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President

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Dear Chairwoman Garza and Mr. Heimert:

On behalf of the U.S. Chamber Institute for Legal Reform, I am writing to you regarding the Commission's upcoming report to the President and Congress on antitrust issues and the possible reform of antitrust laws. I would like to draw your attention to one issue in particular—the use of private outside contingency fee lawyers by state attorneys general.

Enclosed with this letter are two reports, *Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiffs' Bar* and *Bounty Hunters On The Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers*. Both reports outline the concerns that we have with state attorneys general contracting with plaintiffs' lawyers on a contingency fee basis when initiating a lawsuit. These contracts are often awarded without any oversight or accountability and allow plaintiffs' attorneys to drive an antitrust lawsuit with only a profit motive in mind instead of the public interest. In some cases, where contracts have been awarded, the plaintiffs' lawyer has been a substantial contributor to the attorney general's political campaign.



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As a result of these concerns, the American Legislative Exchange Council (ALEC) has drafted model legislation titled the Private Attorney Retention Sunshine Act (PARSA). The legislation would help bring transparency to the process of contingency fee arrangements by:

- Requiring open and competitive bidding processes when attorneys general enter into contracts with private attorneys;
- Mandating legislative hearings on contingent fee contracts that exceed \$1 million;
- Requiring a statement of hours worked, expenses incurred, and effective hourly rates at the end of any contingency fee case; and
- Requiring reporting to and oversight by the legislature.

Various states have agreed with our concerns and the need for transparency. We've worked with our in-state allies and seven states have passed some variation of the PARSA bill. Three other states are also considering it. In light of this, we ask that you consider recommending some of the principles outlined in the PARSA legislation in your report to the President and Congress.

I would be happy to address any questions you may have on this issue. Thank you for your consideration.

Sincerely,

Lisa A. Rickard

Enclosures

# **Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiffs' Bar**

*By John Fund*

## **Summary**

In recent years, state attorneys general have crusaded against one industry after another. Activist AGs portray their activities as bringing wrongdoers to justice and raising money for their states, but their methods sometimes create enormous conflicts of interest and threaten the rule of law.

Increasingly, activist AGs are hiring outside plaintiffs' attorneys to represent their states on a contingency-fee basis. Very often, they hire attorneys who have given them major campaign contributions. For example, when Mike Moore was attorney general of Mississippi and acting as the lead architect of the multi-state tobacco litigation, he received nearly 40 percent of his campaign contributions from plaintiffs' attorneys – some of whom later received multi-million dollar fees for helping the states reach settlements with tobacco companies.

In her 2002 re-election campaign, New Mexico Attorney General Patricia Madrid received more than 27 percent of her campaign funding from plaintiffs' attorneys. Those attorneys gave more than \$230,000 of the more than \$840,000 the campaign raised. The firm of Eaves, Bardacke, Baugh, Kierst & Kernan and its attorneys have contributed \$22,000 to Madrid's campaigns. The firm was awarded a contract worth up to \$500,000 to work for the state in interstate water litigation with the state of Texas.

This pinstripe patronage is not merely unseemly, it represents a dangerous conflict of interest and distortion of incentives. Not only can AGs reward their contributors with no-bid contracts, but the plaintiffs' attorneys, once hired to pursue a lawsuit, have different incentives than the elected officials who hired them. While the AG is sworn to protect the interests of the people of his or her state, an attorney working on contingency has an incentive to pursue only monetary remedies, even if another outcome might best serve the people of the state. And because these attorneys are paid out of the amounts they recover rather than by taxpayers, taxpayers and legislators have no control over them.

At the very least, large state contracts with outside lawyers should be subject to the same sorts of public disclosure and bidding requirements applied to other state contracts. The Private Attorney Retention Sunshine Act – model legislation drafted by the American Legislative Exchange Council – has been adopted by five states to restore some measure of democratic control and avoid a replay of the scandalous back-room deals that plagued the tobacco settlement. That's a good start.

## **Introduction**

State attorneys general used to get a fraction of the attention paid to other political players. But now they are rapidly changing America's legal and economic life by going beyond their traditional law enforcement roles and trying on the capes of crusaders. Acting in concert, they have the power to bring down entire industries. They have sought and reaped publicity and political advantages pursuing multi-state tobacco litigation, cracking down on telemarketers, participating in asbestos litigation, threatening software manufacturers and toymakers and investigating alleged abuses in the mutual fund industry. Other industries inevitably will attract their attention.

It is hard to exaggerate how much the role of state AGs has changed. "For 200 years they defended the state in cases brought by outside parties," Drew Ketterer, Maine's attorney general from 1995 to 2001, told *Corporate Legal Times*. "That was basically the job. Nobody really knew who these people were."

Today all that has changed. The most aggressive state attorneys general – such as New York's Eliot Spitzer – have become nationally prominent as a result of their enforcement activism. Recently, Spitzer and seven of his fellow state AGs sued the nation's five largest public utilities, even though none of the utilities are located in their states. The lawsuit sought a three percent annual reduction in carbon dioxide emissions over the next decade. "Never mind that the AGs have neither the authority nor the responsibility to act in the broader national interest," writes Cato Institute Senior Fellow Robert Levy. Indeed, the state AGs are increasingly performing the function that Congress and federal regulatory agencies are supposed to carry out – as well as saddling the general public with tax and regulatory burdens that were never voted on by elected representatives.

Former Clinton-era Labor Secretary Robert Reich is explicit in stating that we have entered a new era. "Regulation is out, litigation is in," he wrote in *USA*

*Today.* "The era of big government may be over, but the era of regulation through litigation has just begun."

"There's no question that the state AGs are wielding tremendous power these days through civil litigation," agrees Tommy Wells, the former chairman of the American Bar Association's Litigation Section. "They are a throwback to the activist agenda of making social change through the court system."

With power comes scrutiny, and as the headline-grabbing work of attorneys general has loomed larger, it's natural that more attention should be focused on how these increasingly powerful political players are elected – or, if they are "Aspiring Governors," how they seek higher office. One particular concern is the fact that state AGs are increasingly hiring private attorneys to represent the people on a contingency-fee basis. There is a dangerous incentive for this melding of political ambition and the desire for private profit to distort legal principles. In many cases, private attorneys create new causes of action in order to assure a win in their multi-state litigation, and thus create dangerous new legal precedents.

### **Getting Contributions From Plaintiffs' Attorneys**

Contributions to the campaigns of incumbent attorneys general and candidates for the office have soared as the visibility and power of the office has grown. Both major political parties have in the last few years established independent national political committees solely for the purpose of backing AG candidates.

The high profiles that many attorneys general have maintained in recent years and the politicization of their elections have turned AG contests into competitive and expensive campaigns. Multi-million-dollar campaigns, once confined to a few large states, now are increasingly common in mid-sized states. Attorney general races in smaller states also are becoming expensive. Former Kentucky Attorney General Ben Chandler, recently elected to the U.S. House of Representatives, raised more than \$2.9 million for two AG races, and Richard Ieyoub collected more than \$2.2 million for his successful races in Louisiana.

In the nation's largest state, California Attorney General Bill Lockyer ran the country's most expensive AG campaigns in 1998 and 2002, collecting more than \$27 million from more than 9,800 large donors. Lockyer collected nearly \$1.9 million from plaintiffs' attorneys. Several of those contributions came in

large checks (as much as \$50,000 per contribution) that were among the largest donations to Lockyer's campaigns.

For example, the law firm of Milberg, Weiss, Bershad, Hynes & Lerach made three separate \$50,000 contributions, all during the final two months of the November 1998 campaign. Another major plaintiff firm, Girardi & Keese, wrote three separate \$25,000 checks, also during the final two months of the campaign.

In June 2003, Lockyer announced a \$1.625 billion settlement with El Paso Corp. The settlement included up to \$60 million for attorney fees and expenses. Eleven firms shared in the fees for the El Paso settlement, and firms that were large contributors to Lockyer were among those receiving the fees. Firms benefiting from the El Paso settlement included:

- Girardi & Keese, which contributed \$273,750 to Lockyer from 1996 through 2002.
- Loeff, Cabraser, Heiman & Bernstein; \$55,500 in contributions during the same period.
- Engstrom, Lipscomb & Lack; \$63,500 in contributions in 2002.
- Kiesel, Boucher & Larson; \$10,000 contribution in 2002. Raymond Boucher, a name partner in the firm, is vice president of the Consumer Attorneys of California, a group of plaintiffs' attorneys whose political action committee gave Lockyer's campaigns \$211,705 from 1996 through 2002.

In another highly publicized case, plaintiffs' attorneys benefited when Attorney General Lockyer negotiated a settlement of price-gouging claims against Williams Energy Marketing & Trading Co. and its parent, The Williams Companies Inc. As part of that settlement, Williams Energy agreed in 2002 to set up a \$15 million war chest to pay past and future fees and expenses for private attorneys. Among the firms benefiting from that arrangement were Loeff, Cabraser, Heiman & Bernstein and Milberg, Weiss, Bershad, Hynes & Lerach. The latter firm contributed \$193,000 to Lockyer's campaign accounts in the period from 1996 through 2000. William Lerach, a noted plaintiffs' attorney and partner in the firm, personally contributed a total of \$40,000 to Lockyer's campaigns, according to California campaign finance records.

Plaintiffs' attorneys provide a significant amount of campaign contributions to attorneys general in several states, and many attorneys general apparently see

nothing wrong with getting significant financial support from plaintiffs' attorneys who later wind up receiving legal work from their offices. For example, Mississippi Attorney General Mike Moore, the lead architect of the multi-state tobacco litigation, received nearly 40 percent of his campaign contributions from plaintiffs' attorneys, some of whom later received multi-million dollar fees for helping the states reach settlements with tobacco companies.

In New York, the campaign manager for Attorney General Spitzer has stated publicly that Spitzer's campaign "won't accept money from anyone with a matter presently pending" before the attorney general's office. In October 2004, Spitzer returned contributions from casino operator Donald Trump because Trump had legal issues that were being examined by Spitzer's office. However, Spitzer's campaign manager has curiously stated that the prohibition is *not* imposed on contributions from lawyers because "every law firm does work with the attorney general's office."

In her 2002 re-election campaign, New Mexico Attorney General Patricia Madrid received more than 27 percent of her campaign funding from plaintiffs' attorneys. Those attorneys gave more than \$230,000 of the more than \$840,000 the campaign raised.

Attorneys who were campaign donors received significant work from Madrid's office. For example, the law firm of Eaves, Bardacke, Baugh, Kierst & Kernan was awarded a contract worth up to \$500,000 to work for the state in interstate water litigation with the State of Texas. Campaign finance records show the firm and its attorneys have contributed \$22,000 to Madrid's campaigns.

In May 2002, the state reached a \$30 million settlement of a lawsuit against four oil companies. The settlement generated \$9 million in legal fees for firms and attorneys that, over the years, contributed more than \$80,000 to Madrid's campaigns. Members of the Branch Law Firm, one of the firms that worked on the case, contributed \$72,330 to Madrid in the period from 1997 through 2003, campaign finance records show. The Gallegos Law Firm, also involved in the settlement, donated \$13,400.

In another case involving pollution in New Mexico's South Valley, the state was represented again by the Branch Law Firm and also by the law firm of Walter Lack, who directed a \$50,000 contribution to Madrid. The pattern of Attorney General Madrid rewarding contributors with lucrative work has not escaped the attention of media outlets in New Mexico and elsewhere. Her 2002

opponent, Rob Perry, called Madrid "a new poster child for conflict of interest in New Mexico state government. The lawyers get contracts and the millions of dollars in legal fees; she gets the mega political contributions, and Joe New Mexican gets cheated."

In June 2002, the American Legislative Exchange Council noted "the unholy alliance" between the plaintiffs' attorneys and Attorney General Madrid. The council called the phenomenon "Pinstripe Patronage."

### **Giving Fees to Contributors**

Several AG offices are naturally reluctant to disclose information that would suggest a connection between donations to a campaign and the award of state work. Oklahoma is known as the Sooner State, but its Attorney General, Drew Edmondson, would just as soon not reveal his office's connections with plaintiffs' lawyers. His office responded to an open-records request by stating that there had been only one instance in which the office had contracted with outside counsel. However, in a February 13, 2002 editorial, *The Daily Oklahoman* stated that Attorney General Edmondson's 2002 re-election campaign "has thus far received around \$267,000 in reported contributions from individuals. About \$57,400 (more than 20 percent of the total) comes from attorneys who have done legal work with state government through so-called 1917 contracts," a name drawn from a state House bill. These are contracts that are likely to result in fees of more than \$20,000 to an attorney. In order to qualify for such contracts, an attorney must receive clearance from the Attorney General's office. In 1998, the paper noted, Edmondson "raised \$292,600 from individuals, with \$44,200 of it coming from lawyers who had 1917 contracts. He had no opponent that year."

The editorial concluded by arguing that the Attorney General "should return every dime received from individuals who have 1917 contracts, or from persons who work at firms which have received such work." The paper noted that "Edmondson said there is no conflict of interest with contributions to his campaign because the state contracts awarded to the firms never cross his desk." In short, the Attorney General does not appear to believe that he has to report contracts that he has not personally reviewed even if his office is responsible for reviewing the contracts.

Other attorneys general are just as entangled with contributors who are also lawyers doing business with the state. Missouri's Jay Nixon is one of a handful of current attorneys general who were in office during the time of the national

tobacco litigation in the 1990s, and his handling of that case showed a close connection between his office and law firms with a history of contributing to the campaigns of Nixon and other Missouri Democrats.

Nixon selected five law firms to handle the state's participation in the multi-state litigation against big tobacco companies. Those firms eventually received \$111 million in fees after the national tobacco settlement was reached. Campaign records and media reports indicate that the five firms Nixon selected were major contributors to Nixon and other Democratic political entities in Missouri. In September 2000, *The St. Louis Post-Dispatch* reported that the five firms "donated a total of more than \$500,000 in campaign contributions over the past eight years, mostly to Democrats." The firms included Bartimus Frickleton Robertson & Obetz of Kansas City, Humphrey Farrington & McClain of Independence, Caldwell & Singleton of St. Louis and Gray Ritter & Graham of St. Louis.

In 1998, when Nixon ran unsuccessfully for the U.S. Senate against Sen. Kit Bond, the senator criticized Nixon for receiving campaign contributions from 30 attorneys who worked for the firms involved in the tobacco case. Indeed, Nixon's Senate campaign committee reported numerous \$1,000 contributions (then the maximum allowed for a single donation in a federal campaign) from attorneys who worked at the law firms Nixon hired for the tobacco case. The contribution list also included trial attorneys such as Dickie Scruggs of Mississippi and Michael Ciresi of Minnesota, both of whom received multi-million-dollar fees for their work on the national tobacco settlement.

The fees collected by the firms Nixon hired stirred significant controversy in Missouri and triggered a lawsuit that was finally resolved in October 2003 when the state Supreme Court declined to intervene to change the fees. Critics of the fees allege that, because Missouri was tardy in playing the tobacco suit game – it was the 27th state to join the multi-state litigation – Nixon's outside attorneys entered the case after all the hard work had been done by other states' lawyers and when a national settlement was nearly inevitable.

In a September 2000 editorial, *The St. Louis Post-Dispatch* said the fees are "out of proportion to the work performed and the risk involved." Peter Kinder, the Republican president pro tem of the Missouri Senate, said Nixon's outside counsel "did next to nothing for the fee they're about to rake in. Missouri was something like the 27th state to file suit, making these lawyers quite late to this gravy train. All the tough spadework had already been done in other states. What about risk in pursuing the litigation, the kind of risk that might begin to

justify such obscene fees? By the time Missouri hopped aboard, there was next to no risk to the lawyers pursuing the beached whale of Big Tobacco."

Other questions have been raised about the standards Nixon used in selecting the firms to handle Missouri's tobacco case. In a July 2000 audit, Missouri Auditor Claire McCaskill, a Democrat who is her party's 2004 nominee for governor, said Nixon failed to provide state officials with reasons for hiring the legal team for the tobacco case. Nixon's office responded to auditors by saying the selection process was privileged information.

The tobacco case was one of 16 in which Nixon's office failed to provide detailed information about the hiring of specific attorneys, according to the audit by McCaskill, a fellow Democrat. "Considering the extent of payments to these outside legal counsel, it appears this information should be documented to support the propriety of the decision-making process," her office's audit concluded.

Some attorneys general continue to generate controversy about their connections with plaintiffs' lawyers even after they leave office. Plaintiffs' attorneys contributed some 22 percent of the contributions Richard Ieyoub reported in his two campaigns for attorney general of Louisiana. Many were richly rewarded with state work. For example, the 13 Louisiana firms selected by Ieyoub to represent the state in the multi-state tobacco litigation were later awarded a total of \$575 million in fees. Those firms contributed more than \$200,000 to Ieyoub.

One of the firms – Badon and Ranier of Lake Charles – that received multi-million-dollar fees in the tobacco suit also received \$25 million for legal representation of the state in asbestos cases. The Badon firm contributed \$15,000 to Ieyoub's political efforts.

The 13 firms hired by Ieyoub paid \$650,000 in May 2001 to settle a state Board of Ethics investigation into allegations that the firms improperly benefited from the work by receiving fees far larger than allowed for attorneys working for the state.

Ieyoub's tenure as attorney general was marked by his large appetite for hiring outside legal counsel. In 2000, a state legislative audit showed that Ieyoub spent \$11.7 million on outside attorneys in one year. The auditor also complained that there was a lack of documentation about how outside lawyers were selected or how the decisions to hire them were made. Ieyoub claimed

that many of the contracts cited by the auditor were entered into before Ieyoub took office.

The attorney general's method of paying outside counsel also attracted notice. Ieyoub proposed to hire 14 law firms – including many past contributors to his campaigns – to pursue environmental claims on behalf of his office in return for contingency fees of 25 percent of the amounts recovered. Challenged in court, Ieyoub eventually lost when the Louisiana Supreme Court, upholding lower court decisions, ruled in 1997 that Ieyoub could not enter into contingency fee agreements with private attorneys. (The fees paid years later in the tobacco case were treated differently because they were paid directly by the tobacco companies and thus, at least theoretically, did not reduce the state's recovery from the tobacco companies.)

### **Contracting In The Dark**

There is enormous potential for favoritism and even worse in AGs' selection of law firms to do legal work for their states. In Pennsylvania, former Attorney General Mike Fisher, now a federal judge, freely admitted to the *National Journal* that many large law firms had contributed to his 1996 election campaign. When it came time to picking law firms to help with the state's tobacco litigation, "there was a familiarity factor" and "that was how the decision was made." Other firms never had the chance to even make a presentation.

In 1996, then Texas attorney general Dan Morales used his power to handpick five Texas law firms to represent the state in its tobacco litigation. Four of the five Texas firms had made a combined total of nearly \$150,000 in campaign contributions to Morales from 1990 to 1995. Morales sought to award them 15 percent of Texas' \$17.6 billion recovery – roughly \$2.3 billion. Then-Gov. George W. Bush was furious when he learned of all this, and used the Morales contracts to help push an ambitious tort-reform law through the Texas legislature.

"The lawyers who helped settle this case should be paid an appropriate and reasonable fee," he said, "but I cannot in good conscience allow the taxpayers of Texas to assume \$2.3 billion in legal fees until questions about the legality and constitutionality of these fees are answered." Morales fought back, accusing Bush of "meddling." He filed a motion in U.S. District Court to sanction Bush and the legislators – as private citizens rather than as officials of the state – for attempting to stop the payments.

When the dispute went to an arbitration panel for resolution, the panel actually increased the fees to \$3.3 billion. The fee to each of the five firms – assuming that each attorney worked eight hours per day, seven days per week, for 18 months – amounted to \$105,022 per hour. There was a political backlash from the alliance between Morales and his favored law firms. In 1998, Morales was replaced by a judicial reformer, former Texas Supreme Court justice John Cornyn, now a U.S. Senator. Morales ran unsuccessfully for governor in 2002. He was then indicted by a federal grand jury on charges of getting kickbacks from the lawyers working on the tobacco case and using phony back-dated documents to try to bilk the state out of \$520 million from the tobacco settlement. In 2003, Morales pleaded guilty to mail fraud and filing a false income tax return. He is now serving a four-year prison sentence.

Nor was Texas the only state to be rocked by scandal surrounding its use of high-powered private lawyers in a search for tobacco bounty. The state of Maryland hired plaintiffs' lawyer Peter Angelos, one of the owners of the Baltimore Orioles, to handle its tobacco suit for a 25 percent contingency fee. Angelos helped Maryland win \$4 billion. But Angelos had help from his clients. He convinced the Maryland legislature to change the law in order to make his pending state case against the tobacco industry easier to win. "Initially he was losing the case," says Cato Institute Senior Fellow Robert Levy, until the state legislature eliminated traditional defense issues in the state's tort law. "Under the new rules Angelos couldn't lose."

In exchange for this legislative fist on the scale of justice, Angelos agreed to halve his fee. The state was pleased when the tobacco settlement earmarked hundreds of millions of dollars for the state's coffers. "Give me three more Peter Angeloses, and we don't have to worry about the budget," Maryland's then Governor Parris Glendening boasted. Angelos was also pleased, and soon became the single largest contributor to the Democratic Party in Maryland.

But unlike plaintiffs' counsel in other states, Angelos refused to submit his fee request to the national arbitration panel, which oversaw payments to plaintiffs' counsel from the tobacco industry settlement. Instead, when Maryland received the state's first payment from the tobacco industry, Angelos filed a lien on the payment and demanded enforcement of his original 25 percent contingent fee contract, claiming the legislature lacked the authority to alter that agreement. "It's gotten turned around here so that the attorney is telling the client what to do," said Maryland Assistant Attorney General Lawrence P. Fletcher Hill. Legislators resisted giving in to Angelos. *The Washington Post* quoted state Senate President Thomas V. "Mike" Miller Jr. as saying: "Mr. Angelos, in my opinion,

agreed to accept 12.5 percent if and only if we agreed to change tort law, which was no small feat. We changed centuries of precedent to ensure a win in this case." In other words, the rule of law could be scrapped in order to guarantee a payoff for the unholy alliance of the state's attorney general and Angelos.

After a three-year legal battle, Angelos finally settled for a payment of \$150 million over five years for his work on the tobacco lawsuit. That ended the fight between the state's top Democrats and their party's biggest financial contributor.

## **Hardball Tactics**

But Maryland isn't the only state where such hardball tactics have been tried. U.S. Senator Jeff Sessions recalls that while he was Attorney General of Alabama in 1996, he was approached by a group of attorneys who wanted him to hire them to sue the tobacco companies on a 25 percent contingency fee basis. After Sessions told them they didn't have a good legal case, "they persisted and told me certain names they wanted to participate...and the person making the proposal to me...was the Lieutenant Governor of Alabama who was a part-time [public official] and a lawyer. He was coming [to see me] as a private attorney, and he was going to make part of the fee out of the case." After Sessions objected, he was told "You can hire some of your buddies, your Republican law firms – cut them in on the deal. Why don't you do that, Jeff? That will be fair, won't it?" Senator Sessions said in a Senate floor speech that he wasn't the only attorney general who had this experience. "They [went] around the States...approaching attorneys general with this kind of pitch."

Other states have seen scandals surrounding breathtaking fees granted to politically-connected law firms. In 2000, then Kansas Attorney General Carla Stovall had to testify under oath about the way she selected her former law firm, Entz & Chanay, to be local counsel in the state's tobacco suit. When Stovall had run for re-election in 1998, her old firm provided her with an office and campaign contributions. Legislative hearings on the firm's \$27 million arbitration award featured testimony by partners from another firm, Wichita's Hutton & Hutton, that cast doubt on how the non-competitive selection was made.

Mark Hutton testified that a senior deputy attorney general said Hutton's firm was "the only game in town," and the attorney general's office entered into a verbal contract for Hutton to handle the tobacco litigation. The Hutton firm's records show it spent 156 hours on the case in 1996. Then in August 1996,

Stovall informed them that she had selected her former firm, Entz & Chanay, instead, even though it had no experience in tobacco litigation. Internal office e-mails from Attorney General Stovall indicated her desire to "crowd" or back out of her office's relationship with Hutton & Hutton. Stovall testified before the arbitration panel that awarded Entz & Chanay \$27 million that only her former firm was capable of doing, or willing to do, the work. "That's simply not true," said Mark Hutton. "I was there; we *were* doing the work."

Normally, the dispute could be dismissed as sour grapes between two powerful law firms. But the contract that Stovall did sign with her former firm relieved the firm's lawyers of any responsibility to keep records proving they did real work on the case. When *Reader's Digest* asked partner Stuart Entz how many hours his firm had spent on the case to earn its \$27 million award, it was told: "We have no way of knowing." Entz pointed to a provision in his firm's contract with the AG's office: "Counsel are not required to maintain time records." Stovall refused to answer further questions about the contract after her testimony. She chose not to seek reelection in 2002, and left office under an ethical cloud.

Other warriors in the tobacco wars have also recently left office. In 2000, Washington state's antitrust chief, Jon Ferguson, departed his job in state government to join the Seattle law firm of Chandler, Franklin & O'Bryan to work on class action lawsuits. Ferguson worked with the Chandler firm's Steve Berman during the state's tobacco lawsuit. When Ferguson was asked why he was leaving government, he explained, "Steve Berman got \$50 million and I got a plaque."

But many players in the tobacco settlement have stayed in government and climbed higher up the political ladder with support from law firms involved in the litigation – sometimes on both sides. *The Charlotte Observer* reported in 1999 that campaign records for state Attorney General Michael Easley, now the state's governor, revealed he had received \$60,000 from out-of-state lawyers who were involved in state tobacco litigation, including Mississippi lawyer Dickie Scruggs. Easley's campaign manager, Jay Reiff, implied that the AG's acceptance of the lawyer contributions was offset by Easley's donations from tobacco companies and growers. *The Charlotte Observer* quoted Reiff as saying: "It would be easy for opponents to twist this into something that it's not. We're proud to have support from all parties in the tobacco settlement."

Easley's welcoming of all comers when it comes to campaign contributions was emulated this year by Christine Gregoire, the Washington state attorney general

who is now the Democratic candidate for governor in that state. She played a lead role in crafting the master settlement that resulted in tobacco companies agreeing to pay \$206 billion to the states over the next 25 years. Washington state netted \$4.6 billion from the settlement. Other parties also did well from the settlement, especially law firms that divided up \$93 million for the work they did for Gregoire's office on the case. Since then, *The Seattle Times* reports, she has received over \$100,000 in campaign contributions from firms on both sides of the tobacco battle. Last November, Meyer Kaplow, the former lead negotiator for tobacco company Philip Morris, held a fundraiser for Gregoire at his office in New York. Cliff Douglas, president of the Michigan-based Tobacco Control Law Group, couldn't believe that his former ally in the tobacco wars had gone to the fundraiser. "I'm frankly shocked," he told *The Seattle Times*. "It doesn't mean she's going to do the tobacco industry's bidding, but the appearance is ugly."

Gregoire defended the fundraiser at Kaplow's office, noting that her colleague, New York Attorney General Eliot Spitzer, also attended. "These people are friends of mine now. I spent more time with them in two years than I did with my own family," she said.

Today, billions of dollars change hands in contracts between state attorneys general and politically-connected law firms with little oversight, standards or accountability. The AGs who will agree to comment say they always pick the most qualified firm to do legal work for the state, but they also recoil at the suggestion that there be any oversight of that process. The potential for conflicts of interest between campaign contributions and the awarding of contracts for state legal work is greater than it has ever been.

### **An Agenda For Reform**

The growing symbiotic relationship between state attorneys general – all of whom take an oath to uphold the Constitution and pursue the public interest – and plaintiffs' law firms who have an interest in pursuing profits has powerful political and economic incentives behind it. Those can be expected to grow in the future unless action is taken now.

"Today, state AGs occupy a unique and increasingly significant junction of policymaking, enforcement and advocacy, and their potency will only grow," concluded a recent study of their offices by *Corporate Legal News*. "Companies that don't learn how to cooperate effectively will pay the price." Indeed, New York Attorney General Spitzer summed up the new reality in a June 2003

speech: "One of the things I've learned since college is that power is a zero-sum game. If they're giving it away, you've got to embrace it and hold it dear." Having successfully tamed Wall Street with his power, Mr. Spitzer had some advice for how business should look at the state AGs and their new-found power. "If you had to reduce it to one sentence: We're not going anywhere, we're going to hang around – so get used to it."

But such power should be accompanied by accountability. Former Attorney General Dick Thornburgh has testified before Congress that plaintiffs' lawyers "act as if they were not mere attorneys, but private-sector attorneys general." He pointed out that a true attorney general, whether state or federal, is accountable to the public through democratic processes. And certainly no true public law enforcement officer would be allowed to personally profit from a prosecution. "Plaintiffs' lawyers, on the other hand, are not bound or constrained in any way by democratic processes," he warned. "They are free to masquerade their personal agendas in the guise of social policy."

The marriage between plaintiffs' lawyers and state attorneys general, combined with their occasional willingness as in Maryland and Florida to abolish traditional legal defenses to achieve their goals, threatens to undermine the rule of law that is such a bedrock of this nation's success. "The most important political development of the second millennium was the firm establishment, first in one or two countries, then in many, of the rule of law," British historian Paul Johnson has written. The idea that everyone is subject to the law and all are equal before it is a foundation of Western civilization. Rome ruled its Mediterranean empire through Roman law, Johnson notes. As a result, prosperity spread and ordinary citizens could go about their daily lives in peace. But this started to decay when the Republic became an empire, with Nero and Claudius ruling by whim. Historians have noted that one reason for the decline of the rule of law in Rome was the confusion of public and private attorneys, and public and private business.

Today ambitious state attorneys general are supported by the contributions of friendly plaintiffs' attorneys, and political muscle often trumps sound legal reasoning. One need not look far to find another contemporary example of the dangers of allowing attorneys general unbridled power to join with private lawyers in legal actions. After Watergate, Congress authorized independent counsels – private attorneys appointed by panels of federal judges to investigate executive branch officials. The country for years believed that the men and women appointed to such posts operated in the public interest and could be trusted with broad powers and left largely unsupervised by the Justice

Department. But by the Clinton era, both liberals and conservatives began to see the drawbacks of giving independent counsels vast power and unlimited budgets to target specific figures. Both political parties joined together to let the independent counsel law expire in 1999.

The irony is that today we have a new set of independent counsels in the form of state attorneys general. Like the old independent counsels, they are largely unregulated in their power – and, when they operate through private plaintiffs' lawyers who get paid out of recoveries rather than by taxpayers, they often enjoy an unlimited budget to pursue targets of their choosing. Those who opposed the outsized power of independent counsels at the federal level should ask themselves if current policies are creating their functional equivalent at the state level in the form of state attorney generals.

"We are shifting the powers of legislative bodies – commercial regulation, taxation, appropriation and the power to change law – to the judicial branch of government," says former Alabama Attorney General Bill Pryor. He believes the main objective of several of his former colleagues' lawsuits was to raise revenue. The purported goal of the AGs' suits against the tobacco industry was to recover money the states had spent treating tobacco-related illnesses, but Pryor cited a study by Harvard Law School professor Kip Viscusi that "proved that cigarette tax collections more than offset the cost to government for treating tobacco-related illnesses." But, Pryor adds, "using lawsuits to raise revenue is far easier than raising taxes the old-fashioned way. This method bypasses the need for representatives or the voters to approve the tax."

This ability for the state to collect money without any legislative approval threatens to reorder American economic life. The pattern set by the state AGs and their plaintiff-lawyer allies is clear: First, find an industry with deep pockets, then make a squeeze play. "The tactic is to put pressure on the companies directly, then put pressure on the companies indirectly through the investing public, then scare the companies and ask for some money to go away," Wall Street analyst Ken Abramowitz told *Fortune* magazine.

The indirect pressure that can bring companies to heel often involves spooking investors with the prospect of a profit-draining lawsuit that will reap an ocean of negative publicity and depress a company's stock price. Management may feel compelled to settle in order to prevent investor panic. "The most important lesson I learned in the tobacco wars was the pressure the investor can bring to bear on management," says Mississippi trial lawyer Dickie Scruggs, a leading architect of the national tobacco litigation. This pressure can force

changes in American life and freedoms that neither Congress nor state legislatures might have otherwise contemplated.

"Under the pressure of litigation that would have imposed crushing costs, the tobacco companies agreed to things that would have never passed First Amendment muster under legislation," says New York attorney Doug Wood. "Changes in commercial free speech in settlements can now exceed anything contemplated by statute or a court order."

At the very least, stricter oversight is needed of state contingency-fee agreements with private-sector lawyers. Under the current backroom process by which private attorneys are hired to represent the people of a state, the lack of public transparency and competitive bidding creates a clear potential for corruption or abuse.

"There's not that much conceptual difference between a contract to build a new airport...and to hire a plaintiffs' attorney," says Columbia Law School professor John Coffee, who says an open, competitive process should be used to hire lawyers representing the public in such cases.

The American Legislative Exchange Council has developed model legislation called the "Private Attorney Retention Sunshine Act." It would require an "open and competitive bidding process" when attorneys general enter into contracts with private attorneys. The act calls for legislative hearings on contracts that exceed \$1 million. At the end of any contingency-fee case, the bill would require a statement of hours worked, expenses incurred, and effective hourly rates. Five states have already adopted laws based on the ALEC model: Colorado, Kansas, North Dakota, Texas and Virginia.

## **Conclusion**

In his famous 1960s anti-bureaucratic poem "The Incredible Bread Machine," author R.W. Grant described an entrepreneur named Tom Smith who had developed a process by which bread could be made for a mere penny a loaf. But far from being hailed, he was attacked by jealous competitors and power-seeking prosecutors who took him to court to limit the competition he was giving the "bread trust." In the poem, when Tom Smith appears before the judge he asks plaintively why he has been singled out. The judge looks down upon him and intones: "In complex times, the Rule of Law has proved itself deficient. We much prefer the Rule of Men, it's vastly more efficient."

Depending on whose ox is being fattened, that may be, but the result is certainly not ultimately beneficial for either taxpayers or consumers. Most Americans want corporations to be responsible for genuinely harmful actions, but public opinion surveys show they properly remain skeptical of the Brave New World of what former Clinton Labor Secretary Robert Reich calls "the era of regulation through litigation." They would be even more leery if they learned just how much many state attorneys general depend on the plaintiffs' bar for the campaign contributions they need in order to stay in office.

## **About the author**

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Fund joined the Journal in April 1984 as deputy editorial features editor. He became an editorial page writer specializing in politics and government in October 1986 and was named a member of the Journal's editorial board in December 1995.

He began his career as a research analyst for the California State Legislature in Sacramento before beginning his journalism career in 1982 as a reporter for the syndicated columnists Rowland Evans and Robert Novak. In 1993, he received the Warren Brookes Award for journalistic excellence from the American Legislative Exchange Council.

He and former Pennsylvania Rep. James K. Coyne are co-authors of the book "Cleaning House: America's Campaign for Term Limits" (Regnery Gateway, 1992). He is also the author of the just released book "Stealing Elections: How Voter Fraud Undermines Our Democracy."

## **About the Institute for Legal Reform**

Founded in 1998, ILR is a 501 (c) (6) tax-exempt, separately incorporated affiliated of the Chamber. The mission of ILR is simple: to make America's legal system simpler, fairer and faster for everyone. ILR's multifaceted program seeks to promote civil justice reform through legislative, political, judicial and educational activities at the national, state and local levels.

# **Bounty Hunters On The Prowl: The Troubling Alliance Of State Attorneys General and Plaintiffs' Lawyers**

by John Beisner, Jessica Davidson Miller, and Terrell McSweeney<sup>1</sup>

## **EXECUTIVE SUMMARY**

Over the last decade, private plaintiffs' lawyers have succeeded in persuading state attorneys general to retain them under contingency fee arrangements to bring purported enforcement actions in the attorney generals' stead. These retention deals initially came into vogue in the context of the litigation mounted by many states against tobacco companies, but have now spread to numerous other arenas, including general product liability, financial services, and environmental lawsuits.<sup>2</sup> Not surprisingly, the growing frequency of such arrangements has caused raised eyebrows, in part because of the enormous size of the attorneys' fees ultimately paid to the private counsel in some of these actions. For example, the attorneys retained by Texas' state attorney general in one of the tobacco cases several years ago received \$3.3 billion in fees – approximately \$92,000 per hour.<sup>3</sup>

These contingent fee arrangements raise two fundamental policy concerns. First, in many cases, the private attorneys – not the attorney general – are the catalysts for these suits. The private counsel approach the attorneys general with an idea for a proposed lawsuit venture, urging that they be retained to pursue the litigation in the state's name and share a substantial

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<sup>1</sup> Mr. Beisner and Mses. Miller and McSweeney are attorneys resident in the Washington, D.C. office of O'Melveny & Myers LLP. They are members of the firm's Class Action Practice Group.

<sup>2</sup> See, e.g., Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 20, 40 (2000); Edmondson Fed Up, Daily Oklahoman, Sept. 10, 2004, at 6A; Dep't of Justice, *Federal Court Dismisses Four Billion Dollar Claim Against the United States*, Nov. 26, 2002, available at 2002 WL 31663169.

<sup>3</sup> Miriam Rozen & Brenda Jeffers, *Why Did Morales Exchange Good Judgment for the Good Life?*, Texlaw, Oct. 27, 2003.

percentage of whatever recovery they may obtain. Thus, where these practices are occurring, private lawyers are playing a substantial role in setting priorities for state law enforcement efforts and heavily influencing the prosecutorial discretion calls that should be made by duly elected or appointed state officials. The obvious concerns about this abdication of enforcement decision-making responsibility are heightened by the fact that the private attorneys assuming that responsibility (unlike traditional public servants) have a strong financial stake in the outcome of the enforcement efforts they seek to pursue in the state's name.

Second, in many jurisdictions, the decisions to file these lawsuits and the selection of counsel are not made in the sunshine. Because the contingency fee suits do not require an appropriation of public dollars, they are not subject to legislative debate or any other public scrutiny. And in contrast to other contracts entered by state governments, they are generally not subject to competitive bidding. In sum, in most jurisdictions, attorneys general have unfettered discretion to dole out these lucrative arrangements, leading to a perception (if not the reality) that the contingency fee deals are political favors that state attorneys general are bestowing on their campaign supporters.

One critic of such contingent fee arrangements with private attorneys, former Alabama Attorney General Bill Pryor, summarized the concerns as follows:

The use of contingent fee contracts allows governments to avoid the appropriation process and create the illusion that these lawsuits are being pursued at no cost to taxpayers. . . . If you do not ban these arrangements, in the context of government suits, you should, at least, consider several legislative restrictions: caps on hourly rates or percentages; competitive bidding; detailed time and expense record keeping; review by legislative committee of contracts with attorneys; and limits on campaign contributions by attorney to government officials.<sup>4</sup>

Few states have heeded Pryor's warnings. Many continue to use contingency fee counsel

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<sup>4</sup> Bill Pryor, Curbing the Abuses of Government Lawsuits Against Industries, Presentation to the American Legislative Exchange Council (Aug. 11, 1999).

in a variety of settings,<sup>5</sup> and in most states, the contracts with those counsel are subject to little oversight and few restrictions, even though they have the potential to cost taxpayers millions and even billions of dollars. Only three states have capped hourly rates for attorneys hired to represent the state or imposed detailed reporting requirements on contingency-fee counsel, and only one state (Virginia) requires competitive bidding for all contingency fee contracts.<sup>6</sup> While some courts have stepped in to protect the public from such arrangements by ruling that contingency fee arrangements with private attorneys amount to an unconstitutional appropriation of public funds outside the legislative process,<sup>7</sup> it is clear that the policy and ethical concerns raised by such arrangements (particularly the concerns that these profit opportunities are being handed out to political donors) cannot be solved by courts alone. For example, only a few states have acted to adopt ABA Model Rule 7.6, which prevents lawyers from making political contributions for the purpose of soliciting legal business from the state.

Section I of this article discusses in more detail the concerns raised by contingent fee arrangements with outside counsel, and Section II provides a state-by-state summary of the law regarding these contingent fee arrangements.

**I. DELEGATION OF ATTORNEY GENERAL FUNCTIONS TO PRIVATE LAWYERS RAISES A NUMBER OF TROUBLING POLICY AND ETHICAL CONCERNS.**

**A. Enforcement Decisions Should Not Be Made By Private Individuals – Particularly Those Who Have A Personal Stake In The Outcome Of The Litigation.**

Contingency fee agreements in lawsuits brought in the name of state attorneys general

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<sup>5</sup> Allan Kanner & Tibor Nagy, *The Use of Contingency Fees In Natural Resource Damage and Other Patriae Cases*, *Toxics Law Reporter*, Aug. 12, 2004, at 745.

<sup>6</sup> Va. Code Ann. § 2.2-510.1 (2003).

<sup>7</sup> See, e.g., *Meredith v. Ieyoub*, 96-1110 (La. 1/9/97), 700 So. 2d 478.

turn law enforcement principles on their head by effectively pinning the sheriff's badge on private individuals – instead of the duly authorized and empowered public officials charged with enforcement authority. In many cases, the lawsuits at issue are conceived by private attorneys and then “shopped around” to various attorneys general in an effort to sign up as many states as possible. The reason the plaintiffs’ attorneys want the attorney general imprimatur is self-evident: having the attorney general’s name on a lawsuit generates negative publicity for a defendant and increases the pressure to settle. And in some jurisdictions, the attorney general’s apparent involvement with the action will increase the likelihood of victory before the state’s courts. There is perhaps no greater “home town” advantage than an attorney general litigating in the courts of his own jurisdiction. Thus, these suits exert even more pressure on a defendant than the traditional class action – and can result in even higher fees.

The result, however, is that private individuals are deciding matters that are normally left to the prosecutorial discretion of public – and politically accountable – officials. And this subverts basic principles of government. Private attorneys are not office-holders, they are not publicly elected, and there is no political mechanism for holding them accountable for litigation decisions. Simply put: they should not be formulating and carrying out major enforcement or public policy initiatives.

The problem of delegating prosecutorial discretion to private attorneys is exacerbated by the fact that the private attorneys have a strong personal financial interest in the enforcement decisions at issue. The contingency suits thus violate a central tenet of good government: that individuals should not have a personal stake in matters when they purport to represent the public. Government attorneys, as the embodiment of the state’s police power, are never allowed to profit from legal work on behalf of the state. They must avoid any personal stakes in the outcome of

an action. And, of course, their incomes are not contingent upon litigation outcomes.

Private attorneys, in contrast, have a strong and obvious personal stake in litigation. One need look no further than the tobacco litigation to see just how large this personal stake can be. Private attorneys who represented Florida and Mississippi were awarded \$4.9 billion in fees.<sup>8</sup> Attorneys representing the state of New York received \$625 million in fees – \$13,000 per hour – by the New York Tobacco Fee Arbitration Panel as a part of the state’s \$25 billion tobacco settlement.<sup>9</sup> In state after state, private attorneys walked away with billions in fees, which were deducted from the settlements that would otherwise benefit the state’s citizens.<sup>10</sup>

There can be little question that a personal interest of this magnitude may affect decisions, such as the question whether to initiate legal action and issues about when and how to settle filed cases. State attorneys general are required to settle cases in a manner they believe furthers the public interest; presumably, they have no countervailing personal interest. Private attorneys, on the other hand, may not consider the public interest in deciding whether to settle cases, and may instead strongly consider their fee award.

In this regard, the contingency suits are analogous to deploying a private police force on to city streets and giving them a percentage of any fine that they may decide to levy: even if some police officers would work harder in such a regime, the threat of corruption and, at the very least, the perception of corruption would itself dangerously undermine public confidence. As the U.S. Supreme Court has noted, a “scheme injecting personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial

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<sup>8</sup> Barry Miller, *Case Study in Tobacco Law: How a Fee Jumped in Days*, N.Y. Times, Dec. 15, 1998.

<sup>9</sup> Daniel Wise, *New York Tobacco Fee Hearing Has Lawyers Smoking*, New York Law Journal, July 26, 2002.

<sup>10</sup> Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal. F. 71, 81-82 (2003).

decision and in some contexts raise serious constitutional questions.”<sup>11</sup> Allowing private individuals with a strong financial stake to influence (and in many cases, to decide) which lawsuits – and which industries – a state attorney general chooses to prosecute does precisely that.

**B. The Contingency Fee Agreements Are Generally Reached Behind Closed Doors, Immunizing Them From Legislative Or Regulatory Scrutiny.**

The second problem with the use of contingency fee arrangements in connection with enforcement actions is that in many states, they afford a mechanism by which state attorneys general may skirt the financial approval processes of the state legislature or the state’s executive branch. If, for example, a state attorney general seeks funding for an enforcement initiative against a certain industry or practice, and the legislature declines to fund the project, the attorney general can simply turn around and enter into a contingency fee agreement to achieve the same end. Thus, in such circumstances, a state attorney general would have unfettered authority to engage in special projects – effectively shifting the power of the purse from the legislature to the attorney general.<sup>12</sup>

This ability to evade budgetary restraints is particularly troubling because there is no such thing as a free lawsuit. In the first place, contingent fee arrangements are not free, because they result in significant reductions in the public’s recovery. While public funds are not used to finance the litigation up front, large fee awards are essentially a diversion to private lawyers of funds that would otherwise go into the public coffers and reduce the citizens’ tax burdens.<sup>13</sup> Thus, the public does pay in a very direct and substantial way for the lawyers who operate under

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<sup>11</sup> See, e.g., *Marshall v. Jerrico*, 446 U.S. 238, 249-50 (1980).

<sup>12</sup> See, e.g., *Meredith v. Ieyoub*, 96-1110 (La. 1/9/97), 700 So. 2d 478 (holding that a contingent fee contract unconstitutionally transferred the power of the purse from the legislature to the attorney general).

<sup>13</sup> Michael DeBow, *Restraining State Attorneys General, Curbing Government Lawsuit Abuse*, Pol’y Analysis, May 10, 2002, at 1-18.

contingent fee arrangements. This is especially problematic in those states that do not regulate attorneys' fees in any way – *i.e.*, by imposing detailed time and expense record keeping or legislative committee review of contingent fee agreements with private attorneys. Regardless of whether the citizens pay now or pay later, the point is that they are still paying. In some circumstances, the general public may also pay for such lawsuits in the sense that decisions to pursue enforcement actions against certain targets can have broad societal costs. For example, forcing a potentially bankrupting monetary settlement on a state's largest employer (instead of seeking a settlement that involves only injunctive relief) may have enormous costs that ultimately will be borne by taxpayers. When private attorneys – with a huge financial stake that favors money-recovery resolutions – are the ones making enforcement decisions, those considerations may be ignored.

The lack of oversight also feeds a growing perception that the contingency agreements are simply a way for state attorneys general to reward their political backers. The public-private joint tobacco litigation in the 1990s bestowed windfalls on the political supporters of attorneys general and raised concerns that private attorneys were not being selected to represent the people based on their merit, but rather on the generosity of their political contributions. For example, Mississippi Attorney General Mike Moore chose his top campaign contributor to lead the state's suit against the tobacco companies.<sup>14</sup> And in Texas, attorney general Dan Morales reportedly demanded a \$250,000 campaign contribution from any firm seeking to represent the state in tobacco litigation.<sup>15</sup> Alabama attorney general Bill Pryor, who opposes the use of contingency fee counsel, noted that such agreements “create the potential for outrageous windfalls or even

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<sup>14</sup> Kevin Stack, *Tobacco Industry's Dogged Nemesis*, N.Y. Times, Apr. 6, 1997.

<sup>15</sup> Robert A. Levy, *The Great Tobacco Robbery – Hired Guns Corral Contingent Fee Bonanza*, Legal Times, Feb. 1, 1999, at 27; Rozen & Jeffreys, *supra* note 3..

outright corruption for political supporters of the officials who negotiated the contracts.”<sup>16</sup>

Simply put, any time a public official has the ability to bestow potentially lucrative contracts on private individuals – with no legislative or regulatory check on that authority – there will be, at the very least, a perception that the contracts are being awarded as political favors. And, of course, this perception is all the more troubling when the person bestowing the contracts is the state’s chief law enforcement officer.

## **II. ONLY A FEW STATES HAVE TAKEN STEPS TO RESOLVE THESE CONCERNS BY REGULATING OR PROHIBITING CONTINGENCY CONTRACTS WITH PRIVATE COUNSEL.**

### **A. Types Of State Regulation**

Although there are several common-sense initiatives that states can adopt to alleviate both the policy and ethical concerns raised by the contingent fee arrangements, very few states have adopted – or even seriously considered – these reforms. For example:

- One way to address accountability concerns is simply to require legislative approval of contingency fee contracts. But only nine states have taken that simple step.
- Another approach is to subject attorney contracts to the same competitive bidding requirements that apply to other government contracts. Requiring competitive bidding for attorneys’ fee contracts would eliminate many of the ethical concerns raised by the contingency fee arrangements – without in any way diminishing the benefits of such suits to the citizens themselves. Nonetheless, only one state has adopted this reform.
- Another potential approach to addressing the potential abuses of contingency contracts is to cap fees so that these representations remain remunerative without becoming one-contestant jackpots. Again, most states have failed to adopt this simple reform.

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<sup>16</sup> Pryor, *supra* note 4.

- And yet another important reform is to prohibit attorneys general from awarding lucrative contracts to their campaign donors. However, just two states have adopted the ABA’s modest Model Rule 7.6, which prevents lawyers from making political contributions for the purpose of soliciting legal business from the state.<sup>17</sup> Eight states have expressly decided not to adopt the rule.<sup>18</sup>

The following chart summarizes the types of regulation of attorney general-private counsel contingency fee arrangements that states have adopted:

<b>FORMS OF REGULATION OF ATTORNEY GENERAL CONTINGENCY FEE CONTRACTS</b>	<b>STATES ADOPTING FORM OF REGULATION</b>
<b>Contract Must Be Approved By Legislature</b>	AL; AR; FL; KS; LA; MS; TX; VT; WI
<b>Contract Must Be Approved by Governor (or Executive Branch)</b>	AR; ID; KY; MD; MN; NV; NC; ND; TN
<b>Cap On Hourly Rates</b>	AZ (does not apply when court sets fees); CO; TX
<b>Attorney Must Provide Detailed Reporting Of Time Spent On Matter</b>	CO; KS; TX
<b>Attorney Contracts Must Be Subject To Competitive Bidding</b>	VA
<b>Outside Counsel Must Be Paid With Legislatively Appropriated State Funds</b>	FL; LA; NV; TN
<b>Attorneys Prohibited From Making Contributions In Order To Secure Government Engagement</b>	DE; ID; NY; NJ; NY; OH; SC, UT, WV

<sup>17</sup> Delaware Rules of Professional Conduct; Idaho Rules of Professional Conduct.

<sup>18</sup> North Dakota Ethics Committee Minutes 2004; 2002 Final Report, New Jersey Bar Association; Nevada Bar Association Ethics Report, Dec. 2003; Oregon Bar Association Report 2003; Maryland Lawyers Committee on Professional Responsibility Final Report 2003, DC Bar Association Final Report, 2003; Virginia Bar Association Report 2003; Comment on Nebraska Proposed Rules of Professional Conduct. Model Rule 7.6 stops short of prohibiting lawyers from accepting government contracts from officials to whom they make political contributions. But the comment to Rule 7.6 warns that when lawyers who receive government litigation contracts make political contributions to government officials “the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit.” In such circumstances, the comment notes, “the integrity of the profession is undermined.”

## **B. State-By-State Summary Of Regulation**

The following is a summary of how each state regulates contingency fee contracts between the attorney general and private counsel:

### **1. Alabama**

Alabama does not limit contingent fees for private attorneys engaged by the state. However, legislative approval of such arrangements is required.<sup>19</sup> In *State v. American Tobacco*, the Alabama Supreme Court held that legislative approval is required for all state contracts for private legal services – including those entered into by the governor and attorney general.<sup>20</sup> In that case, the court voided a contingent fee agreement between Governor Fob James and private attorneys hired to recover tobacco-related damages on behalf of the state. The contract entitled the attorneys to up to seven percent of the state’s recovery – more than \$2 million of the \$38 million payment designated for a trust fund to benefit at-risk children. The award amounted to more than \$2,051 per hour for each attorneys. The Court voided the contract and reduced the fee award to \$115,062, plus \$10,000 for expenses.<sup>21</sup>

### **2. Alaska**

Alaska does not impose statutory restrictions on the use of contingent fee agreements to retain private attorneys to represent the state. Only the attorney general is authorized to contract for legal services on behalf of the state.<sup>22</sup> Alaskan courts have granted the attorney general nearly unlimited discretionary control over the legal business of the state.<sup>23</sup> In a case challenging the attorney general’s ability to appoint special prosecutors, an Alaska appellate court noted that

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<sup>19</sup> Ala. Code §§ 29-2-41, 29-2-41.2(b) (2004).

<sup>20</sup> *State v. Am. Tobacco Co.*, 772 So. 2d 417, 419-20 (Ala. 2000).

<sup>21</sup> *Id.* at 423.

<sup>22</sup> Alaska Stat. § 36.30.015 (2004).

<sup>23</sup> *Dep’t of Law v. Breeze*, 873 P.2d 627, 634 (Alaska Ct. App. 1994).

“[u]nder the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state’s litigation which he thinks best.” However, the same court noted that “the attorney general is to maintain appropriate supervision, direction, and control” over the people to whom he has delegated his authority.<sup>24</sup> Moreover, while the attorney general may hire outside counsel in matters “distant from the capital” in which the state has an interest, he needs approval from the governor to do so.<sup>25</sup> Arguably, therefore, the statutory provision that permits the attorney general to delegate his powers might limit the use of contingent fee agreements if a court were to conclude that such arrangements prevented the attorney general from adequately supervising the work of outside counsel or were not approved by the governor.

### 3. **Arizona**

Arizona permits the attorney general to contract with private attorneys to enforce federal or state antitrust, restraint of trade, or price-fixing statutes, but caps the fees that private attorneys can recover under contingency agreements with the state. Private attorneys may not be paid more than a \$50 maximum hourly fee contingent on the outcome of a case.<sup>26</sup> However, this cap is significantly weakened by an exception: the cap does not apply where a court sets the attorneys’ fee award.<sup>27</sup>

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<sup>24</sup> *Id.* at 633.

<sup>25</sup> Alaska Stat. § 44.23.050 provides: “If a matter in which the state is interested is pending in a court distant from the capital, and it is necessary for the state to be represented by counsel, the attorney general, with the approval of the governor, may engage one or more attorneys to appear for the attorney general. The attorney general may pay for these services out of appropriations for the attorney general’s office.”

<sup>26</sup> Ariz. Rev. Stat. § 41-191(D) (2004) (“The attorney general may also, in suits to enforce state or federal statutes pertaining to antitrust, restraint of trade, or price-fixing activities or conspiracies, employ counsel on a fixed fee basis, not to exceed an hourly rate of fifty dollars per hour, such fee to be contingent upon and payable solely out of the recovery obtained in suits so instituted, except that where the court in which the case is pending has the authority to set a fee in conjunction with a given case, and does so set a fee, the court awarded fee shall be paid in lieu of the fee provided in this section.”).

<sup>27</sup> *Id.*

#### 4. **Arkansas**

In Arkansas, the attorney general may hire outside counsel for state legal matters, but can only do so with approval of the governor and after legislative review.<sup>28</sup> Arkansas law does not expressly prohibit or restrict the use of contingency agreements with private attorneys, but it requires written approval from the governor and attorney general for compensation fixed by a court.

#### 5. **California**

Under certain circumstances, the attorney general of California can employ outside counsel by contingency fee contract.<sup>29</sup> However, California courts have prohibited the use of such contracts in cases in which the state pursues sovereign interests such as eminent domain proceedings and nuisance cases or any civil actions that “demand[] the representative of the government to be absolutely neutral.”<sup>30</sup> In one case, the California Supreme Court concluded that with regards to such actions: “any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated.”<sup>31</sup> Contingency fee arrangements have specifically been permitted in tort cases.<sup>32</sup> Notably, however, a \$1.25 billion fee award to attorneys in the California tobacco litigation was reduced after a reviewing court concluded it was “irrational.”<sup>33</sup>

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<sup>28</sup> Ark. Code Ann. § 25-16-702 (2005) (“If, in the opinion of the Attorney General, it shall at any time be necessary to employ special counsel to prosecute any suit brought on behalf of the state or to defend a suit brought against any official, board, commission, or agency of the state, the Attorney General, with the approval of the Governor, may employ special counsel. The compensation for the special counsel shall be fixed by the court where the litigation is pending, with the written approval of the Governor and the Attorney General. The Attorney General shall not enter into any contract for the employment of outside legal counsel without first seeking prior review by the Legislative Council.”).

<sup>29</sup> Cal. Gov. Code § 12520.

<sup>30</sup> *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740 (1985).

<sup>31</sup> *Id.* at 749.

<sup>32</sup> *City & County of San Francisco v. Phillip Morris Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1997).

<sup>33</sup> William McQuillen, *Court Throws Out \$1.25 Billion Award to California Tobacco Lawyers*, Sept. 26, 2002, available at <http://Bloomberg.com>.

## 6. Colorado

Colorado contracts with outside attorneys at an hourly rate,<sup>34</sup> but a law enacted in 2003 permits government agencies to hire contingency counsel subject to certain restrictions. The law requires private attorneys to report monthly costs, including the number of hours billed, a description of work performed, and court costs associated with the case. In addition, the law caps the amount that the state may pay under a contingent fee contract to \$1000 an hour.<sup>35</sup>

In the declaration accompanying the law, the Colorado legislature explained that the restrictions were necessary because contingent fee contracts give the attorneys involved in the case “a direct personal stake in the outcome of legal proceedings [that] is potentially unfair to the citizens or businesses against whom the governmental entity has filed suit and may not serve the best interests of the citizens of businesses on whose behalf the governmental entity initiates legal proceedings.”<sup>36</sup> The legislature also reasoned that the restrictions were necessary to provide accountability for government decisions and to avoid the payment of excessive attorney fees by the state.<sup>37</sup>

## 7. Connecticut

Connecticut grants its attorney general authority to “procure such assistance as he may require.”<sup>38</sup> While Connecticut statutes do not limit the use of contingent fee contracts to retain private attorneys, Connecticut courts have consistently held that the power to receive state funds

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34. Colorado Legislative Council Staff Report, SB03-086, Dec. 30, 2002.

35. Colo. Rev. Stat. § 13-17-304 (2003).

36. *Id.* § 13-17-302(f).

37. *Id.* § 13-17-302(g)-(h).

38. Conn. Gen. Stat. § 3-125.

or expend them rests solely with the legislature.<sup>39</sup> Furthermore, Connecticut law provides that all funds recovered in a legal action are the property of the client, not his attorney.<sup>40</sup> Arguably, therefore, fees deducted from a *parens patriae* award would, at a minimum, require legislative approval.

## 8. Delaware

Delaware grants its attorney general broad authority to retain private attorneys for state legal matters.<sup>41</sup> In fact, courts have even approved a program through which private attorneys (paid by their private employers) act as volunteer prosecutors.<sup>42</sup> At present, there are no statutory restrictions on the use of contingent fee contracts to retain outside counsel. However, Delaware has attempted to prevent private attorneys from profiting from political contributions, by adopting the ABA's Model Rule 7.6, which, as discussed above, prohibits a lawyer from accepting a government engagement if the lawyer or law firm makes a political contribution or solicits political contributions in an effort to secure the appointment.<sup>43</sup>

## 9. Florida

Florida law does not explicitly restrict the state attorney general's use of contingent fee agreements to retain outside counsel. However, even though Florida courts have not directly addressed the issue, case law suggests that legislative approval is required for the attorney general to enter into contingent fee agreements. During the tobacco litigation in the late 1990s, the state hired outside counsel on a contingency fee basis, a step that was expressly authorized by

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<sup>39</sup> *Adams v. Rubinow*, 251 A.2d 49, 65 (Conn. 1968) (finding that a statute transferring the power to set probate court fees from the legislature to the probate court administrator unconstitutionally transferred the legislature's power of the purse).

<sup>40</sup> *Erickson v. Foote*, 153 A. 853, 854 (Conn. 1931) ("The costs allowed in an action belong to the party in whose favor they are taxed, and not to his attorney.").

<sup>41</sup> Del. Code Ann. tit. 29, § 2507.

<sup>42</sup> *Seth v. State*, 592 A.2d 436 (Del. 1991).

<sup>43</sup> Model Rules of Prof'l Conduct R. 7.6 (2000).

the legislature.<sup>44</sup> When the validity of that agreement was later challenged, the Florida Supreme Court ruled that the state funds derived from the tobacco settlement had to be disbursed directly to the state before attorneys' fees were deducted, because the contract explicitly stated that the lawyers' right to their fees "ripen[ed] upon the payments being made pursuant to the settlement." The court reasoned that pursuant to the terms of the contingency fee agreement, the trial court could not disburse the attorneys' fees.<sup>45</sup> The fees, therefore, were subject to the legislative appropriations process.

## 10. Georgia

Georgia law expressly authorizes that state's attorney general to "select and employ private counsel," but does not explicitly restrict or prohibit the use of contingency fee contracts.<sup>46</sup> The attorney general's authority to employ outside counsel is exclusive.<sup>47</sup> However, the governor has the power to direct the Department of Law to institute and prosecute matters in the name of the state.<sup>48</sup> The statute stops short of requiring the governor to approve the selection of outside counsel.

## 11. Hawaii

The Hawaii attorney general may contract with outside counsel on a contingency fee basis when seeking recovery of money or property for the state.<sup>49</sup> For other purposes, however, the attorney general must employ private counsel on a fixed-price or hourly-fee basis.<sup>50</sup>

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<sup>44</sup> *State v. Am. Tobacco Co.*, 723 So. 2d 263 (Fla. 1998).

<sup>45</sup> *Id.*

<sup>46</sup> Ga. Code Ann. § 45-15-4 (2004).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* § 45-15-35.

<sup>49</sup> Haw. Rev. Stat. §§ 28-8(b), 661-10 (2004) ("The attorney general may appoint and, by contract, retain the services of special deputies to perform such duties and exercise such powers as the attorney general may specify in their several appointments. The special deputies shall serve at the pleasure of the attorney general. At the option of the attorney general, special deputies may be compensated on a fixed-price basis, an hourly rate basis, with or

## 12. Idaho

Idaho does not explicitly prohibit state government contingency fee arrangements with outside attorneys. The Idaho attorney general may authorize contracts for legal services whenever he or she “determines that it is necessary or appropriate in the public interest.”<sup>51</sup> In short, the attorney general decides when and for what purposes private counsel will be retained. However, the state’s Board of Examiners makes the decision about which outside attorneys to hire. In determining which outside counsel to hire, the Board may consider whether the attorneys can provide legal services at an “acceptable cost.”<sup>52</sup>

Idaho has also adopted the ABA’s Model Rule 7.6, which prohibits attorneys and law firms from making political contributions to government officials in order to win lucrative government contracts.

## 13. Illinois

Illinois law does not prohibit contingent fee contracts. However, before filing the first pleading in any antitrust civil action in the name of the state, the attorney general must file with the state’s Auditor General a statement disclosing the fee arrangements applicable to the attorneys’ fees in relation to that civil litigation.<sup>53</sup>

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without a fixed cap, or, if a special deputy has been appointed to represent the State in an action by the State pursuant to section 661-10, through a contingent fee arrangement to be specified in the contract and payable out of all sums the special deputy recovers for the State by judgment, order, or settlement.”).

<sup>50</sup> *Id.*

<sup>51</sup> Idaho Code § 67-1406; 67-1409.

<sup>52</sup> *Id.*

<sup>53</sup> 15 Ill. Comp. Stat. 205/4b (“Before the filing of the first pleading in federal district court in any civil action brought by the Attorney General in the name of the State as *parens patriae* on behalf of the natural persons residing in this State, as authorized by Section 4c of the Clayton Act, 15 U.S.C. § 15c, the Attorney General shall file with the Auditor General a statement disclosing the fee arrangements applicable to the attorneys’ fees in relation to that civil action.”).

#### 14. **Indiana**

Indiana law does not address the use of contingent fee contracts for outside attorneys. State officers can only make contracts binding on the state when there is a statute expressly giving them such power<sup>54</sup> – but it is within the state attorney general’s power to appoint outside counsel for the state. The attorney general has the exclusive power to represent the state, and outside counsel may be employed by the state with his written permission.<sup>55</sup> It is likely, therefore, that the attorney general can retain outside counsel on a contingency fee basis.

#### 15. **Iowa**

Iowa law does not address whether the attorney general may contract for outside counsel on a contingency fee basis. Nor is there any reported case law addressing the question.

#### 16. **Kansas**

In Kansas, the Legislative Budget Committee must approve both the proposed request for any contingency fee contract with outside counsel and the final contingent fee contract itself.<sup>56</sup> In addition, with respect to any contingency fee counsel contract, Kansas law requires the state Director of Purchases to prepare a quarterly detailed report disclosing the hours worked on the case, the expenses incurred, the aggregate fee amount, and a breakdown of the hourly rate.<sup>57</sup> Kansas also requires that the judge hearing the case assess whether the attorneys’ fees are reasonable prior to final disposition. Any individual can provide the court information about the reasonableness of the fees paid by the state.<sup>58</sup> In determining reasonableness, the court is

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<sup>54</sup> *Julian v. State*, 23 N.E. 690 (Ind. 1890).

<sup>55</sup> Ind. Code Ann. § 4-6-5-3 (2004); *Carson v. State*, 456 N.E.2d 444 (Ind. Ct. App. 1983).

<sup>56</sup> Kan. Stat. Ann. § 75-37, 135(a) (2001).

<sup>57</sup> *Id.* § 75-37, 135(d).

<sup>58</sup> *Id.* § 75-37, 135(e).

instructed to consider a number of factors, including the time and labor required, legal skill, risk, customary fees, results obtained, and experience.<sup>59</sup>

#### 17. **Kentucky**

Kentucky law expressly permits contingent fee arrangements with private attorneys engaged by the state, subject to approval by the governor.<sup>60</sup> The attorney general may recommend outside counsel, but the governor must approve the appointment.

#### 18. **Louisiana**

The attorney general of Louisiana may not enter into contingency fee agreements absent legislative authorization.<sup>61</sup> Although the attorney general is authorized to hire outside counsel by statute,<sup>62</sup> Louisiana courts have found that contingent fee arrangements with private attorneys are unconstitutional, because the power to appropriate and spend public funds is solely a legislative function.<sup>63</sup> In one case, a Louisiana intermediate appellate court concluded that because the state constitution requires all funds received by the state to be directly deposited in the treasury,<sup>64</sup> a contingent fee contract with law firms engaged for an environmental lawsuit was unconstitutional.

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<sup>59</sup> *Id.*

<sup>60</sup> Ky. Rev. Stat. Ann. § 12.210.1 (“The Governor, or any department with the approval of the Governor, may employ and fix the term of employment and the compensation to be paid to an attorney or attorneys for legal services to be performed for the Governor or for such department...The compensation and expenses of any attorney or attorneys employed under the provisions of this section shall be paid out of the appropriations made to such department as other salaries, compensation and expenses are paid, except when the terms of employment provide that the compensation shall be on a contingent basis, and in such event the attorneys may be paid the amount specified out of the moneys recovered by them or out of the general fund.”).

<sup>61</sup> *Meredith v. Ieyoub*, 96-1110 (La. 1/9/97), 700 So. 2d 478.

<sup>62</sup> La. Rev. Stat. Ann. § 49.258.

<sup>63</sup> *Bruneau v. Edwards*, 517 So. 2d 818 (La. Ct. App. 1987).

<sup>64</sup> La. Const. art. VII, § 9 (A).

## 19. **Maine**

Maine law does not address contingency fee contracts with private counsel. The attorney general has sole authority to hire private counsel.<sup>65</sup>

## 20. **Maryland**

Under Maryland law, outside counsel may be retained by the state's attorney general on a particular matter if (a) he or she determines that the matter is extraordinary and (b) the state's governor approves the retention of counsel.<sup>66</sup> Contingent fee contracts with private counsel were challenged and upheld during the state's tobacco litigation in the 1990s.<sup>67</sup> Maryland's highest court held that contingency fee contracts approved by the governor were proper under Maryland law and that the gross recovery from the tobacco litigation did not constitute state funds subject to legislative appropriation, until the state fulfilled its obligations under the contingency agreement.<sup>68</sup> Furthermore, the court reasoned that private counsel retained on a contingency basis were not unreasonably interested in the outcome of the litigation.

## 21. **Massachusetts**

Massachusetts does not place a statutory limit on contingent fees for private attorneys engaged by the state. In litigation against tobacco products manufacturers several years ago, private firms representing the state were awarded the equivalent of \$7,700 an hour in fees. Incredibly, those firms challenged the award, arguing that they were entitled to the full 25 percent provided in the contingency fee contract – \$1.3 billion more.<sup>69</sup> Earlier this month, a

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<sup>65</sup> Me. Rev. Stat. Ann. tit. 5, § 191(3)(B) (2004).

<sup>66</sup> Md. Code Ann., State Gov't § 6-105(b).

<sup>67</sup> *Philip Morris, Inc. v. Glendening*, 349 Md. 660 (1997) (holding that the language of Md. Code Ann., State Gov't § 6-105 (b) permits the Attorney General to enter into a contingency fee contract).

<sup>68</sup> *Id.*

<sup>69</sup> Alex Beam, *Greed on Trial*, Atlantic Monthly, June 1, 2004.

Suffolk county jury denied the full request but awarded the firms' \$100 million more in legal fees, a substantial supplement to the \$775 million already awarded to them.<sup>70</sup>

## 22. Michigan

Michigan does not place a statutory limit on contingent fees for private attorneys engaged by the state. As a result, the state has permitted the payment of high contingency fees to private counsel. For example, in the tobacco litigation brought on the state's behalf by private firms working under contingent fee arrangements, those firms were awarded \$450 million in fees – an hourly rate of \$22,500. Arbitrators concluded that the outside counsel had done only a “modest” amount of work on behalf Michigan.<sup>71</sup> Nevertheless, they recommended the large award.

## 23. Minnesota

Minnesota's attorney general has broad power to conduct civil litigation on behalf of the state.<sup>72</sup> However, whenever the attorney general enters into a legal services agreement, he or she must notify the state legislative committees responsible for funding the office of the attorney general.<sup>73</sup> The state may employ additional counsel with the certified permission of the attorney general, the governor, and the chief justice of the supreme court, but the statute does not explicitly restrict methods of compensation for these attorneys.<sup>74</sup> The state attorney general may

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<sup>70</sup> Frank Phillips, *Jury Caps Fees Owed Tobacco Law Firms*, Boston Globe, Dec. 20, 2003.

<sup>71</sup> William McQuillen, *Michigan Tobacco Lawyers Awarded \$450 Mln From Accord*, Sept. 7, 2001, available at <http://Bloomberg.com>.

<sup>72</sup> Minn. Const. art. V, § 1; Minn. Stat. § 8.01 (1998); *Slezak v. Ousdigian*, 110 N.W.2d 1, 5 (Minn. 1961).

<sup>73</sup> Minn. Stat. § 8.15(3) (2005).

also retain private attorneys to sue the federal government when the federal government owes money to the state.<sup>75</sup> Attorneys hired for this purpose are entitled to a contingency fee of 25% when any awards are paid to the state.<sup>76</sup> Based in part on this provision, Minnesota courts have declined to imply a requirement that outside counsel hired by the state be paid only through an appropriations process.<sup>77</sup>

Minnesota was one of the leaders in hiring contingency fee counsel to represent the state in tobacco litigation. Under the agreement, the outside counsel were entitled to 25% of the state's total recovery. After securing a settlement of \$6.1 billion, the attorneys agreed to a reduced fee award of \$440 million. A Minnesota court rejected a challenge to this contingency arrangement, concluding that the fees were not state money and therefore not subject to legislative appropriation.<sup>78</sup>

## 24. Mississippi

Mississippi law grants that state's attorney general the authority to retain special counsel to litigate on the state's behalf "on a fee or salary basis," which is "reasonable compensation"

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<sup>74</sup> The statute specifies:

Whenever the attorney general, the governor, and the chief justice of the supreme court shall certify, in writing, filed in the office of the secretary of state, that it is necessary, in the proper conduct of the legal business of the state, either civil or criminal, that the state employ additional counsel, the attorney general shall thereupon be authorized to employ such counsel and, with the governor and the chief justice, fix the additional counsel's compensation. The governor, if in the governor's opinion the public interest requires such action, may employ counsel to act in any action or proceeding if the attorney general is in any way interested adversely to the state.

Minn. Stat. § 8.06.

<sup>75</sup> The relevant text states: "The attorney general is hereby empowered, authorized, and directed to retain attorneys to take exclusive charge of prosecuting, collecting, and recovering from the United States any such claim which may be developed..." Minn. Stat. § 8.09. *See Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143 (Minn. Ct. App. 1999) (noting that the attorney general was permitted to engage private counsel using contingency fees under Chapter 8 of the Minnesota Code).

<sup>76</sup> Minn. Stat. § 8.09-10.

<sup>77</sup> *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143 (Minn. Ct. App. 1999).

<sup>78</sup> *Id.*

and “in no event” exceeds “recognized bar rates for similar services.”<sup>79</sup> The statute places no restrictions on the type of fee that the attorney general can negotiate. In one case, the Mississippi Supreme Court upheld a contingency fee contract with outside counsel that paid counsel 15%-25% of the recovery.<sup>80</sup> However, in that case, then-attorney general Michael Moore testified that the fees would not be paid out of tax monies recovered. Instead, the attorney general was going to apply to the legislature for an appropriation to pay the firm an amount to be measured by the terms of the retention agreement.<sup>81</sup> Thus, his actions arguably set a precedent for legislative approval of contingency arrangements. This comports with earlier Mississippi Supreme Court decisions holding that the attorney general cannot bind the state to pay for outside counsel,<sup>82</sup> as well as cases suggesting that the legislature is the sole authority over the public treasury.<sup>83</sup>

## 25. Missouri

Although Missouri laws require that all state funds be immediately deposited in the treasury upon receipt and prohibit appropriation of public funds without legislative action,<sup>84</sup> contingent fee contracts for legal services were upheld during the state’s tobacco litigation. In a 2000 ruling, the Missouri Supreme Court found that although the attorney general is not explicitly granted the right to engage outside counsel on a contingency basis, Missouri law does not prohibit the attorney general from exercising his common law right to enter into contingency fee arrangements or “agreements that otherwise provide for civil defendants sued by the State to

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<sup>79</sup> Miss. Code. Ann. § 7-5-7.

<sup>80</sup> *Pursue Energy Corp. v. Miss. State Tax Comm’r*, 816 So. 2d 385 (Miss. 2002).

<sup>81</sup> *Id.*

<sup>82</sup> *See, e.g., Edward Hines Yellow Pine Trs. v. Knox*, 108 So. 907 (Miss. 1926).

<sup>83</sup> *Barbour v. Delta Corr. Facility Auth.*, 871 So. 2d 703 (Miss. 2004).

<sup>84</sup> Mo. Const. art. III, § 36 (2004); *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918 (Mo. 1995) (Art. III of the Missouri constitution forbids the withdrawal of money from the treasury except pursuant to appropriations made by law).

pay attorney fees directly to outside counsel.”<sup>85</sup> In a more recent case, however, a federal district court in Missouri adopted a rationale for denying a contingency fee to special assistant attorneys general hired to litigate Missouri’s claims against tobacco companies that was not raised in the earlier case.<sup>86</sup> In that more recent case, taxpayers obtained an injunction preventing tobacco companies from paying fees exceeding \$111,000,000 to attorneys who represented Missouri in tobacco litigation.<sup>87</sup> The court held that the private attorneys failed to fit the relevant statutory description of “officers of the state,” and that those counsel thus were not entitled to compensation.<sup>88</sup>

## 26. **Montana**

Montana law only addresses contingency fee awards with respect to tobacco lawsuits. Under a statute enacted in the wake of the tobacco litigation, Montana law limits the amount outside counsel can recover in a tobacco-related lawsuit to the amount charged hourly by state legal services agencies and reasonable reimbursable costs. Montana law requires that

the court, upon a finding that a tobacco product manufacturer has failed to comply with its obligations... shall award the attorney general the expenses incurred in investigating the claim, the costs of suit, and reasonable attorney fees. In cases in which outside counsel represents the attorney general, the attorney fees awarded must equal the outside counsel charges reasonably incurred by the attorney general for attorney fees and expenses in prosecuting the action. In all other cases, the attorney fees must be calculated by reference to the hourly rate charged by the agency legal services bureau for the provision of legal services to state agencies, multiplied by the number of attorney hours devoted to the prosecution of the action, plus the actual cost of any expenses reasonably incurred in the prosecution of the action.<sup>89</sup>

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<sup>85</sup> *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 136 (Mo. 2000).

<sup>86</sup> *Neel v. Strong*, 114 S.W.3d 272 (Mo. Ct. App. 2003). *Cf.*, *State v. Weatherby*, 168 S.W.2d 1048, 1049 (Mo. 1943) (en banc) (holding that the word “salaries” as used in a statute included payment of attorney’s fees, thus entitling outside counsel (hired by the state as a special attorney) to payment from general revenues but not from appropriated funds).

<sup>87</sup> *Neel*, 114 S.W.3d at 272.

<sup>88</sup> *Id.* at 276.

<sup>89</sup> Mont. Stat. Ann. 16-11-404 (2003).

Outside the context of tobacco litigation, however, Montana law does not regulate state contingency fee contracts with private counsel.

#### 27. **Nebraska**

Nebraska permits the hire of outside counsel when requested by specific agencies. Generally such counsel must be paid out of appropriated funds – but Nebraska law does not address the use of contingency counsel in *parens patriae* litigation.<sup>90</sup>

#### 28. **Nevada**

The Nevada attorney general is authorized to hire special counsel and to fix the fee paid to such counsel with the approval of that state’s Board of Examiners.<sup>91</sup> However, compensation must be paid out of state funds, implying that contingency fees are not an option for the attorney general’s hires.

#### 29. **New Hampshire**

With the approval of a legislative fiscal committee, the governor, and another oversight agency, the New Hampshire attorney general may employ counsel and attorneys (among others) in case of reasonable necessity, and may pay them “reasonable compensation” out of any money in the treasury not otherwise appropriated.<sup>92</sup> New Hampshire’s statutes also address tobacco-related litigation fees that the state may recover, including “costs of investigation, expert witness fees, costs of the action, and reasonable attorney’s fees.”<sup>93</sup> Again, statutes make no specific

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<sup>90</sup> See, e.g., Neb. Rev. Stat. § 81-504, Neb. Rev. Stat. § 53-115 (2004). See also, McKay v. State, 132 N.W. 741 (Neb. 1911) (holding in part that only county attorneys could hire private prosecutors, and only then to assist in felony prosecutions).

<sup>91</sup> “The attorney general may employ special counsel whose compensation must be fixed by the attorney general, subject to the approval of the state board of examiners, if the attorney general determines at any time prior to trial that it is impracticable, uneconomical or could constitute a conflict of interest for the legal service to be rendered by the attorney general or a deputy attorney general. Compensation for special counsel must be paid out of the reserve for statutory contingency account.” Nev. Rev. Stat. § 41.03435 (2004).

<sup>92</sup> N.H. Rev. Stat. Ann. § 7:12 (2004).

<sup>93</sup> N.H. Rev. Stat. Ann. § 541-D:8.

mention of contingency fees for attorneys in the employ of the state.

### 30. **New Jersey**

New Jersey law permits the attorney general to hire outside counsel,<sup>94</sup> and does not explicitly address the use of contingency fees. However, New Jersey courts upheld the use of outside contingency counsel in the state's tobacco litigation.<sup>95</sup> New Jersey law does address concerns about these contracts being political favors, though; a recently enacted New Jersey law bars political contributions by those who do business with the state or seek to do business with the state.<sup>96</sup>

### 31. **New Mexico**

New Mexico law does not specifically address whether the attorney general may retain private counsel on a contingency fee basis. Private counsel may be retained with the permission of the attorney general, but local governments do not require the permission of the attorney general to retain private counsel.<sup>97</sup>

### 32. **New York**

New York does not restrict the attorney general from hiring private attorneys on a contingency-fee basis. However, the state's attorney general generally does not employ contingency fee counsel.<sup>98</sup> Notably, however, the state did use contingency fee counsel in its litigation against tobacco companies. Private attorneys retained by the state were awarded \$625

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<sup>94</sup> "Deputy Attorneys-General and Assistant Attorneys-General in the Department of Law and Public Safety shall hold their offices at the pleasure of the Attorney-General and shall receive such salaries as the Attorney-General shall from time to time designate." N.J. Stat. Ann. 52:17A-7 (2005).

<sup>95</sup> *Philip Morris Inc. v. State*, No. L 11480-096 (N.J. Super. Ct. 1997) (upholding use of contingent fee contracts to retain outside counsel).

<sup>96</sup> 2005 N.J. Laws C.19:44A-20.13 *et seq.* (enacted March 22, 2005).

<sup>97</sup> N.M. Stat. Ann. § 36-1-19.

<sup>98</sup> A phone call to New York's Office of the Attorney General, Office of Legal Recruitment, confirmed that, to the spokesperson's knowledge, the New York attorney general does not hire attorneys on a contingency-fee basis.

million in attorneys' fees out of the state's \$25 billion settlement – \$13,000 per hour.<sup>99</sup>

New York's professional responsibility rules prohibit lawyers from making political contributions to any candidate if "a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement," even if there is no "understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation."<sup>100</sup>

### 33. **North Carolina**

State government agencies are permitted by North Carolina law to hire private counsel, but the attorney general must provide written permission in advance, and the governor must also approve it.<sup>101</sup> The requirement for written permission does not apply to governmental subdivisions below the state level (*e.g.*, cities, counties). When hired by the governor, outside counsel receive pay in a manner deemed appropriate by the governor.<sup>102</sup>

### 34. **North Dakota**

North Dakota was among the first states to enact restrictions on contingent fee agreements with private attorneys retained by the state. It did so following the Supreme Court's denial of a challenge to a contingency counsel arrangement.<sup>103</sup> The statute requires the Attorney General to obtain approval from the State Emergency Commission (comprised of the Governor and the Chairman of the State Senate Appropriations Committee) before retaining contingency

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<sup>99</sup> Wise, *supra* note 9.

<sup>100</sup> N.Y. Code of Prof'l Responsibility EC 2-37 (2000).

<sup>101</sup> N.C. Gen. Stat. § 114-2.3 (2004).

<sup>102</sup> N.C. Gen. Stat. § 147-17(a).

<sup>103</sup> *State v. Hagerty*, 1998 ND 132, 580 N.W.2d 139.

counsel in cases in which fees may exceed \$150,000.<sup>104</sup> State senators supporting the legislation argued that the legislative branch of government should have oversight over large contingency fee cases, because such contracts are effectively “appropriation[s] that go [] to private attorneys.”<sup>105</sup>

### 35. Ohio

Ohio law permits the attorney general to hire special counsel, so long as they are paid from funds “appropriated for that purpose.”<sup>106</sup> However, a special provision in Ohio law establishes the Attorney General Reimbursement Fund, which allows the attorney general to hire special counsel to collect “claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect,” and pay counsel from the funds collected.<sup>107</sup> All amounts that the attorney general receives for reimbursement for legal services rendered to the state or its agencies must be paid into either the state treasury or this fund.<sup>108</sup> Money in the attorney general’s fund may only be used to make payments pursuant to a court order. Therefore, an Ohio attorney general may, at least in theory, direct contingency fees into his fund as long as there is a court order requiring their disbursement.

Ohio has also enacted a fairly aggressive “pay-to-play” law that caps political contributions to government officials within the two years prior to negotiating a government contract with them.<sup>109</sup> The State Controlling Board, which must approve contracts above

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<sup>104</sup> N.D. Cent. Code § 54-12-08 (1999).

<sup>105</sup> See 1999 Senate Standing Committee Minutes, Feb. 10, 1999 at 1-2.

<sup>106</sup> Ohio Rev. Code Ann. § 109.07 (2005).

<sup>107</sup> Ohio Rev. Code Ann. § 109.08.

<sup>108</sup> Ohio Rev. Code Ann. § 109.11.

<sup>109</sup> Ohio Rev. Code Ann. § 3517.13(I) (2000).

\$50,000, recently delayed approval of the attorney general's request for \$1.2 million in private attorney contracts for firms that had also contributed to his gubernatorial campaign.<sup>110</sup>

### 36. **Oklahoma**

Oklahoma has a detailed statute describing the process by which the state may engage private legal services.<sup>111</sup> The statute permits the acquisition of private legal counsel when the attorney general's office has a conflict of interest, when the hiring agency requires special expertise beyond the abilities of the attorney general's office, or when the attorney general's office lacks sufficient personnel to meet existing needs. Oklahoma law mandates that the attorney general's office maintain a list of attorneys eligible for state work, though the statute does not denote the manner in which the attorney general is supposed to compile the list. The statute also requires the drafting of a contract for legal services that specifies the scope of work, duration of the contract, hours to be worked, and method for calculating compensation. Finally, the attorney general must approve legal services expected to cost more than \$20,000. Oklahoma also prohibits payment of private counsel from state funds in connection with the issuance and sale of state revenue bonds.<sup>112</sup> When such a transaction requires private counsel, bond buyers must pay the costs of any such retention.

### 37. **Oregon**

Oregon law permits hiring of private counsel by the attorney general, but the relevant statutes do not specify the method of payment.<sup>113</sup> Those statutes include a tobacco-specific provision under which the state can recover "reasonable" attorney's fees.<sup>114</sup> In the tobacco cases

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<sup>110</sup> *State Board Delays OK of Attorney Pacts*, Akron Beacon Journal, Apr. 26, 2005.

<sup>111</sup> Okla. Stat. tit. 74, § 20i (2005).

<sup>112</sup> Okla. Stat. tit. 62, § 15.

<sup>113</sup> Or. Rev. Stat. § 180.140 (2003).

<sup>114</sup> *Id.* § 180.450.

litigated on the state's behalf several years ago, all funds recovered were required to be deposited in the state's Tobacco Enforcement Fund.<sup>115</sup>

### 38. **Pennsylvania**

Like Oregon, Pennsylvania law provides for recovery of reasonable attorneys' fees in connection with ongoing enforcement of the tobacco agreement.<sup>116</sup> Notably, two private firms split \$50 million in fees, the equivalent of about \$1,323 per hour, in connection with the state's tobacco settlement in spite of the fact that, as Yale Law School Professor Peter Schuck noted, "most of the work was done" by other firms.<sup>117</sup>

Pennsylvania also permits reimbursement on a pro rata basis for private counsel who help recover property for the state.<sup>118</sup> Moreover, the attorney general may have authority by statute to hire contingent fee lawyers under the Commonwealth Property Recovery Act.<sup>119</sup>

### 39. **Rhode Island**

Rhode Island authorizes the attorney general to hire 30 assistant and "special assistant attorneys general as may from time to time be necessary and as shall be authorized by annual appropriation or otherwise provided for in the annual budget adopted by the general assembly."<sup>120</sup> But Rhode Island law does not specifically restrict the use of contingent fee contracts for outside counsel. The Supreme Court of Rhode Island is currently considering a case challenging the use of contingency attorneys by the state in a lead case.<sup>121</sup> The defendants

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<sup>115</sup> *Id.* § 180.205.

<sup>116</sup> 35 Penn Cons. Stat. § 5702.308 (2004).

<sup>117</sup> Glen Justice, *In Tobacco Suit, Grumblings Over Lawyer Fees*, Philadelphia Inquirer, Oct. 4, 1999.

<sup>118</sup> 71 Penn. Cons. Stat. § 826.6.

<sup>119</sup> *Id.* ("So much of the proceeds of any recovery, out of an information under this act, as is necessary for the payment of informers' fees and the fees of any attorney or attorneys employed by the attorney general in connection with the Commonwealth claim, is hereby appropriated to the department of Justice for the payment thereof.")

<sup>120</sup> R.I. Gen. Laws § 42-9-1 (2004).

<sup>121</sup> *State v. Lead Industries Assoc.*, No. 2004-63-MP (R.I. 2004).

in that case argued that the practice unconstitutionally transfers appropriations authority to the attorney general.<sup>122</sup>

#### 40. **South Carolina**

Although South Carolina has almost no restrictions on the use of contingency contracts for private counsel – it merely prohibits the government from engaging private counsel on a contingency basis without written agreement prior to the initiation of the representation<sup>123</sup> – it has enacted a fairly progressive pay-to-play law. South Carolina prohibits government contractors from making campaign contributions to officials responsible for issuing government contracts.<sup>124</sup>

#### 41. **South Dakota**

South Dakota allows its attorney general to appoint special assistant attorneys general on a part-time basis and to fix their compensation.<sup>125</sup> To hire outside legal counsel, the attorney general must ensure that work is done pursuant to a written contract.<sup>126</sup> South Dakota law also specifies that contingency fees may be used to reimburse legal counsel who recover on delinquent accounts of private prison industries.<sup>127</sup> However, the state's laws do not otherwise expressly address contingent fee arrangements.

#### 42. **Tennessee**

The governor of Tennessee may employ additional counsel when in the governor's judgment, as well as the attorney general's and the reporter's judgment, additional counsel would

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<sup>122</sup> Brief of Washington Legal Foundation at 13, *State v. Lead Industries Assoc.*, No. 2004-63-MP (R.I. 2004).

<sup>123</sup> S.C. Code Ann. § 1-1-1030 (2003).

<sup>124</sup> *Id.* § 8-13-1342.

<sup>125</sup> S.D. Codified Laws § 1-11-5 (2004).

<sup>126</sup> *Id.* § 1-11-15.

<sup>127</sup> *Id.* § 24-7-19.

be in the interest of the state.<sup>128</sup> The statute granting the governor this authority requires compensation for outside counsel to come from “the treasury of the state not otherwise appropriated.”<sup>129</sup> While the statute is otherwise silent on the use of contingency fee arrangements, this language could be construed to prohibit the use of such agreements to retain outside counsel. Tennessee law also permits payment of assistant attorneys general (not to exceed their normal salaries) from funds recovered in economic fraud cases when the treasury cannot cover payroll.<sup>130</sup>

#### 43. Texas

Texas imposes numerous restrictions on contingent fee agreements between state government entities and private attorneys. It requires all state government entities to notify the Legislative Budget Board before entering into contingent fee agreements (if recoveries are expected to exceed \$100,000) for legal services. Once notification is received, the Legislative Budget Board may only approve contingency proposals after finding that: (1) there is a substantial need for the legal services; (2) legal services cannot be adequately performed by state attorneys; and (3) private attorneys cannot be paid hourly rates because of the nature of the services or because the government entity contracting for the services does not have the amount available to pay the fees.<sup>131</sup>

Under the Texas law, all contingent fee contracts must provide the method by which the

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<sup>128</sup> Tenn. Code Ann. § 8-6-106 (2005) (“In all cases where the interest of the state requires, in the judgment of the governor and attorney general and reporter, additional counsel to the attorney general and reporter or district attorney general, the governor shall employ such counsel, who shall be paid such compensation for services as the governor, secretary of state, and attorney general and reporter may deem just, the same to be paid out of any money in the treasury not otherwise appropriated, upon the certificate of such officers certifying the amount to the commissioner of finance and administration.”).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* § 40-3-209.

<sup>131</sup> Tex. Gov’t Code Ann. § 2254.103(d) (2000).

fee is to be computed and limits reimbursement for outside expenses (such as expert witnesses) if they are not contemplated by the agreement.<sup>132</sup> Texas caps hourly rates at \$1000 per hour and adopts a lodestar method for fee computation.<sup>133</sup> Under this method, the base fee (the hourly rate multiplied by the hours worked) is multiplied by a “reasonable multiplier based on any expected difficulties in performing the contract” that may not exceed four without legislative approval.<sup>134</sup>

Texas also requires outside attorneys to keep detailed written time and expense records and to report the data contained in those records to the State Auditor.<sup>135</sup> In addition, the contracting attorney must provide the state with a description of the recovery and the firm’s computation of the amount of the contingent fee at the conclusion of litigation.<sup>136</sup>

#### 44. **Utah**

In Utah, the attorney general is authorized to hire private legal counsel, and may do so on behalf of any state agency allowed by law.<sup>137</sup> The attorney general bears the responsibility for paying private legal counsel, unless the agency for which the attorney general obtained counsel has a legislatively established fund for legal fees.<sup>138</sup> Utah courts upheld the use of contingency fee counsel in the state’s tobacco litigation.<sup>139</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*, § 2254.106(a)-(b).

<sup>134</sup> *Id.* § 2254.106(c).

<sup>135</sup> *Id.* § 2254.104(a)-(b).

<sup>136</sup> *Id.* § 2254.104(c).

<sup>137</sup> Utah Code Ann. § 67-5-5 (2004). The statute concedes that the state constitution or other statutes may specifically authorize some agencies to hire outside counsel.

<sup>138</sup> *Id.*

<sup>139</sup> *Philip Morris Inc. v. Graham*, No. 960904948 CV (Dist. Ct. Utah 1997) (upholding a Utah statute allowing contingent fee contracts)

#### 45. Vermont

The Vermont attorney general may hire outside counsel but probably needs legislative approval to enter into a contingency contract with private attorneys.<sup>140</sup> In 1998, the Vermont legislature granted the attorney general authority to hire contingent fee attorneys to bring tobacco suits.<sup>141</sup>

Vermont case law indicates that the governor also has the authority to hire private attorneys on a contingency basis to pursue claims against the U.S. government.<sup>142</sup> In one case, the state treasurer refused to pay a 25% contingency fee to the successful private counsel working for the state on a litigation matter on the grounds that it was not properly appropriated. The court granted the attorney's fee over the treasurer's objections, holding that although legal title to the award resided with the State, the fee award "never legally and equitably belonged to the state as part of its public funds."<sup>143</sup>

#### 46. Virginia

Virginia is the only state that requires public, competitive bidding for all contingency contracts for legal counsel that exceed \$100,000.<sup>144</sup> As such, it is the only state that applies normal competitive protections to the procurement of legal services. The Virginia law requires outside attorneys to file proposals that include: the qualifications and legal expertise of the bidding attorneys and the predicted cost of services.<sup>145</sup> The legislative report accompanying the law estimated that the competitive bidding requirement would result in savings because the

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<sup>140</sup> Vt. Stat. Ann. tit. 3, § 153-4.

<sup>141</sup> Tobacco Medicaid Reimbursement Act, 1998 Vt. Acts & Resolves No. 142.

<sup>142</sup> *Button's Estate v. Anderson*, 28 A.2d 404 (Vt. 1942).

<sup>143</sup> *Id.*

<sup>144</sup> Va. Code Ann. § 2.2-510.1 (2003).

<sup>145</sup> *Id.*

reform encourages “legal services firms to submit lower prices for representing the Commonwealth’s state agencies than they otherwise would.”<sup>146</sup>

#### 47. **Washington**

Washington statutes and case law do not directly address the use of contingency fee contracts for retaining outside counsel for the state. Under Washington law, the attorney general is the only state official with the authority to hire private counsel.<sup>147</sup>

#### 48. **West Virginia**

West Virginia law does not prohibit the use of contingent fee agreements in *parens patriae* litigation. However, West Virginia case law is inconsistent on whether contingent fee arrangements are unlawful appropriations of state funds. In one case, a West Virginia trial court determined that a contingent fee arrangement is an unlawful appropriation of state funds and that the attorney general has neither statutory or constitutional authority to retain such counsel.<sup>148</sup> However, other trial courts (in the contexts of other matters) have refused to nullify contingent fee agreements.<sup>149</sup>

West Virginia has taken steps to prevent lucrative legal services contracts from being awarded to the most generous political fundraisers for state office holders. The state recently enacted a pay-to-play law that bans campaign contributions to state candidates from those seeking government contracts.<sup>150</sup>

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<sup>146</sup> Virginia Department of Planning and Budget 2002 Fiscal Impact Statement, H.B. 309, March 7, 2002.

<sup>147</sup> Wash. Rev. Code § 43.10.067.

<sup>148</sup> *McGraw v. Am. Tobacco Co.*, Civ. A. No. 94-C-1707 (W. Va. Cir. Ct. Nov. 29, 1995).

<sup>149</sup> *See, e.g., State v. Bear Stearns & Co.*, No. 03-C-133M (Marshall County Cir. Ct., W. Va.).

<sup>150</sup> W. Va. Code § 3-8-12(d) (2004).

49. **Wisconsin**

The Wisconsin attorney general may not hire a private attorney unless specifically empowered by statute to do so. There is no general grant of power to hire outside counsel on a contingency basis. In a ruling several years ago, the Wisconsin Supreme Court further limited the attorney general’s power, holding that “the attorney general is devoid of the inherent power to initiate and prosecute litigation intended to protect or promote the interests of the state or its citizens and cannot act of the state as *parens patriae*.”<sup>151</sup> And in another case, that court concluded that “unless the power to bring a specific action is granted by law, the office of the [Wisconsin] attorney general is powerless to act.”<sup>152</sup>

50. **Wyoming**

Wyoming law grants its attorney general authority to engage contingency counsel for state litigation.<sup>153</sup> Contingency fees must be distributed through a fund administered by the attorney general.<sup>154</sup> The fund includes all monies “which the attorney general holds and disburses as an agent or attorney in fact, which shall include but not be limited to class action litigation recoveries that are to be distributed to any person or business organization, local government pass-through monies, and contingent fee contracts to be distributed to contract attorneys.”<sup>155</sup>

**Conclusion**

Contingent fee contracts between state attorneys general and private lawyers raise important policy and ethical concerns by delegating public enforcement powers to financially

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<sup>151</sup> *State v. City of Oak Creek*, 605 N.W.2d 526 (Wis. 2000).

<sup>152</sup> *In re Estate of Sharp*, 217 N.W. 2d 258 (Wis. 1974).

<sup>153</sup> Wyo. Stat. Ann. § 9-1-639 (2004).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

interested private citizens. Moreover, these arrangements have largely escaped legislative scrutiny because they create the illusion that there is no cost to the taxpayers. Unlike some of the more thorny litigation reform challenges that we face as a country, however, this one is easy to resolve. A few simple steps can ensure that contingency contracts do not become a boondoggle for political donors and are not used to subvert the public process. These include: (1) requiring legislative approval of large contingent fee contracts; (2) requiring attorneys – like other government contractors – to be selected in a competitive bidding process; (3) imposing fee caps on such retentions; and (4) prohibiting attorneys who contribute to state attorney general campaigns from collaborating with those attorneys general on litigation.

# Private Attorney Retention Sunshine Act

## Section 1. {Title}

This act may be known as the Private Attorney Retention Sunshine Act.

## Section 2. {Definitions}

For the purposes of this Act, a contract in excess of \$1,000,000 is one in which the fee paid to an attorney or group of attorneys, either in the form of a flat, hourly, or contingent fee, and their expenses, exceeds or can be reasonably expected to exceed \$1,000,000.

## Section 3. {Procurement}

Any state agency or state agent that wishes to retain a lawyer or law firm to perform legal services on behalf of this state shall not do so until an open and competitive bidding process has been undertaken.

## Section 4. {Oversight}

No state agency or state agent shall enter into a contract for legal services exceeding one million dollars (\$1,000,000) without the opportunity for at least one hearing in the legislature on the terms of the legal contract in accordance with Section 5.

## Section 5. {Implementation}

A. Per the requirement of {Section 4}, any state agency or state agent entering into a contract for legal services in excess of \$1,000,000 shall file a copy of said proposed contract with the clerk of the House of Representatives, who, with the approval of the President of the Senate and the Speaker of the House of Representatives, shall refer such contract to the appropriate committee.

B. Within 30 days after such referral, said committee may hold a public hearing on said proposed contract and shall issue a report to the referring state agency or agent. Said report shall include any proposed changes to the proposed contract voted upon by the committee. The state agency or state agent shall review said report and adopt a final contract as deemed appropriate in view of said report and shall file with the clerk of the House of Representatives its final contract.

C. If the proposed contract does not contain the changes proposed by said committee, the referring state agency or agent shall send a letter to said clerk accompanying the final contract stating the reasons why such proposed changes were not adopted. Said clerk shall refer such letter and final regulations to the appropriate committee. Not earlier than 45 days after the filing of such letter and final contract with said committee, the state agency or agent shall enter into the final contract.

D. If no proposed changes to the proposed contract are made to the state agency or agent within 60 days of the initial filing of the proposed regulation or any amendment or repeal of such regulation with the clerk of the House of Representatives, the state agency or agent may enter into the contract.

E. Nothing in this Act shall be construed to expand the authority of any state agency or agent to enter into contracts where no such authority previously existed.

F. In the event that the legislature is not in session and the attorney general wishes to execute a contract for legal services the Governor with the unanimous consent of the Speaker of the House, and the President of the Senate, may establish a five-member interim committee consisting of five state legislators, one each to be appointed by the Governor, the Speaker of the House, the President of the Senate, and the minority leader in each house of the legislature to execute the oversight duties as set forth in paragraphs B-E of this section.

i. identical deadlines and reporting responsibilities shall apply to the Attorney General and this interim committee as would apply to a standing committee of the legislature executing its duties set forth in

paragraphs B-E.

**Section 6. {Contingent Fees}**

A. At the conclusion of any legal proceeding for which a state agency or agent retained outside counsel on a contingent fee basis, the state shall receive from counsel a statement of the hours worked on the case, expenses incurred, the aggregate fee amount, and a breakdown as to the hourly rate, based on hours worked divided into fee recovered, less expenses.

B. In no case shall the state incur fees and expenses in excess of \$1,000 per hour for legal services. In cases where a disclosure submitted in accordance with paragraph (a) of this section indicates an hourly rate in excess of \$1,000 per hour, the fee amount shall be reduced to an amount equivalent to \$1,000 per hour.

**{Severability Clause}**

**{Repealer Clause}**

**{Effective Date}**

*Adopted by ALEC's Civil Justice Task Force at the Annual Meeting August 20, 1998. Approved by full ALEC Board of Directors September, 1998.*