

LAW WEEK COLORADO

WilmerHale Partner Talks About 'Extraordinary Moment' of High Activity From State AGs

Data privacy, antitrust and the opioid crisis at top of mind

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Twenty-seven of 50 states currently have Democratic attorneys general, and under the Trump administration, they're making noise. They've filed lawsuits against the president for his immigration policies and plans to put a citizenship question on the U.S. Census, and they're also going after private companies for everything from the opioid crisis to data breaches.

WilmerHale partner Jamie Gorelick, former U.S. deputy attorney general under President Bill Clinton, sat down with Law Week on Thursday to talk about what stands out to her about the level of activity the U.S. is seeing from state attorneys general.

She was in Denver last week for an event for women in general counsel.

LAW WEEK: I want to contextualize the activity we've seen from state AGs lately over different regulatory matters,

whether it's the opioid crisis or any number of things against the Trump administration you could possibly name. In your experience, does this seem to be an unusually high amount of activity?

JAMIE GORELICK: This is an extraordinary moment you have identified; one of the most extraordinary things that's happened in the last couple of years. The Democratic state AGs have announced themselves as the "not Trump." And their view is that the Trump administration does not properly enforce the law, and that they have significant authorities to do that, and that they are going to do it.

If you look at how many Democratic state AGs there are, there are now 27 out of the 50 states, which is a higher number of Democratic state AGs than there are governors. Which means that they are a potent force in and of themselves, and they have discovered their collective strength.

Now you have here in Colo-



Jamie Gorelick, former U.S. deputy attorney general under President Bill Clinton visited Denver last week to discuss women in leadership. / COURTESY PHOTO

rado — you have Phil Weiser, Leh, came from WilmerHale. whom I've known for forever. And when you have people of His deputy, Natalie Hanlon- that caliber, you are going to

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get some very fine lawyering. Now, am I going to agree with him on everything they're doing? No. But do I love the fact that people who are that smart and that dedicated and that principled are seeking those jobs, giving up law firm partnerships to take those jobs? I love it.

For private clients, it creates a whole new set of challenges, because you're dealing both with the federal government and state governments with overlapping authorities. And navigating through that is a challenge.

As a macro observation, your observation is exactly correct, that they have become a force to be reckoned with. And as a Colorado-based observation, you have a very dynamic state AG's office.

LAW WEEK: And talking a little bit about subject matter, some of the big themes we've seen — well, the opioid crisis is a big one that the AGs are really involved in. Data privacy is another big one. Are you seeing other themes in terms of subject matter that the AGs are really getting involved in?

GORELICK: I mean, antitrust authority is vested in both federal and state attorneys general, and they have been very active. We are representing a company that is trying to merge with another company.

It's gotten federal approval. And you would imagine that in prior times, federal approval would basically be it. But a number of state attorneys general are suing to stop the merger. And so even when you've passed muster with federal antitrust authorities, you now have to think about state ones.

I would say consumer protection, generally. Now, this has been the bread and butter of state AGs for a long time to make sure that consumers are protected when they buy products or services.

But I think it has been amped up. We have a number of what are called multi-state investigations, which is the way it sounds.

So I would say antitrust, data privacy, consumer protection and data breaches. Data breaches are a bit of a subset. So if you look at something like the Equifax breach, [it]

resulted in a very substantial state AG collective action.

LAW WEEK: One thing I'm really curious about is when attorneys general are taking on an investigation that is just huge. Is there any strategy for going about deciding whether they need to bring in say, private counsel to help them and how they decide who they want to bring in?

GORELICK: This is actually a really interesting and growing area. Because there are state AGs who do outsource, certainly trial work, but now you're seeing them trying to outsource investigations,

It's the investigative part that I think if you're going to do it at all, you have to be extremely careful. And I don't think we're being extremely careful.

LAW WEEK: With it being really common to have attorneys [at WilmerHale] who have been in government when you're working with clients in an advisory role, before they get sued basically, what type of perspective can attorneys with government experience bring to that type of work?

GORELICK: We want our clients to benefit from our having sat on the other side of

with this practice," or, "I would change this practice." Or you're saying, "I think this argument would have salience, and this one would not." So you're not just, when you're litigating, a hired gun to go and say whatever the client would like you to say. You're bringing your judgments to the table on how to be the best advocate.

LAW WEEK: With these themes that we talked about that state AGs are really paying attention to that have to do with technology — so the data privacy, the antitrust as it relates to these social media companies, things like that — there's just a lot of talk about the need to apply old laws to new technology, because a lot of these laws were written a long time ago. Is that fact something that in your experience, does it keep lawyers up at night?

GORELICK: You know, statutes are at risk of being obsolete the minute they're passed. And in a rapidly changing technological environment, that is even more so.

And so while it doesn't keep me at night, it does call out for creativity, because what you have to do is think about what were the core purposes of this statute? And if someone were to read those core purposes against the current technology, or the current environment, where would they draw the line?

Now, you still have to read a statute as it is written. But you also have to imagine that standards change.

We have a very big practice in congressional investigations representing clients who are pulled up to Capitol Hill to answer questions. Often, they're being asked questions about conduct which was perfectly legal, but which now seems to somebody to be wrong.

And explaining to a client that something that is perfectly legal can nevertheless be the source of criticism is hard, because people say, well, there's a law, abide by the law, doesn't that end the story? But members of Congress are put there in part to decide what the laws should be. And part of changing the law from where it is to where they think it should be is explaining why what just happened, while maybe legal, is not right. •

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which I think will raise really serious policy and legal questions. It's one thing for me to hire you to try a case. It's another thing for me to turn my badge over to you. And that is something I do worry about. And I think you're going to see that litigated.

I really think this is a serious issue, particularly if you pay that hired gun on a contingent basis. We've come to trust law enforcement to be principled. And we would never pay a sheriff based upon the number of arrests or the like. We would think that would [incentivize] them to do things in an inappropriate way. So I do worry that “outsourcing the badge”, is what I would call it, has real problems. And those problems are exacerbated if you pay that person on a contingency basis.

And again, I don't have a problem with hiring someone to help try a case. When I was deputy AG, we hired someone to help try the Microsoft case. I don't have a problem with that.

the table. So if you come to me with a problem, I'm going to be able to tell you how someone sitting in my former office today is going to react to something that you did or some argument that you might make. It's of tremendous benefit. You know, it's not about influence on that agency. Indeed, for the most part, you can't go back to your old agency for a period of time. It's really about understanding how an argument would resonate.

LAW WEEK: Something I've thought about quite a bit that is just interesting to me about the difference between doing advisory work and litigation is, it just seems like it's a very different relationship with your clients when you're advising them on making sure they're complying with the laws they need to comply with, before something goes wrong.

GORELICK: But even when you're litigating, you're also advising. You're saying, “I think there's nothing wrong