combination with Thompson & Knight LLP in 2021.

"We had people all over the firm that were interacting with state attorneys general in their own states. And at the same time the attorneys general were getting more active and engaged on a range of issues," Shepherd said.

Some of those issues include election law, Medicaid fraud and antitrust, he said.

"We'd been doing the work before the group was formalized, but the clients and the industries were thinking about it as an area that they needed legal guidance and help on, so they didn't just want to talk to their litigators, they wanted people with attorney general experience, whether that means they worked in an attorney general office for years or deal in that area regularly," Shepherd said.

Another recent phenomenon, according to Shepherd, is the use of outside law firms to litigate cases on behalf of state attorney general offices on a contingency fee basis. This has, in some ways, changed the dynamic of the work the offices do, he said, to focus more on payouts as opposed to injunctive relief.

Erica Buckley, a leader of Nixon Peabody LLP's state attorneys general practice, says she has seen a "proliferation" of cases filed by state AG offices under the False Claims Act.

"State AGs are seeing the value of getting involved with these cases, as it is tailored to provide monetary relief, including attorneys fees and treble damages," Buckley said.

Another area that state attorneys general have focused on more heavily in recent years, according to Alexander Berengaut, Covington government litigation practice co-chair, is in the use of unfair, deceptive and abusive practices, or UDAP, statutes.

"We're seeing states try to use these laws in broad and new ways regarding conduct that was not under the traditional purview of those laws," Berengaut said.

In a recent matter he worked on with his fellow co-chair, Megan Crowley, the team defended TikTok against a UDAP challenge by the state attorney general of Indiana related to the technology company's social media platform. In that case, an Indiana state court decided that the statute did not apply because the platform is freely available, he said.

"I do think the UDAP statutes are very broad and were written to be broad, but there are certain limitations," Crowley said. "States are trying to find ways to regulate companies that operate nationwide and in their state using those statutes across a wide range of sectors."

As the 2024 election approaches, the Covington team sees a number of opportunities for their group, related to the interaction between how the federal government and state governments regulate corporations.

In some cases, they said, state authorities will engage in "follow on" regulation as the federal government takes up an issue and proposes legal theories for how to enforce a given corporate

behavior. Others look to step in where they feel the federal government is falling short on enforcement, and that applies regardless of which party is in power in Washington.

Whether a Republican or Democrat wins the presidency, Nixon Peabody's Buckley said her team expects that state AGs are going to remain busy.

"It is no longer the case that state AGs only step in when the U.S. Department of Justice or other federal agencies change priorities," Buckley said. "The role of the state AG as a formidable civil enforcement office is becoming the norm."

--Editing by Robert Rudinger.

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