



# — 2017 UT SYSTEM — LEGAL CONFERENCE

*presented by the Office of General Counsel*

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## Session 4a

# The Role of the Attorney General in Litigation Matters

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September 28, 2017 1:30-2:30 pm



# **The Role of the Attorney General in Litigation Matters**

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# Customary Client-Attorney Relationship

**CLIENT**

**chooses  
empowers  
directs**

**LAWYER**



# Attorney General – Client Relationship

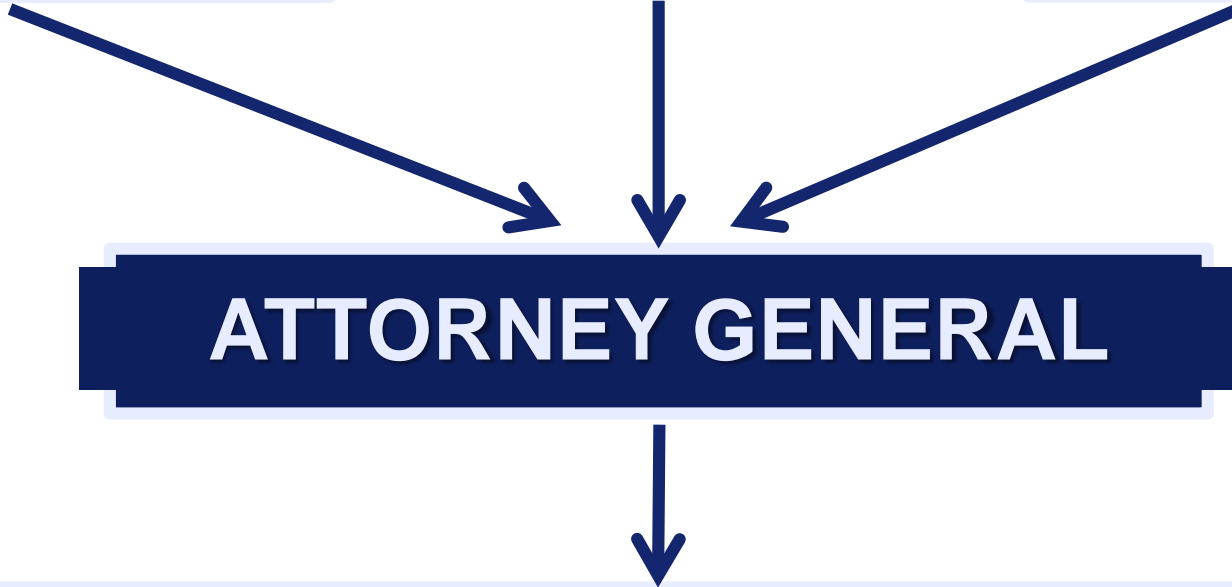
**CONSTITUTION**

**LEGISLATURE**

**VOTERS**

**ATTORNEY GENERAL**

**STATE OF TEXAS**





# Attorney General – Client Relationship

- ▶ Texas Constitution, Article 4, § 22. ATTORNEY GENERAL.
- ▶ The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, ... and perform such other duties as may be required by law.



# Attorney General – Client Relationship

- ▶ Government Code § 402.021. REPRESENTATION OF STATE.
- ▶ The attorney general shall prosecute and defend all actions in which the state is interested before the supreme court and courts of appeals.



# Attorney General as Plaintiff Lawyer

- ▶ In some cases, the Attorney General is empowered by the Legislature to:
  - determine a violation of law
  - file suit on behalf of the State of Texas to remedy the violation
  - resolve the lawsuit, typically with court approval



# Attorney General as Plaintiff Lawyer

- ▶ Example: Antitrust (Tex. Bus. & Comm. Code § 15.20)
- ▶ CIVIL SUITS BY THE STATE. (a) Suit to Collect Civil Fine. The attorney general may file suit in district court ... on behalf of the State of Texas to collect a civil fine from any person, other than a municipal corporation, whom the attorney general believes has violated any of the prohibitions in Subsection (a), (b), or (c) of Section 15.05 of this Act.





# Attorney General as Defense Lawyer

- ▶ The Attorney General is empowered to defend the State of Texas when a component of the State (e.g., a state agency) is named as a defendant in litigation.
- ▶ General Appropriations Act § 16.01(a)(1)



# Attorney General as Defense Lawyer

- ▶ General Appropriations Act § 16.01(a)(1)
- ▶ Except as otherwise provided by the Constitution or general or special statutes, and only as consistent with Government Code, Sec. 402.0212 and Chapter 2254, Government Code, the Attorney General shall have the primary duty of representing the State in the trial of civil cases.



# Attorney General as Defense Lawyer

- ▶ The Attorney General is empowered to defend the State of Texas when a component of the State (e.g., a state agency) is named as a defendant in litigation.
- The AG decides whether the representation is appropriate.
  - Government Code § 402.0212



# Attorney General as Defense Lawyer

- ▶ Government Code § 402.0212. PROVISION OF LEGAL SERVICES – OUTSIDE COUNSEL.
- ▶ (a) ... The attorney general shall provide legal services for a state agency for which the attorney general determines those legal services are appropriate and for which the attorney general denies approval for a contract for those services under this subsection.



# Attorney General as Defense Lawyer

- ▶ The Attorney General is empowered to defend the State of Texas when a component of the State (e.g., a state agency) is named as a defendant in litigation.
  - The AG decides whether the representation is appropriate.
- The AG decides whether the agency can use outside counsel.
  - Government Code § 402.0212
  - General Appropriations Act § 16.01(a)(2)



# Attorney General as Defense Lawyer

- ▶ Government Code § 402.0212. PROVISION OF LEGAL SERVICES – OUTSIDE COUNSEL.
  
- ▶ (a) Except as authorized by other law, a contract for legal services between an attorney, other than a full-time employee of the agency, and a state agency in the executive department, other than an agency established by the Texas Constitution, must be approved by the attorney general to be valid.



# Attorney General – Client Relationship

- ▶ General Appropriations Act § 16.01(a)(2)
- ▶ Funds appropriated by this Act may not be used by a state governmental entity for retaining outside legal counsel before the state governmental entity requests the Attorney General to perform such services.



# Attorney General as Defense Lawyer

- ▶ The Attorney General is empowered to defend the State of Texas when a component of the State (e.g., a state agency) is named as a defendant in litigation.
    - The AG decides whether the representation is appropriate.
    - The AG decides whether the agency can use outside counsel.
- The agency cannot act in litigation without AG consent.
    - General Appropriations Act § 16.01(b)





# Attorney General – Client Relationship

- ▶ General Appropriations Act § 16.01(b)
- ▶ Funds appropriated by this Act may not be expended by a state governmental entity to initiate a civil suit or defend itself against a legal action without the consent of the Attorney General. Absent this consent, the state governmental entity shall be represented in that particular action by the Attorney General.



# Attorney General as Defense Lawyer

- ▶ The Attorney General is empowered to defend the State of Texas when a component of the State (e.g., a state agency) is named as a defendant in litigation.
  - The AG decides whether the representation is appropriate.
  - The AG decides whether the agency can use outside counsel.
  - The agency cannot act in litigation without AG consent.
  - The AG can act over the objection of the agency.
    - *Bullock v. Escobedo*



# Attorney General – Client Relationship

- ▶ *Bullock v. Escobedo*, 583 S.W.2d 888, 894 (Tex.App.—Austin 1979, writ refd)
- ▶ In this suit, the Comptroller obviously exercised his administrative discretion and rejected the request for a refund of taxes paid under protest; otherwise, there would have been no litigation. Thereafter, upon filing of suit, the Comptroller's statutory powers ended.



# Attorney General – Client Relationship

- ▶ *Bullock v. Escobedo*, 583 S.W.2d 888, 894 (Tex.App.—Austin 1979, writ refd)
- ▶ In matters of litigation, the Attorney General is the officer authorized by law to protect the interests of the State, and even in matters of bringing suit, the Attorney General “must exercise judgment and discretion, which will not be controlled by other authorities”. (quoting *Charles Scribner’s Sons v. Marrs*, 262 S.W. 722, 727 (1924).)



# Attorney General as Defense Lawyer

- ▶ The Attorney General is empowered to defend the State of Texas when a component of the State (e.g., a state agency) is named as a defendant in litigation.
  - The AG decides whether the representation is appropriate.
  - The AG decides whether the agency can use outside counsel.
  - The agency cannot act in litigation without AG consent.
  - The AG can act over the objection of the agency.
- The AG approves the content of settlements.
  - General Appropriations Act § 16.01(d)



# Attorney General – Client Relationship

- ▶ General Appropriations Act § 16.01(d)
- ▶ (d) Payment of all judgments and settlements prosecuted by or defended by the Attorney General is subject to approval of the Attorney General as to form, content, and amount, and certification by the Attorney General that payment of the judgment or settlement is a legally enforceable obligation of the State.



# In Attorney General Litigation It Appears That:

- ▶ The LAWYER decides whether the representation is appropriate.
- ▶ The LAWYER decides whether the CLIENT can use outside counsel.
- ▶ The CLIENT cannot act in litigation without LAWYER consent.
- ▶ The LAWYER can act over the objection of the CLIENT.
- ▶ The LAWYER approves the content of settlements.

**BUT THERE IS MORE TO THE ANALYSIS.**



# Attorney General – Client Relationship

- ▶ The Attorney General protects the interest of the State (the client).
- ▶ Defendant agencies are typically the State's delegate for managing the state program or state action that is subject of the lawsuit.
- ▶ Thus, agencies are important in determining the State's interests in the future management of the state program or state action.
- ▶ Plus, as to settlement of a lawsuit against an agency, the Governor, Comptroller and Legislature have a role.





# Reasons the Attorney General's Role is Different from Private Attorneys

- ▶ An elected Attorney General is part of governmental checks and balances.
- ▶ The AG utilizes finite resources for the litigation needs of over 200 state agencies, boards and commissions.
- ▶ Payment of all judgments and settlements is subject to approval of the Attorney General as to form, content, and amount.
- ▶ Thus, as a general rule, the AG must be a gatekeeper for decisions in litigation to fulfill the AG's governmental purpose.



# **How to Effectively Assist Your Assistant Attorney General Before and During Litigation Matters**

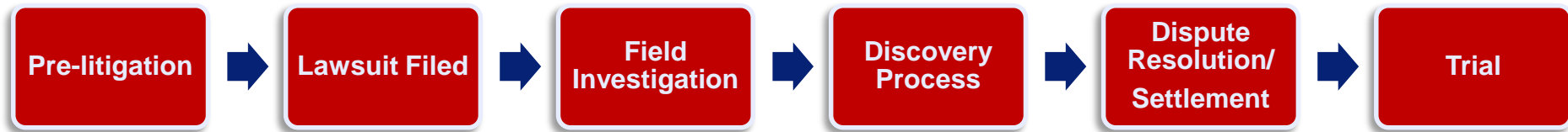


# General Facts About Assistant Attorneys General

- ▶ 11 Civil Litigation Divisions at the Office of the Attorney General
  - Approximately 400 Assistant Attorneys General in the agency.
  
- ▶ 35 Assistant Attorneys General in the General Litigation Division
  - Average of 500 open cases per fiscal year.
  - Each attorney is assigned to be the first-chair attorney on 15-20 cases.
  - Attorneys frequently will provide second-chair assistance for other matters.



# Key Points In A Case Where University Counsel And AAGs Work Together





# How To Be In The Best Position Pre-Litigation

- ❑ **Litigation hold and evidence preservation**
  - Emails and personnel files for complainant and alleged discriminatory actor
  
- ❑ **Ensure consistent explanation of termination basis**
  - Consider making termination letters not too specific
  
- ❑ **Consider pre-litigation mediation**
  - Free and confidential EEOC mediation option
  
- ❑ **Inform OAG if you need assistance through the pre-litigation phase of the matter**



# What Helps For Later Litigation

- ❑ **Witnesses identified and accounted for**
  - Ideally interviewed for internal investigation
  
- ❑ **Keep track of any signed witness statements**
  - Need to disclose early on
  
- ❑ **Manage and monitor internal communications regarding the claim**
  - Not every communication is privileged
  
- ❑ **Put together a succinct timeline of key events**
  - Helps AAG quickly spot timeliness issues
  
- ❑ **Draft a solid position statement with supporting evidence**
  - Easy way for your AAG to become familiar with facts



# Lawsuit Is Filed

***“Begin with the end in mind.”***

**Help your AAG understand the answers to these key questions for each matter:**

- ▶ What do we, as a client, seek to accomplish and why?
- ▶ What are the best ways to achieve our goals?
- ▶ What resources do we need?
- ▶ What immediate steps do we need our AAG to take?

**Work with your AAG to conduct an early case assessment to create a strategic road map for the matter.**



# Timeline Of Events For AAGs After A Lawsuit Is Filed

## WITHIN 48 HOURS OF ASSIGNMENT

Expected to contact client upon case assignment to introduce himself/herself and schedule an initial discussion of the case.

## WITHIN 1 WEEK OF ASSIGNMENT

Initial meeting/conference with client to discuss general overview of the claims asserted and likely arguments that can be raised in a dispositive motion.





# Discovery Process

- I. Implementing the Litigation Hold
- II. Field Investigation
- III. Collecting/Maintaining Documents
- IV. Written Discovery
- V. Preparing for Depositions



# Implementing The Litigation Hold



- ✓ Remember that a litigation hold is not a notice. It is a process.
- ✓ Implement litigation holds as soon as you believe a lawsuit or an investigation is reasonably anticipated.
- ✓ Develop a plan to implement the hold.
- ✓ Distribute notice of the litigation hold to all individuals who are likely to possess relevant records.
- ✓ Ensure compliance with the litigation hold.



# The Litigation Hold Notice

## Rules of Thumb:

- ❑ Functionality over thoroughness.
- ❑ Three pages or less.
- ❑ Use words your custodians will understand.
- ❑ Don't confuse custodians with things that IT can do better.

**Electronically Stored Information ("ESI")** includes all electronically stored information and data subject to possession, control, or custody of the agency regardless of its format and the media on which it is stored. ESI includes, but is not limited to: electronic files; communications, including e-mail and instant messages sent or received, and voicemail; data produced by calendaring software; and information management software. In addition to specific data that are electronically stored and readily retrievable, ESI includes data that may not be visible that is generated by a computer hard-drive, e-mail and instant messaging, information management software, handheld computer device (ex: Blackberry), telecommunications device, and any back-up storage device. ESI may be stored on different electronic devices and removable devices (ex: internal and external drives, PDAs, smart phones, servers, laptops, backup tapes, thumb drives, CDs, DVDs) and may also reside at different locations (e.g., on the home or work systems, University or personal systems, in departmental files, etc.).



# Litigation Holds to Custodians and IT Representatives

## CONFIDENTIAL NOTICE OF EVIDENCE PRESERVATION

To: [Decision-makers  
HR reps  
Witnesses  
Custodian of HR records  
Custodian of Payroll records]

Cc: [Trial Counsel]

From: [In-house Attorney]

Date:

Re: Evidence Preservation Notice re [Plaintiff]

As you may already be aware, the [Agency] has been named in a lawsuit filed by [Plaintiff], who worked for [Agency] as a [job position/dept] from [dates of employment]. [Plaintiff] claims that he is the victim of [whatever evil thing the agency did]. Although we believe that the claims are without merit, it is important that we identify and retain all documents and electronically stored information that might assist us in our defense or be needed to satisfy our discovery obligations under court rules. You may have already been instructed to identify and preserve information you possess that relates to this case; this memo is intended to provide more detail and further clarification of the types of information sought and your obligation to preserve it. **Please treat this memo and this matter as confidential.**

Each individual employee is under a legal duty to preserve, retain, and protect all possibly relevant evidence, including electronically-stored information. Please carefully review the description of files and documents below and the instructions related to preserving them. Please then email me [inhouse.attorney@agency.texas.gov] to confirm that you have read and understood this memo and have taken the requested steps to preserve potentially relevant information.

### CATEGORIES OF DOCUMENTS AND INFORMATION TO RETAIN

Until cancelled in writing by me, the following types of documents and information must be preserved—even if it would otherwise be your normal practice to discard or automatically delete such items. **Please note that this hold notice pertains not only to information stored on company property and devices, but also information stored at your home or on your personal cell phone, home computers, laptops, or other devices.** The following are examples of the types of information that must be preserved:

1. Emails or other communications (memos, letters, etc.) sent to, generated by, or received from [Plaintiff];
2. Emails or other communications between you and others about [Plaintiff];
3. Text messages and chat messages to or from [Plaintiff] or between you and others about [Plaintiff], whether contained on company devices or personal devices;

## CONFIDENTIAL NOTICE OF EVIDENCE PRESERVATION

To: [IT Representative]

Cc: [Litigation Attorney]

From: [In-house Attorney]

Date:

Re: Evidence Preservation Notice re [Plaintiff]

This memorandum is in follow-up to our prior discussions regarding the litigation hold and collection of electronically-stored evidence in response to the lawsuit brought against [AGENCY] by [Plaintiff]. As you are aware, [Plaintiff] worked for [AGENCY] as a [job position] from [dates of employment], and he is now claiming that [the agency did something really bad to him]. Your expertise and cooperation will assist us in identifying and retaining electronically-stored information necessary for [AGENCY]'s defense or needed to satisfy our discovery obligations under court rules. **Please treat this memo and this matter as confidential.**

For your reference, we have listed below the general categories of documents and information we have asked custodians to retain. The memo also contains explicit instructions regarding retention and preservation of emails and other types of electronically-stored information that may exist. Please carefully review, then email me to confirm that you have read and understood this memo and have taken the requested steps to preserve potentially relevant information.

### CATEGORIES OF DOCUMENTS AND INFORMATION TO RETAIN

The following types of documents and information must be preserved—even they would normally be subject to deletion per [Agency's] document retention protocols:

1. Emails or other communications (memos, letters, etc.) sent to, generated by, or received from [Plaintiff];
2. Emails or other communications between you and others about [Plaintiff];
3. Text messages and chat messages to or from [Plaintiff] or between you and others about [Plaintiff], whether contained on company devices or personal devices;
4. The [relevant policies] in place during [the relevant time period] relating to hiring procedures, equal employment opportunity, discrimination/harassment, PRN employment, at-will employment, RT shift scheduling, termination, and professionalism/code of conduct;
5. [Plaintiff]'s personnel file and any other file (formal or informal) maintained on [Plaintiff] by HR, management, or any other individual (i.e., supervisor's file, medical file, leave of absence file maintained by a vendor, etc.);



# Initial Client Meeting

## The AAG will cover the following issues:

- We will be sending you a draft litigation hold notice.
- We will rely on you to follow-up with custodians and IT.
- We will send a document collection plan.
- We want a half hour with someone from IT.
- We will ask you to make .PST files of the mailboxes of email custodians.
- We will identify potential issues upfront.



# Initial Client Meeting

## The AAG will give you homework:

- Send us a copy of any litigation holds you have already sent.
- Send us a copy of the agency's retention policy.
- Figure out the answers to any of the questions we asked that you didn't know the answer to.
- Get an immediate check on status of email accounts and equipment of departed employees.
- Set up a time for us to talk to your IT person.



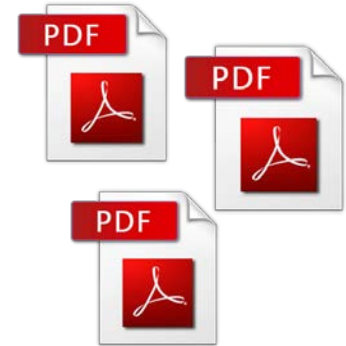
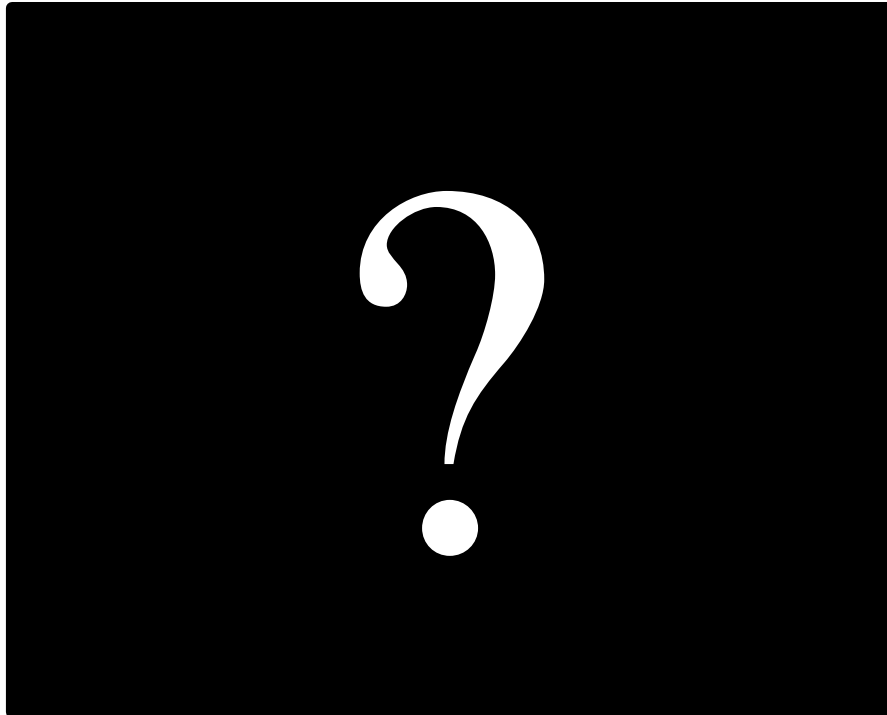
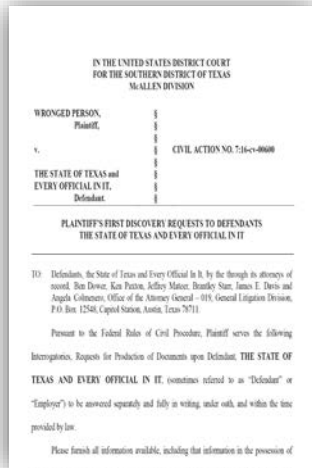
# Conducting The Field Investigation

- ▶ From the AAG's perspective, we have two goals: (1) understand the facts of the case and (2) develop a relationship with the witnesses.
- ▶ Help your AAG ask the right questions to make sure your AAG gets the information he needs.
- ▶ Develop trust with the witness. If the witness trusts agency counsel, he will learn to trust the AAG.



# Document Collection

## The Traditional Way







# Document Collection

## Two Contrasting Approaches:

**Client Controlled**

*Client controls the document collection and review process. Client determines which documents are discoverable.*

- ▶ Less documents for lawyer to review.
- ▶ Leverage client's own knowledge of their documents.
- ▶ May be more comfortable for client.
- ▶ High reliance on client's assessment of what is relevant.
- ▶ Could be more costly than a more "lawyer-controlled" approach.

**Lawyer Controlled**

*Lawyer controls the document collection and review process. Lawyer determines which documents are discoverable.*

- ▶ More documents for lawyer to review.
- ▶ Not practicable in all cases.
- ▶ Can be easier if issues change/develop, supplemental discovery is required, etc.

**Optimal = Both client and AAG actively contribute in the document collection process.**



# Document Collection Plan

## Purpose:

- Get clients to think of evidence that wasn't on their radar
- Keep track of evidence we have and evidence we don't have
- Keep track of documents provided to AAG
- Keep track of collection efforts



Doc Collection  
Plan Employment



# Written Discovery and Depositions

- ▶ Develop a game plan to complete discovery on time.
- ▶ Clear and timely communications are key throughout the discovery process.
- ▶ Everyone must resist the urge to procrastinate.
- ▶ Coordinate with witnesses to ensure that they have searched through all their files and have provided all relevant documents.
- ▶ Set up adequate preparation time for depositions.
- ▶ Please assist your AAG in depositions and during the discovery phase – we value your input!



# Dispute Resolution and Settlement

- ▶ Discuss the possibility of settlement early in the case.
- ▶ Discuss how much authority the client agency has for settlement.
- ▶ Discuss the funding source for the monetary settlement.
- ▶ Obtain any necessary approval from your respective superiors, if needed, early on in the process so that the settlement is not slowed down.
- ▶ Work with your AAG to find common ground if you disagree on settlement.



# Trial

## ▶ Presenting the University's Position at Trial

- Help ensure that all witnesses are available for pre-trial preparation and the actual trial.
- Participate in moots for opening and closing statements.
- Be accessible to potential trial witnesses to help answer any questions or concerns that they may have.
- Agency counsel should be present during the trial to assist the trial team with strategic decisions.
- Someone with settlement authority should be present or immediately accessible in the event settlement discussions arise during the course of the trial.



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