



BEYOND DUE PROCESS – A LITIGATION PRIMER:

Challenging Attorney General
and Other Government
Contingency Fee Arrangements



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**Beyond Due Process – A Litigation Primer:
Challenging Attorney General and Other Government Contingency Fee Arrangements**

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An increasing number of plaintiffs’ attorneys are soliciting state Attorneys General (AGs) and other government officials to permit them to bring cases on behalf of state and local governments on a contingency fee basis.¹ As a result, a number of officials have engaged private contingency fee counsel to sue companies across a wide variety of U.S. industries.

Many of these arrangements create irreconcilable conflicts of interest because the private plaintiffs’ lawyers granted government authority have a personal stake in the outcome of the case, and call into question the impartiality of the government as a prosecutor. As a result, defendants have raised due process challenges to the arrangements, asserting that attorneys suing on the government’s behalf have an obligation of neutrality, as set forth by the California Supreme Court in *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985) (“*Clancy*”), and that, accordingly, in nearly all circumstances, government contingency fee arrangements are void.

To date, however, these challenges have met with mixed results, with the Rhode Island Supreme Court rejecting an outright prohibition on such arrangements in the seminal lead paint public nuisance case, *State v. Lead Industries Ass’n*, 951 A.2d 428 (R.I. 2008) (“*LIA*”), and California courts re-interpreting the holding in *Clancy* to permit such arrangements, most notably a California appellate court in *County of Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842 (Ct. App. 6th 2008) (“*Santa Clara*”), another lead paint liability case. A number of lower state courts also have refused to void the arrangements on due process grounds, and

¹ Federal agencies are currently barred from using contingency fee lawyers under Executive Order No. 14433, signed by President Bush on May 16, 2007.

have permitted government contingency fee litigations to proceed.² These courts largely have rejected the argument that government contingency fee arrangements are fundamentally at odds with due process, and, instead, have focused on whether individual contingency fee arrangements meet certain legal and factual requirements.

In light of these results, defendants in government contingency fee lawsuits should consider a variety of non-due process “bright line” challenges to contingency fee arrangements. These include challenges based on the government’s control or lack of control of the case and whether it was brought and is being litigated in the public interest; as well as challenges based on state separation of powers provisions, government contracting laws, and laws pertaining to government employment of outside counsel. This paper highlights these challenges as well as the limitations of certain of these challenges in *qui tam* suits, which have been brought by private plaintiffs’ attorneys to circumvent the legal and policy issues associated with more traditional government contingency fee arrangements.

I. Gathering the Facts Necessary to Challenge Contingency Fee Arrangements

At the outset, any defendant in a government contingency fee case seeking to challenge the underlying contingency fee arrangement will need to gather and conduct a thorough examination of any information it can obtain regarding the arrangement. The first priority should be to obtain a copy of the retainer agreement between the AG and outside counsel.³ This may be done through litigation document requests (with attendant motions to the court, if necessary) or by making requests under state sunshine laws. In some jurisdictions,

² See, e.g., *Commonwealth v. Janssen Pharmaceutica Inc.*, No. 080102181 (Phila. Ct. Com. Pl.); *State of Okla. ex rel. Edmondson v. Tyson Foods*, 05-CV-00329 (N.D. Okla); *State ex rel. McGraw v. Johnson & Johnson, et al.*, No. 04-C-156 (W. Va. Cir. Ct. Brooke County).

³ This paper focuses primarily on state AGs, though contingency fee cases also have been brought on behalf of governors and other state and local officials. See, e.g., *Commonwealth v. Janssen Pharmaceutica Inc.*, No. 080102181 (Phila. Ct. Com. Pl.) (case where Pennsylvania Governor Rendell brought suit rather than AG). There may be additional bases to challenge contingency fee cases brought by these other officials that are not reflected herein. See *id.*, Defendant’s Motion to Disqualify Plaintiff’s Counsel (raising objection to contingency fee arrangement between Governor Rendell and outside counsel because neither the Governor nor a member of the Governor’s office signed or verified the complaint).

government retainer agreements must be approved by the legislature and may be publicly available.

Other discovery tools (e.g., interrogatories, depositions) and additional sunshine law requests regarding communications between outside counsel and the AG also may be employed to learn the circumstances under which the case was brought and how the litigation is being conducted. The information collected can form the bases for the challenges outlined below, including, among other things, whether the AG is in control of the case and whether the case was brought and is being litigated in the public interest, both of which are required under *Clancy* and *LIA*.

It is predictable that the AG and outside counsel will resist efforts to gather information about the underlying contingency fee arrangement. A defendant should anticipate that it will face objections to its sunshine law and traditional discovery requests on the basis that the material sought may reveal privileged attorney-client communications and/or protected attorney work product relating to the government's litigation strategy. In that event, defense counsel should request that a court perform an *in camera* examination of the contracting documents, correspondence, or even witnesses. In response, the state may contend that the AG or outside counsel's testimony would create a conflict of interest (where an attorney becomes a witness), but most states allow an attorney to continue representation if the testimony merely goes to the "nature" of the representation. Regardless of the basis of the argument against revealing information regarding the AG and outside counsel's relationship, it is imperative that the court be able to determine whether the contingency fee arrangement complies with applicable law.

II. The AG Must Maintain Sufficient Control of the Case

A threshold issue to be explored in challenging a contingency fee arrangement is whether the arrangement gives the AG sufficient control over the litigation and whether he or she has, in fact, exercised that control. The underlying issues here include whether the retainer agreement contains provisions that may directly or indirectly constrain the AG's

authority over the case and whether the AG's and outside counsel's conduct during the litigation demonstrates that the AG is driving the strategy and/or resolution of the case.

A. Synopsis of Key Court Decisions on Control

The leading decisions regarding government contingency fee agreements are the 2008 decision by the Rhode Island Supreme Court in the lead paint public nuisance suit, *LIA*, and the California Supreme Court's 1985 decision in *Clancy*, a case involving the pursuit by contingency fee counsel of public nuisance suits against adult bookstores. Although the *LIA* court declined to reject contingency fee arrangements altogether, it imposed substantial limitations on them, including mandating that the AG retain "total control" over a case. The *Clancy* court, on the other hand, did not base its decision on who controls the litigation, but rather the requirement that a government attorney must have no personal interest in the litigation. Until recently, *Clancy* had been viewed as barring government contingency fee agreements on due process grounds, but a California appellate court reviewing another lead paint public nuisance case interpreted *Clancy* as prohibiting only agreements that give complete control of cases to contingency fee counsel. *Santa Clara*, 74 Cal. Rptr. 3d 842. The *Santa Clara* decision – and hence the *Clancy* decision – will be reviewed by the California Supreme Court this year.

The *LIA* and *Santa Clara* courts took similar approaches to the issue of control. The *LIA* court focused on the AG's obligation to "seek justice" and wide discretion to do so as mandating that the AG maintain complete control over any contingency fee litigation in order to satisfy due process. The court further emphasized that the validity of contingency fee arrangements hinges on whether the AG retains "absolute and total control over all critical decision-making" (emphasis in original). In so ruling, the court insisted that, at a minimum, in order to be valid, a contingency fee agreement must on its face: (1) guarantee the AG has complete control over the course and conduct of the litigation; (2) give the AG veto power over any of outside counsel's decisions; and (3) provide that a senior member of the AG's

staff be personally involved in the litigation. The court also emphasized that the AG had to *appear* to be in control of the case.⁴

In *Santa Clara*, the California appellate court examined agreements between the plaintiff municipalities and outside counsel, as well as sworn statements by the government attorneys, and determined that, because outside counsel was merely “assisting” the government attorneys, the contingency fee agreements were permissible, overturning a contrary decision by the trial court. The California Supreme Court will review the case this year, and will determine whether “[o]versight by . . . government attorneys does not eliminate the need for or requirement that outside counsel adhere to the standard of neutrality [as articulated in *Clancy*],” as the trial court ruled, or if relegating outside counsel to a “co-counsel” position satisfies constitutional requirements. In addition, the California Supreme Court may examine whether, as the trial court pointed out, ascertaining the AG’s level of control in order to determine whether the use of contingency fee counsel passes constitutional muster would be prohibitively difficult.

B. Challenging Contingency Fee Arrangements on AG Control of a Case

As a result of these rulings, a defendant in a government contingency fee case should ask the court to determine whether the underlying arrangement satisfies the “control” requirement outlined above.

It is in a defendant’s best interest to petition the court to determine, as early in the case as possible, whether control of the case resides with the AG.⁵ In doing so, a defendant should gather information not only on the government’s retainer agreement with outside counsel, but also on the decision-making process in initiating the case. In *LIA*, the defendants acquired

⁴ Recognizing that the propriety of government contingency fee cases remains a controversial issue, the court stated that its views could change, and that all such cases must be reviewed on a case-by-case basis to ensure their compliance with the court’s requirements.

⁵ A defendant should also consider arguing that, in accordance with the *Santa Clara* trial court ruling, the extent of discovery and court supervision required would make a full evaluation of the government’s control impossible, and that, without such a review, the arrangement must be stricken.

the retainer agreement as a result of a sunshine law request, and issued interrogatories directly to the AG (not merely the State as plaintiff) that questioned whether the AG conducted a fact investigation to determine if it was in the State's interest to bring the case. A defendant also may use initial disclosure requirements required under applicable court rules, or requests for limited discovery that may provide the court with a full understanding of whether the AG initiated the case or whether it was pitched by outside counsel, the AG's involvement in the preparation of the case, and whether the arrangement provides for any constraints on the AG's decision-making in the case.

When examining the retainer agreement, a defendant should closely review whether any clauses effectively limit the AG's involvement in or control over the case. The initial agreement between the Rhode Island AG and contingency fee counsel in *LIA*, for example, stated that outside counsel "will diligently and forcefully prosecute all claims which, in their judgment, should be asserted" (emphasis added). The trial court determined that this clause illegally delegated the AG's authority to outside counsel, and, therefore, had to be amended.

Red flags also may include agreement provisions that penalize the AG for terminating outside counsel or dismissing the case. For example, the agreement between the Rhode Island AG and outside counsel provided that if outside counsel were terminated for any reason, they would still be compensated on the basis of *quantum meruit* and that any compensation would not be less than 16 $\frac{2}{3}$ % of any settlement offers received by the State at the time of termination. The trial court determined that this clause would impose a prohibitive cost on the AG if he chose to fire counsel, effectively taking control of the case out of the AG's hands (and likely forcing the AG to accept the settlement on the table at the time of the termination). Other control-depriving provisions may include those that convert the contingency fee agreement to an hourly one with fees due upon dismissal of counsel or the case.

In addition, clauses that limit the AG's ability to settle a case or that require outside counsel's approval of a settlement indicate that the AG does not have full control of a case.

Further, if outside counsel block settlement negotiations or the AG and AG staff are only peripherally involved in settlement negotiations or other discussions during the course of the litigation, a defendant may wish to bring this to the court's attention as evidence the AG has insufficient control.

A defendant also should use discovery tools throughout the litigation (including deposing AG staff or the AG personally) to gather information regarding the AG's involvement in the case to make sure the AG or AG staff are providing sufficient oversight. Warning signs that the AG or the AG's office may not be exercising the appropriate level of control may include instances where outside counsel filed pleadings with minimal input or review from the AG's office. Overall, any indication that outside counsel has acted as more than an "assistant" to government attorneys could be grounds for dismissal.

III. The Arrangement Must Be in the Public Interest

Another basis for challenging a contingency fee arrangement is whether it is in the public interest. The focus of a court inquiry into this issue should be whether the AG can pursue and has pursued the case in a manner that clearly subordinates contingency fee counsel's profit-making motivation in favor of a resolution that best serves the public.

A. Synopsis of Court Decisions on the Public Interest

Both the Rhode Island Supreme Court in *LIA* and the California Supreme Court in *Clancy* emphasized that a government official's common law duty to represent the public interest must take precedence over any other consideration in a contingency fee case, and that outside counsel's profit-making motivation must be secondary.

Drawing from earlier California state court opinions, as well as the American Bar Association's Code of Professional Responsibility, the California Supreme Court in *Clancy* held that a prosecutor, even in civil cases, has a "duty of neutrality." The basis for this duty is the prosecutor's role as a representative of the government, which is required to govern

impartially. Because the prosecutor has the “vast power of the government available to him[,] he must refrain from abusing that power by failing to act evenhandedly.” The court went on to say that that neutrality is violated if the government attorney has a personal interest in the litigation.

The Rhode Island Supreme Court in *LIA*, similarly emphasized the AG’s duty to “seek justice” and to act as more than simply an advocate in both civil as well as criminal cases. In so doing, the court stressed that every person who serves in the capacity of a government lawyer must adhere to this principle and that all courts must be vigilant in upholding this standard.

B. Challenging Contingency Fee Arrangements on “Public Interest” Grounds

Because the courts clearly are concerned with the inherent tension between contingency fee counsel’s profit-making motivations and, as the *LIA* court stated, the “more pristine considerations that should guide the [AG’s] decision-making,” a defendant should consider challenging whether the contingency arrangement is in the public interest on both theoretical due process grounds as well as on a factual basis.

Just as retainer provisions that penalize the AG for settling a case or otherwise give contingency fee counsel control over strategic litigation decisions diminish the AG’s control over the case, such provisions also may restrict the AG’s ability to act in the public interest. Many government cases involve a delicate balancing of public rights and interests, and a financial penalty, such as paying contingency fee lawyers if a case is dismissed or settled without their consent, may force the AG to tip the scale in favor of pursuing large damages over an equitable settlement or other resolution that would benefit the public. Furthermore, arrangements that require the AG to obtain outside counsel’s agreement to settle a case or allow outside counsel to stonewall settlement attempts by defendants also may hinder a resolution that is in the public interest. Finally, any interference by contingency fee counsel with the settlement process, whether contractual or by counsel’s conduct, may prevent government attorneys from fulfilling their obligation to settle cases in order to save court time

and save taxpayer money (a concept recognized in *LIA*). Thus, any provision that implicitly or explicitly limits the AG's ability to settle a case, or any conduct by outside counsel that interferes with settlement attempts, may color the AG's ability to act solely in the public interest and may be used as a basis to void a contingency fee agreement.

Further, in many cases commonly pursued by contingency fee counsel on behalf of AGs, such as suits alleging public nuisance, the only available remedy is injunctive relief. In these cases, the payment of plaintiffs' legal fees is often keyed to the value of the relief obtained by the government in the lawsuit. A defendant in such a suit should therefore examine whether proposed remedies are unduly expensive or otherwise not the most expedient or beneficial to the public. For example, after the successful trial verdict in the *LIA* case (before it was overturned by the Rhode Island Supreme Court), the AG submitted an abatement plan to the court that would have cost upwards of \$2 billion, would have required the displacement of thousands of people, and could not reasonably be accomplished in the time allotted.⁶ The plan was roundly criticized as unworkable and a deviation from the standards generally accepted for safely abating lead paint hazards by a variety of diverse constituents. A defendant may wish to challenge remedies, therefore, that are blatantly untenable and would provide a windfall to contingency fee counsel, but would not reasonably be in the public interest.

IV. Contingency Fees Must Be Reasonable

In addition to challenging the use of contingency fee counsel in litigating government claims, a defendant also may challenge the amount of the fee award, either at the outset or conclusion of a case. The focal point of such an inquiry should be whether the fee award is proportionate to the time counsel reasonably invested in the case.

⁶ This plan sought payment for the costs to remove or mitigate the effects of lead paint in as many as 240,000 permanent dwellings, 13,000 seasonal units, over 400 child-care centers and nearly 350 schools over a period of just four years.

A. Synopsis of Rules and Court Decisions on Fee Reasonableness

A number of courts, including the *LIA* court, have held that the reasonableness of contingency fees is subject to judicial oversight. In order to determine the reasonableness of fees, many courts will look to Rule 1.5 of the ABA Model Rules of Professional Conduct,⁷ which sets forth a number of factors including the time and labor required, the novelty and difficulty of the questions involved, the fee customarily charged in the locality for similar legal services, and the experience, reputation, and ability of the lawyer or lawyers performing the services.

A few states also have enacted statutes that require fees paid to AG-appointed counsel not “exceed recognized [hourly] bar rates for similar services.”⁸

B. Challenging the Reasonableness of Fees

An unreasonable fee could be one that includes a recovery percentage that is unreasonable on its face, or a fee that is unreasonably high when reduced to an hourly rate based upon work performed. In anticipation of challenges based on hourly rates and work performed, a defendant should request that the court require outside counsel to maintain detailed time records to substantiate the work performed, and to present such records for scrutiny at the case’s conclusion.⁹

Notably, seven states, Colorado, Connecticut, Kansas, Minnesota, North Dakota, Texas, and Virginia, have passed laws, described in more detail below, that require such reporting and limit the effective hourly rate that may be paid to outside counsel. These laws may serve

⁷ The Model Rules have been adopted by all but two States, California and Maine.

⁸ See, e.g., Iowa Code §13.7 (2008); Kan. Stat. Ann. § 75-37,135(a) (2001); Miss. Code Ann. § 7-5-7 (2008).

⁹ In order to avoid such scrutiny, contingency fee lawyers increasingly are seeking to bifurcate settlement payments into separate agreements – a specific amount for payments to the government and another for payments to outside counsel. Courts should be sensitive to this trend and obtain copies of all settlement agreements to conduct their review of fees.

as guidance even in states that have not passed such laws in determining what is considered reasonable.

V. Contingency Fee Arrangements Must Relate to Civil Claims Only

A defendant in a government contingency fee case also should be alert to any civil case brought by contingency fee counsel on behalf of the state that has criminal-like allegations or penalties. Outsourcing a state's authority to prosecute criminal cases when the lawyers involved have a clear personal stake in the litigation raises the most serious due process concerns, and criminal-like claims or penalties should not be part of any government contingency fee case. The existence of such claims could thus form the basis of a challenge not only to the claim at issue, but the entire contingency fee arrangement.

A. Synopsis of Court Decisions and Rules on Use of Contingency Fees in Criminal Cases

Although it is almost universally recognized that contingent fee contracts in criminal cases are unethical and most likely also are unconstitutional, few courts have addressed the issue. Anticipating that this may ultimately be an issue, the *LIA* court expressly limited its approval of contingency fee agreements to civil cases, and emphasized that it was unable to envision a criminal case where contingency fees would ever be appropriate. The American Bar Association's Model Rules of Professional Conduct and nearly all state ethical rules also prohibit contingency fee arrangements in criminal cases.

B. Challenging the Contingency Fee Arrangement Because of Criminal Allegations

In fact, to date, AGs have used outside contingency fee counsel only in civil cases. However, some defendants have found themselves defending claims that hinge on criminal allegations that have been included in a civil complaint to try to amplify claims for damages or otherwise create settlement leverage. A number of state consumer protection statutes have criminal as well as civil penalties that may, for example, require a defendant to pay treble damages. Therefore, a defendant should seek to dismiss any damages claims in contingency

fee lawsuits involving criminal allegations or criminal-like penalties on grounds that the AG has impermissibly outsourced the state's police power to private counsel with a clear personal interest in the outcome of the matter. A defendant also may consider the presence of such claims as the basis for challenging the contingency fee arrangement altogether.

VI. The Arrangement Must Satisfy Separation of Powers Requirements

Constitutional separation of powers may also form the basis of a successful challenge to contingency fee arrangements. Further, in some states, statutes restrict the AG's ability to retain outside counsel without approval by the legislature or governor. Therefore, if the agreement impermissibly cedes legislative appropriations power to the AG, or if an AG has not obtained the requisite approval, it may form a basis for the court to void the agreement.

A. Synopsis of Court Decisions and Select Statutes Regarding Separation of Powers

Nearly all state constitutions vest the power of appropriation in the state legislature. As such, an AG should be required to pay outside counsel out of fees appropriated by the legislature rather than from funds recovered by the state as damages.

In the 1997 case *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997), the Louisiana Supreme Court voided a series of contingency fee agreements entered into by the AG for future, unspecified cases on the ground that Louisiana's separation of powers doctrine prohibits the AG from entering into contingency fee contracts absent approval by the State legislature. In so doing, the court ruled that the Louisiana legislature has the sole power to apportion funds, and that any contingency fee contract involving the State and outside counsel must be approved by the legislature. The court also noted that the legislature had made such appropriations in the past and that it was not an onerous requirement.

A number of states also have statutes that require any contract with outside counsel to be approved by the legislature¹⁰ or executive branch.¹¹ Other states require that outside counsel may be paid only out of a legislative appropriation.¹²

B. Challenging Contingency Fee Arrangements on the Basis of Separation of Powers

A defendant in a government contingency fee litigation should, therefore, examine the authority granted to the legislative branch by the state constitution to determine whether a contingency fee arrangement may impermissibly cede the legislative power of the purse to the AG.¹³ In addition, a defendant should consult the state law to see if the AG is statutorily required to obtain legislative or executive approval of an agreement or fees paid to outside counsel. If the contingency fee arrangement was not approved by the required body (or bodies) or there was no appropriation for the contract, a court may be convinced to void the agreement.

VII. The Arrangement Must Meet State Statutory and Regulatory Requirements

Other challenges to contingency fee arrangements include those based on state appropriations and contracting requirements. Just like other state contracts, contingency fee counsel contracts may be subject to bidding requirements and, if so, counsel must meet those requirements.

¹⁰ These states include Alabama, Arkansas, Kansas, and Texas.

¹¹ These states include Arkansas, Idaho, Kentucky, Maryland, Minnesota, Nevada, North Carolina, North Dakota, and Tennessee.

¹² These states include Florida, Nevada, Ohio, and Tennessee.

¹³ In addition to attempts to avoid scrutiny of reasonableness of their fees (see footnote 9), contingency fee lawyers also may attempt to bifurcate settlement payments to avoid separation of powers or other legal challenges.

A. Synopsis of State Laws and Regulations On Agreements with Outside Counsel

1. State Regulations

Nearly every state has laws and regulations that mandate a bidding process for contracts with outside vendors and set forth minimum criteria for working with the state. For example, procurement laws and regulations may require that a minimum number of bids be submitted, the contractor must be bonded, and/or that the contractor must be free from any conflicts of interest with the state. Further, many state laws require a specific appropriation or approval from the legislature for contracts over a certain value (e.g., if the expected recovery is over \$100,000).

Some AG offices also have policies and procedures governing the use of outside counsel. For example, certain AG offices, such as in New Jersey and Ohio, issue “Requests for Qualifications” (RFQs) under which law firms may submit materials to the AG’s office so that they may be pre-qualified to represent the state in future cases. In addition, a number of states (e.g., Connecticut, Oregon, and Utah) use “Requests for Proposals” (RFPs) whereby the state solicits law firms to bid on representing the state in a specific case. Although few states have publicly available written procedures for hiring and the conduct of litigation by outside counsel, in September 2008, the Ohio AG’s office issued a “Handbook for Outside Counsel” that details necessary qualifications and obligations of law firms representing the state. It is expected that, with the increased attention to contingency fee contract issues, more AG offices will work to increase the transparency of contingent fee arrangements by issuing similar guidelines.

Often, state regulations, RFQs, and RFPs require that firms bidding for contracts reveal any conflicts of interest they may have with the state (i.e., the firm is adverse to the state in a

litigation). Although in most states a conflict of interest may be waived, in certain states, the state, as a public entity, may not waive a conflict of interest.¹⁴

2. State Laws

A few states have separate laws (sometimes comprising part of their appropriations or government sunshine laws) regarding qualifications for outside counsel.¹⁵ Additionally, seven states have passed, and a number of other states have considered, legislation based on the American Legislative Exchange Council's Model Private Attorney Retention Sunshine Act (PARSA).¹⁶ PARSA mandates a competitive bidding process, legislative oversight for contracts over \$1,000,000 (or the value of which reasonably is expected to exceed that amount), a reporting of attorney hours and expenses incurred on the case, and a breakdown of the hourly rate. PARSA also prohibits the state from paying fees of more than \$1,000 per hour when the total fee recovery is divided by the number of hours worked on the case.

In addition, twelve states¹⁷ have instituted "pay-for-play" laws that prohibit entities that have or are bidding for contracts with the state from directly or indirectly donating to a campaign of any officeholder (or candidate), including AGs, involved in the procurement process. These laws often include provisions that prohibit awards of bid or no-bid contracts to any entity (or any owner thereof) that donated to an official required to approve a contract in the previous eighteen months to two years.

¹⁴ See, e.g., New Jersey Rule of Professional Conduct 1.7 (prohibiting the state from waiving a conflict of interest); Nebraska Ethics Advisory Opinion for Lawyers No. 08-01 (finding that there is no mechanism for the state to waive a conflict of interest and, therefore, a conflicted outside counsel may not represent the state).

¹⁵ See, e.g., Idaho Code Ann. § 67-1409 (outside counsel chosen based on who can "best provide quality legal services for the state entities at an acceptable cost").

¹⁶ Colorado, Connecticut, Kansas, Minnesota, North Dakota, Texas, and Virginia have passed statutes based on PARSA. Similar legislation has been introduced in Arizona, Florida, Mississippi, Oklahoma, Pennsylvania, West Virginia, and Wisconsin in the past.

¹⁷ California, Connecticut, Hawaii, Kentucky, Maryland, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, and West Virginia.

B. Challenging Contingency Fee Agreements under State Regulations and Statutes

Given these regulations and statutes, a defendant should, in all instances, examine whether contingency fee counsel was retained in compliance with the state's appropriations, bidding, or contracting regulations and laws. In doing so, a defendant should consult public sources, make requests under state sunshine laws, and move the court for discovery so that it may examine the information submitted to the state in the bidding process. Primary inquiries should include whether there was a bidding process at all and whether outside counsel was properly vetted and free from conflicts of interest. A defendant also may want to examine the AG's campaign contribution records to ascertain whether outside counsel donated to the AG's campaign and whether such donation violates the states' "pay-for-play" prohibitions.

Further, a defendant may make requests under state sunshine laws or move a court for discovery to determine whether outside counsel is qualified to represent the state under the RFQ or RFP. A defendant also should investigate whether the AG or state has publicly available materials (similar to Ohio's) or whether it can obtain the policies and procedures of an AG's office upon request under state sunshine laws or discovery. If it does obtain these materials, a defendant should evaluate whether the bidding process and resulting contingency fee agreement comply with these policies.

VIII. Special Considerations – State *Qui Tam* Suits

In addition to the rise in state and local governments using outside counsel to bring cases on a contingency fee basis, there also are increasing attempts by the plaintiffs' bar to bring *qui tam* suits on behalf of states under state False Claims Acts (FCAs). Such suits permit plaintiffs and their attorneys to take a percentage of any government recovery resulting from the suit, similar to a contingency fee arrangement. However, because *qui tam* suits are permitted by statute, a defendant is limited in its ability to challenge the suit and the underlying fee arrangement.

Qui tam suits permit a private party (a “relator”) to bring under seal a civil suit for recovery of a payment made by the state for a false claim, filing the case in his or her name and in the name of the state. While the case is under seal, the AG reviews it and determines if he or she will intervene to assume responsibility for the litigation of the suit or otherwise dismiss it. If the AG chooses the latter, a court must hear objections by the relator prior to dismissal. If the AG does not intervene, the relator continues the suit, but the AG remains apprised of the litigation and may intervene at any time.

If the AG does intervene and elects to settle the suit, in a number of jurisdictions the relator is entitled to a hearing on the scope and magnitude of the settlement, and can stonewall negotiations to gain a larger settlement. Although most *qui tam* statutes require the relator to be heard regarding whether or when litigation is settled or dismissed, an intervening AG still retains ultimate control over the case and has the full and final authority on such decisions, as well as the obligation to exercise that authority in the public interest. As such, a defendant’s strongest argument against a relator’s authority is that the AG is obliged to seek justice and pursue the public interest and therefore should dismiss or otherwise settle a *qui tam* suit when it may be beneficial to the public, regardless of the relator’s objections.

The past two years have seen a flurry of new state laws adopting and amending FCAs containing *qui tam* provisions¹⁸ bringing the total number of FCAs with *qui tam* provisions to twenty-three. A driving force in the passage of these laws is the plaintiffs’ bar, which funds and controls several organizations that have agitated for plaintiff-friendly provisions in state *qui tam* statutes that, *inter alia*, expand a relator’s right to delay or modify settlements by AGs, increase the pool of money from which a relator’s award is drawn, and permit new theories of recovery. Companies should be aware of these efforts and consider mounting counter-efforts to curtail the expansion of *qui tam* statutes.

¹⁸ Georgia, New Jersey, New York, Oklahoma, Rhode Island, and Wisconsin have all adopted *qui tam* statutes since 2007.

IX. Conclusion

The current landscape of AG contingency fee arrangements with outside counsel makes it apparent that due process challenges alone may not result in favorable decisions for defendants. Defendants, therefore, must consider case-specific and fact-oriented arguments rooted in recent court decisions and state law.

To mount a successful challenge to a contingency fee arrangement based on these arguments, it is imperative that any defendant obtain all the information it can on the underlying arrangement so that it can then conduct a thorough evaluation of the AG's control of the case, including the AG's ability to settle the case absent contingency fee counsel approval, and whether he or she has proceeded in the public interest. A defendant further must determine whether the fees to be paid to contingency fee counsel are reasonable. A defendant also should scrutinize the complaint closely to determine if it includes claims for damages based on criminal-like statutes, which also can be a potential basis for a challenge to a contingency fee arrangement. Finally, a defendant should determine if the arrangement complies with state constitutional separation of powers requirements, and evaluate case law, regulations and statutes, as well as the AG's own policies and guidelines, to determine whether the retainer agreement was properly entered into, a key consideration to disputing the validity of a contingency fee arrangement.

Defendants also must be mindful of the possibility that they may become the targets of *qui tam* suits. These suits resemble contingency fee agreements but are not subject to many of these challenges. In this regard, defendants must be vigilant in monitoring attempts to expand the number and scope of *qui tam* laws and undertake efforts to combat them.



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