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Institute for Legal Reform

Big Bucks and Local Lawyers

The Increasing Use of Contingency Fee Lawyers by Local Governments

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Table of Contents

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Introduction & Executive Summary

Scene #1:

Place: ***THE WHITE HOUSE SITUATION ROOM***
Time: ***NEAR FUTURE***

The President of the United States has gathered with senior military and diplomatic leaders, deciding whether to end U.S. military action in a foreign country. Moving one-by-one around the table, the President asks those present to state their positions. The Secretary of State speaks in favor of ending the military action. Next, the Secretary of Defense explains the reasons why he favors pressing on. The National Security Advisor then expresses her support for the peace deal presently on the table. The Vice President disagrees.

Finally, the President asks the Chairman of the Joint Chiefs for his opinion. The Chairman responds by saying that, before offering his recommendation, he first must consult with the CEO of Defense Strategies, Inc. (DSI). The Chairman explains that DSI's consulting contract with the Department of Defense ties its compensation to the conflict's outcome and, because the current proposal would result in less compensation for DSI than an alternative resolution obtainable after a few additional months of fighting, DSI's contract requires such consultation. The Chairman takes pains to assure the President that he will make his own recommendation and that DSI's contract only gives it input, not control.

Scene #2:

Place: ***THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE***
Time: ***PRESENT DAY***

The Assistant District Attorney is huddled with a private investigator, whom the District Attorney's office hired to assist the fiscally-strapped Los Angeles Police Department with certain criminal investigations requiring special financial expertise. The ADA is attempting to decide which charges to bring against a defendant. The ADA believes that the defendant's actions warrant a misdemeanor charge. The private investigator disagrees. She is paid more for investigations that lead to felony convictions than for investigations that lead to misdemeanor convictions, and she therefore argues forcefully that the defendant should be charged with a felony.

These scenes may seem silly and far-fetched—a portrayal better suited for pulp fiction than for high-minded discussions of legal reform. But the sad reality is that scenes very similar to these already *are* happening in cities and counties across the country.

Specifically, local prosecutors and city attorneys are hiring private attorneys to pursue public interest cases under contingency fee contracts that give those private attorneys a direct, pecuniary interest in the outcome of those cases. As a result, the public interest is no longer the sole consideration of the public's lawyers in those cases or the sole measure of an appropriate outcome in them. Moreover, the work and remuneration of these private attorneys often is shielded from public scrutiny by claims of attorney-client privilege.

This paper examines this troubling trend in three stages.

FIRST

In order to provide context for assessing the problems with using contingency fee arrangements in public interest cases, the paper provides a short history of contingency fees. This brief history highlights that the primary justification for contingency fee arrangements has been providing access to the courts to those who otherwise would not be able to obtain such access. This goal is seen as important enough to justify the use of contingency fees, notwithstanding the many acknowledged practical and ethical problems with such arrangements.

But this traditional justification for contingency fees does not apply to representations of local entities in "public cases," because those local entities already have access to the justice system. As a result, local entities that use contingency fee arrangements are employing a tool that creates serious practical and ethical problems without any corresponding social or policy justification for doing so.

SECOND

The paper reviews some recent "real life" examples where private contingency fee attorneys have worked with or on behalf of local government lawyers to represent the public. These cases highlight some of the significant problems associated with contingency fee representations and underscore how they create distortions in both individual cases and the civil justice system as a whole. While the practice of state attorneys general employing contingency fee lawyers has been established for more than a decade, legislators concerned about the practice have passed sunshine laws in 21 states which, while not prohibiting contingency fee arrangements, place reasonable limits on, and require disclosure of, such arrangements.[1]

The increasing descent of this phenomenon to a more local level, however, has received less notice and is more troubling, because it promises to be extraordinarily difficult to police and has the potential to produce even more corruption.

THIRD

In light of these real life examples, the paper identifies some of the key ethical and public policy problems posed by contingency fee lawyers working on behalf of public officials. These issues include, among others: the conflict of interest between the private attorney's fee recovery and the public good; lack of control of the litigation by the municipality or public entity; and improper leveraging of potential civil and criminal penalties to increase the amount of the payment to private attorneys. Each of these issues, standing alone, is troubling enough. Taken together, they represent a real threat to the fair and impartial administration of justice in cases where municipalities have engaged private contingency fee lawyers.

Contingency Fees: History & Rationale

Part of the reason why the use of contingency fee attorneys by public entities is controversial is because contingency fees themselves are controversial. Indeed, back in 1952, *Reader's Digest* printed an article addressing contingency fees that was entitled "And Then—Sudden Ruin."

Origins of Contingency Fees

Historically, the common law prohibited maintenance and champerty. In simplistic terms, "maintenance" refers to providing support to a third party to pursue a lawsuit and "champerty" refers to acquiring an interest in a lawsuit. In 2014, a Delaware Superior Court reaffirmed Delaware's longstanding definition of maintenance as "the intermeddling in a suit by a stranger, one having no privity or concern in the subject matter and standing in no relation of duty to the suitor."[2] Black's Law Dictionary similarly defines champerty as "a bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds."[3]

As early as 1275, England had enacted statutes prohibiting champerty, and the rules and traditions against both champerty and maintenance were well settled by the 17th century.[4] Similar statutory prohibitions continue to exist, in varying forms and with varying force, in many U.S. states today.[5]

Some recent scholarship has suggested that these ancient prohibitions, rather than being venerable embodiments of our most noble legal traditions, actually were means the English upper classes employed to restrain efforts by the lower classes to use the courts to correct wrongs or address emerging social problems.[6] Seen in this light, the United States' rejection of the "loser pays" rule and embrace of contingency fees has been portrayed as

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a "particularly American response" to the issue of access to the courts, one that "relies on private initiative and market forces rather than government largess."[7]

Against this historical backdrop, legal historians often have identified the widespread use of contingency fees and our modern tort system as originating from an era of intense labor-capital conflict in the late 19th and early 20th century, just as an aggressive group of first generation lawyers entered the legal system.[8] Many of the current criticisms of contingency fees reflect these historical origins.

For example, contingency fees often are criticized as an accident of our modern tort system that should be reformed as the tort system itself is reformed, as an unnecessary hold-over from a period characterized by conflict between labor and capital, and as an ugly relic of an ambulance-chasing era that does not measure up to the higher standards aspired to and required of today's legal profession.[9]

Under this historical view, the current utility of contingency fees often is argued (for and against) by comparing the current legal and political situation against the late 19th and early 20th century and assessing how much (rendering current contingency fees anachronistic and unnecessary) or how little (making the continued use of contingency fees necessary) things have changed. Many of the themes that characterize current assessments of the continued utility of contingency fees also run through the debate over newer forms of litigation funding, such as third party litigation financing.[10]

Local Entities' Use of Contingency Fees

The point of this nutshell history is that—regardless of one's view of their historical origins and continued utility—the primary justification for contingency fee arrangements always has been to ensure *access* to the courts. Even the most ardent advocate for contingency fees justifies them on the basis of whether they provide such access. As one scholar put it, contingency fee arrangements facilitate "access to the judicial system for individuals who lack the means to pre-pay legal expenses."[11]

> *"[C]ontingency fees often are criticized as an accident of our modern tort system that should be reformed as the tort system itself is reformed..."*

But this justification is wholly inapplicable to local public entities. Local governments do not need to pay lawyers contingency fees in order to obtain access to the judicial system. To the contrary, it is no exaggeration to say that these state and local government entities themselves often create, finance, and maintain the legal system.

Nor are contingency fees the only way that cities and counties can gain access to lawyers. Again, just the opposite is true. Cities and counties have prosecutors and city attorneys. Many cities and counties employ at least one full-time lawyer. Some employ scores of lawyers. Nearly all hire needed legal expertise on a non-contingency fee basis.

Local public entities do not seriously—and could not plausibly—contend that they would not have access to the court system without the ability to access contingency fee lawyers. Rather, they usually justify the use of contingency fee lawyers on fiscal grounds. In effect, the argument goes something like this: "In these cash strapped times, hiring contingency fee lawyers enables us to get really good, experienced counsel for free." Or, as one commentator put it, "[t]he proliferation of these [contingency] fee arrangements should be no surprise because they…permit state and local governments to employ sophisticated firms, with greater experience and resources, to prosecute their claims without governmental appropriations or direct payment of litigation costs."[12]

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But this fiscal rationale is very different from the traditional justification for contingency fees. The question of whether a city can hire good lawyers for free is a far cry from the question of whether an individual can access the justice system at all. Contingency fees traditionally were justified as a means to help deserving individuals who could not afford to bring claims *against the government* and wealthier individuals or large entities, not to assist the government in bringing affirmative claims.

The government's use of contingency fees as a means to bring claims against companies and citizens therefore stands the original justification for contingency fees on its head. Instead of enabling prospective litigants to gain access to the courts that they otherwise would not be able to achieve, the use of contingency fees by local governments allows private attorneys to capitalize on the government's existing access to the system and privileged status in order to expand their business and enrich themselves. Employed by the government, contingency fees are the equivalent of a powerful weapon in the wrong hands, where it will be used in the wrong circumstances, without good cause, and with serious collateral effects.

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Impacts on Individual Cases & the Legal System

Because public entities do not need to pay private contingency fee attorneys in order to obtain access to the court system or to have the resources to devote to meritorious cases, involving private attorneys compensated on a contingency basis in public cases causes distortion in the legal system, both in individual cases and in the system more broadly. This distortion takes three primary forms: the "pile on," the "pay back," and the "squeeze."

The "Pile On": Unnecessarily Duplicative or Contradictory Enforcement Actions

Urban Dictionary perfectly defines "pile on" as "when everyone jumps on top of one unfortunate soul."[13] In the context of litigation by a public entity, a "pile on" takes place when a public entity files suit against a private party after or in addition to suits filed by other private parties and public entities. Sometimes a "pile on" involves lawsuits filed after initial litigation brought by public entities more immediately affected by, or with more direct regulatory responsibility over, a particular controversy.

The use of contingency fee attorneys facilitates piling on because it permits public entities to join in suits brought and led by other public entities without having to make a substantial expenditure of public resources. Obtaining approval to expend public resources would be difficult to justify in cases where multiple other municipalities already have acted or where other government agencies have a more direct reason for being involved.

A paradigmatic example of the "pile on" problem is the Orange County, California District Attorney's 2009 suit against Toyota over alleged defects in certain Toyota cars. In 2009 and 2010, Toyota recalled nearly six million cars because of the potential risk of unintended acceleration caused by floor mat and gas pedal issues. The recall, as well as several accidents initially attributed by the victims to unintended acceleration, led to a predictable avalanche of class action lawsuits. These lawsuits were consolidated in a multi-district litigation (MDL) proceeding in the Central District of California. Toyota ultimately settled the class actions for approximately $1.2 billion.[14]

Toyota also was charged with wire fraud by the Department of Justice (DOJ), which accused the company of reporting inaccurate safety data, providing false information to members of Congress, and misleading the public. Toyota ultimately agreed to pay a $1.2 billion fine—the largest fine of its kind ever levied against an automaker—as part of a settlement involving a deferred prosecution agreement.[15]

In addition to the billion dollar class action settlement and the billion dollar federal fine, Toyota also was fined more than $60 million by the National Highway Traffic Safety Administration (NHTSA),[16] paid $29 million to settle litigation brought by 29 state attorneys general, and defended itself against numerous individual lawsuits.[17]

While some might view this array of legal actions as a robust or even excessive response from regulators and the private bar, the Orange County District Attorney (DA) apparently concluded that it was insufficient and so decided to join the fray. The DA, Tony Rackauckas, entered into an agreement with prominent Orange County plaintiffs' lawyers to sue Toyota on behalf of the DA's office. These contingency fee lawyers then filed a civil law enforcement action alleging fraudulent business practices and seeking a $2,500 civil penalty for each violation. Rackauckas stated that he brought the action because people were "scared" by the possibility of an unintended acceleration event and to "ensure that Toyota is transparent about safety issues."[18]

In April 2013, Toyota agreed to pay $16 million to settle the DA's action. In announcing the settlement to the public and the press, the DA's office indicated that it intended to distribute $8 million to the Orange County Gang Reduction Intervention Partnership and $4 million to fund the DA's efforts to fight economic crimes.[19] The private contingency fee lawyers collected $3.2 million of the settlement.[20]

Whatever the merits of the DOJ and class action plaintiffs' claims against Toyota—a federal investigation ultimately was unable to link the alleged gas pedal issues to any accidents or injuries[21]—the Orange County DA's suit against Toyota was not a necessary or important part of ensuring that Toyota addressed those issues. To the contrary, the regulators (DOJ and NHTSA) primarily responsible for assessing the company's previous safety reporting took aggressive action against Toyota themselves.

Similarly, the private bar pursued Toyota through a large MDL class action proceeding, so the DA's suit was not even arguably a means of bringing justice to individual citizens who otherwise would have no means of obtaining it. The DA's lawsuit likewise was not directed at addressing any pressing public harm unique to Orange County, unless one considers the vague possibility that an Orange County resident might be "scared" as a pressing public harm.

Rather, the DA's lawsuit was a transparent example of piling on to extort the proverbial pound of flesh from a corporate defendant with no meaningful ability to resist. Rackauckas quite openly used Toyota to fund his office's gang intervention and economic crime programs during the post-crash period of tight fiscal constraints. Because of his contingency fee arrangement with a prominent local firm, he did not have to spend public money, or obtain public approval, to do so. This is the essence of "piling on."

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A second example of the "pile on" phenomenon can be seen in the opioid suits filed by several California counties, the City of Chicago, and the State of Mississippi against several leading pharmaceutical manufacturing companies. In May 2014, two California counties—Orange County and Santa Clara County—filed suit against five pharmaceutical companies, alleging that they marketed their painkilling drugs through a "campaign of deception."[22] The plaintiffs' firm Cohen Milstein, as well as two other well-known firms, represented the counties in their suit.[23]

The next month, in June 2014, the City of Chicago filed suit in Cook County Superior Court similarly alleging that the pharma companies had misrepresented the risks associated with their opioid pain medication drugs. Cohen Milstein, along with the City's law department, filed the complaint on behalf of the City.[24] Then, in late 2015, the State of Mississippi filed a very similar action, retaining the Mississippi contingency law firm of Davidson Bowie to represent the state.[25] Although it is not clear that Cohen Milstein is involved in the Mississippi action, the firm has collaborated with the Mississippi Attorney General in the past.

Without commenting on the merits or substantive allegations of the opioid lawsuits, these three separate actions—brought by California counties, a Midwestern city, and a Southern state—asserting essentially the same allegations involving products that are highly federally regulated, illustrate the duplication and potential conflict that comes from the "pile on" phenomenon. The multiple suits highlight the risk of inconsistent rulings, and underscore the entrepreneurial nature of the plaintiffs' bar in "shopping" certain cases and theories to states, counties, and municipalities.[26]

The “Pay Back”: Rewarding Friends And Supporters With Lucrative Cases

A second problem with the government’s use of lawyers compensated on a contingency fee basis is that local officials can and do use the potentially lucrative contingency fee opportunities to reward their supporters. This “pay-to-play” problem obviously poses serious issues for the impartial administration of public justice.

While most known examples have occurred in connection with state attorneys general, the phenomenon can occur at the local level. For example, the Los Angeles City Attorney partnered with a well-known plaintiffs’ law firm in a civil law enforcement action against a health insurer and received $7,500 in contributions to his campaign for California attorney general from the firm and family members of the firm’s partners.[27]

Other examples at the state level include the following:

- In January 2015, the *Pittsburgh Tribune* reported that nine outside law firms held contracts with the Pennsylvania Attorney General’s office and that those firms and their employees collectively had donated more than $362,199 to the attorney general’s campaign. Four law firms that received no-bid contingency contracts had donated more than $191,400 to the attorney general’s campaign.[28]
- Mississippi Attorney General Jim Hood hired 27 different law firms in more than 20 different suits and received more than $500,000 in campaign contributions from those firms.[29]
- A South Carolina attorney general awarded a no-bid contract to a law firm from whom he had received a total of $60,000 in contributions from lawyers and family members.[30]
- A suit by the Pennsylvania Governor’s Office of General Counsel against a pharmaceutical company was handled by a Texas law firm whose founding partner had directly contributed more than $160,000 to the governor’s re-election campaign.[31]

These are egregious examples, but they reflect significant, recurring problems with public corruption. A December 2014 study from the Edmund J. Safra Center for Ethics at Harvard University reported that there were 20,000 convictions for public corruption across the United States in the previous two decades, with an additional 5,000 defendants awaiting trial. In addition, the study also found that legislative and executive branch corruption was “common” or “moderately common” in a number of large U.S. states, including California, Florida, Illinois, New Jersey, and Texas.[32]

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And a November 2015 article detailing the results of the Center for Public Integrity's investigation into public corruption across the country found that "in state after state, open records laws are laced with exemptions, and part time agency officials and legislators engage in glaring conflicts of interests and cozy relationships."[33]

In sum, in this environment it is foolish to expect that using lucrative contingency cases to "pay back" political supporters will be an isolated phenomenon. Rather, it has been, and will continue to be, a recurring practice, absent some legislative or judicial limitations on the use of contingency fee contracts by public entities in public interest cases.

The "Squeeze": Private Lawyers Leveraging Government Power To Extract More Lucrative Settlements

While the "pile on" and the "pay back" are serious issues, an equally troubling problem created by public entities' use of contingency fees is the "squeeze." The "squeeze" involves the leveraging of the potential criminal penalties, substantial civil fines, regulatory control, and significant reputational harm that the government can inflict on any defendant in order to obtain a more lucrative settlement (and increased contingency fee amounts).

While to some extent this type of "weighing the downside" may be a practical part of any litigation against the government, the key factor that makes the "squeeze" problematic is that the government has unique leverage that is not normally available to private contingency fee attorneys representing non-government clients. The government in some circumstances can choose to treat the same offense as either a civil or criminal matter, can seek fines and penalties in either the civil or criminal context, and can affect a host of other regulatory issues of significance to any company. Private lawyers have access to none of these tools. Thus, the government's inherent leverage effectively permits, or at least creates the possibility that, private contingency fee lawyers may use the express or implicit threat of government action in order to obtain a more lucrative settlement.

This extortion need not take the form of a blatant quid pro quo exchange or an unseemly threat. Rather, it is inherent in every situation where the government

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could choose to impose penalties of either a civil or criminal nature. The “squeeze” may also occur when class action and government lawyers each take advantage of the pendency of the other’s lawsuit in a coordinated effort that drives up settlement and fine amounts.

One illustration of this type of “squeeze” occurred in the Los Angeles City Attorney’s 2008-2009 suit against health insurer Health Net over its rescission practices. Prior to the passage of the Affordable Care Act, California law permitted health insurers to engage in medical underwriting for individual insurance policies. As a result of this regulatory regime, California had a vibrant market for individual health insurance, and multiple insurers offered low cost individual insurance policies.

One reason that the price of these individual policies was low, however, is that most health plans used individual medical underwriting to (largely) exclude people who had a pre-existing condition. Given that regime, it perhaps is not surprising that disputes sometimes developed over whether an applicant for insurance had been forthcoming on his or her application, and California law permitted health insurers to rescind individual insurance policies based on misrepresentations during the application process.

These rescission practices became a target for regulators and the plaintiffs’ bar. In late 2007 and early 2008, prominent plaintiffs’ lawyer William Shernoff—a pioneer of bad faith law based in California—filed class action lawsuits against Health Net and other insurers alleging that their rescission policies were unlawful and constituted unfair business practices. Shernoff also called for the suspension of Health Net’s license to sell insurance and for a criminal investigation into Health Net’s conduct.[34]

In February 2008, as a follow-on to the class actions, the Los Angeles City Attorney’s office filed a civil law enforcement action against Health Net on behalf of the People of the State of California. The civil law enforcement action contained allegations that were substantively similar to those in the private class action lawsuits but, in lieu of remedies for the individual class members, sought civil penalties. The city attorney’s suit asserted claims under both California Business & Professions Code section 17200 (which allows the city attorney to seek civil penalties for each violation) and section 17500 (which authorizes the city attorney to treat violations as either a civil matter or as a misdemeanor).[35]

The city attorney and the Shernoff firm then coordinated their cases and pursued them together. The city attorney used the class action as a way of seeking relief for individuals and the Shernoff firm used the penalties available in the city attorney's case to leverage a more lucrative settlement. Ultimately, both cases were resolved together, in technically distinct but mutually dependent settlements, in February 2009.

Under the settlement, Health Net agreed to pay $6.3 million to the class, up to an estimated $3 million to reimburse out-of-pocket medical expenses incurred by members whose polices were rescinded, $2 million in civil penalties, and $2 million in attorney's fees. The settlement was noteworthy because the payments to class members did not require a claims process.[36]

The Health Net rescission cases show in no uncertain terms the way that improper leveraging of the potential civil and criminal penalties available to government entities affects the outcome of civil cases. In those cases, the "squeeze" manifested itself in both the terms and structure of the Health Net settlement. And those cases are noteworthy because they involved (a) high caliber plaintiff and government attorneys; and (b) a situation where the city attorney actually filed and pursued a separate case on his own behalf rather than entirely delegating that responsibility to contingency fee attorneys. Even in those "best case" circumstances, however, the "squeeze" was real, and smothering. With attorneys of less skill and fewer principles, the possibilities for abuse are even more dramatic and disturbing.

> *"[These] cases show in no uncertain terms the way that improper leveraging of the potential civil and criminal penalties available to government entities affects the outcome of civil cases."*

Practical & Ethical Concerns

Having briefly outlined some of the primary ways in which local governments' use of contingency fee attorneys distorts both individual cases and the legal system, following are some of the main practical and ethical concerns that should provide compelling reasons for local governments to avoid employing contingency fee arrangements.

Conflict of Interest

In *People ex rel. Clancy v. Superior Court,*[37] the California Supreme Court recognized that "the contingent fee arrangement between the City and [a private attorney] is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public interest claim." In the court's view, public enforcement actions "involve a balancing of interests," and require "a delicate weighing of values" that demands the representative of the government to be absolutely neutral." As a result, the court determined that "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated."[38] Although the California Supreme Court subsequently permitted use of contingency fee awards in some circumstances in *County of Santa Clara,*[39] it reiterated the *Clancy* court's concern that contingency fee arrangements create impermissible conflicts of interest for government lawyers in most circumstances.

This reasoning should remain persuasive to governmental entities considering whether to use contingency fee arrangements. These agreements absolutely create a potential conflict between the financial interest of the contingency fee lawyer and the public's interest in an appropriate resolution untainted by the financial interest of a private lawyer. Even if one believes that these inherent conflicts can be successfully managed, there simply is no compelling reason to create them.

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Control

In *County of Santa Clara*, the California Supreme Court limited *Clancy*'s prohibition on contingency fee arrangements based on its facts, where the contingency fee attorney was the local government's sole representative and had complete control over the litigation. The California Supreme Court distinguished that situation from circumstances where "neutral, conflict-free government attorneys retain the power to control and supervise the litigation…even if some of the attorneys involved in the case in a subsidiary role have a conflict of interest that might—if present in a public attorney—mandate disqualification."[40]

Even assuming that the California Supreme Court's rationale in *County of Santa Clara* were persuasive, being faithful to the court's admonition to exercise genuine control often can pose major difficulties for local governments who seek to do so.

To begin with, local governments often lack the subject matter expertise and experience necessary to control outside counsel. Indeed, the absence of this expertise often is one of the reasons why local government entities look to retain outside counsel in the first instance. This lack of expertise does not necessarily pose a control problem when outside counsel is compensated on a non-contingency fee basis, but it can be a serious issue when the government's lawyers are supposed to do more than merely rubber stamp the decisions, analysis, and recommendations of conflicted outside contingency fee counsel.

Moreover, besides lacking the expertise necessary to exercise meaningful control, many government lawyers lack the desire to do so because it would require an investment of very substantial resources —and the lack of those resources often is alleged as a factor in prompting local governments to look for outside counsel in the first place.

In addition, even if a public entity actually does exercise control over the decisions and work of outside counsel, it may be difficult or impossible for the public to have visibility into whether that is the case, because much of the work of outside counsel and its communications with government counsel will be shielded by the attorney-client privilege. Thus, there may be no meaningful way for the public to scrutinize the local government's conduct and hold it accountable for controlling outside counsel and ensuring that the government is not delegating its unique role in public nuisance cases.

For all of these reasons, public entities should be very cautious about embracing contingency fee arrangements based on the casual assumption that they will be able to provide sufficient "control" of outside contingency fee counsel. Absent such control, contingency fee arrangements are inappropriate and risk being invalidated. The difficulty of exercising such control only underscores why such contingency fee arrangements are inadvisable in the first place.

Appearance of Impartiality

Even if a local governmental entity could avoid any actual conflicts of interest and could exercise real control over outside contingency fee counsel, the use of such counsel still compromises the critically important appearance of impartiality. In the *County of Santa Clara* case, the California District Attorneys Association filed an eloquent amicus brief, which argued that allowing local governments to enter into contingency fee arrangements "jeopardizes key civil law enforcement statutes by undermining existing public confidence that those statutes will be applied in an even-handed, neutral, impartial manner by financially disinterested prosecutors."[41] That is exactly right. Regardless of whether such contingency fee arrangements are legally permissible, there is no reason why a local government entity should undermine this critical aspect of the administration of justice when there is no compelling legal or policy reason to do so.

> *"[A]llowing local governments to enter into contingency fee arrangements 'jeopardizes key civil law enforcement statutes by undermining existing public confidence that those statutes will be applied in an even-handed, neutral, impartial manner by financially disinterested prosecutors.'"*

Conclusion

In summary, the increasing use of contingency fee counsel by local government entities is a disturbing trend that poses real risks to the fair and impartial administration of justice. This increasing practice by local governments is inconsistent with the historical justification for contingency fees. Moreover, it creates the possibility of abuse in several ways: first, by using lucrative contingency fee contracts as a way to reward political supporters; second, by extracting settlements from unpopular defendants in the absence of any compelling policy reason for the local government to be involved, and finally, by leveraging the government's civil and criminal power to gain more valuable settlements for private lawyers. In addition, the use of contingency fee arrangements creates conflicts of interest, control issues, and the appearance of impropriety for government lawyers working on public nuisance cases.

For each of these reasons, local governments should refrain or be prohibited by legislation from hiring private lawyers to pursue public nuisance and other "public interest" cases under contingency fee contracts.

Endnotes

1 *See, e.g.*, H.B. 227 (2013) *codified at* Ala Code § 41-16-72; H.B. 2423 (2011), *as amended by* S.B. 1132 (2012) *codified at* Ariz. Rev. Stat. § 41-4801 *et seq.*; S.B. 204, (2015), *codified at* Ark. Code Ann. § 25-16-714; Colo. Rev. Stat. § 13-17-301 *et seq.*; S.B. 712 (2010) *codified at* Fla. Stat. Ann. § 16.0155; S.B. 38 (2015), *codified at* Ohio Rev. Code Ann. § 9.49 *et seq.*; H.B. 4007 (2016) amending W.Va. Code §§ 5-3-3, 5-3-4.

2 *Charge Injection Technologies v. E.I du Pont de Nemours & Co.,* C.A. No. N07C-12-134 JRJ (Del. Super. Ct. Feb. 27, 2014).

3 Black's Law Dictionary 231 (6th ed. 1990).

4 Richard W. Painter, *Litigating On A Contingency: A Monopoly of Champions Or A Market For Champerty* 71 Chi.-Kent L. Rev. 625, 639 & n.62 (1964).

5 Paul Bond, *Making Champerty Work: An Invitation To State Action,* 150 U. Pa. L. Rev. 1297, 1297-1310 (reviewing the current status of champerty prohibitions and finding the doctrine "vital and irreplaceable").

6 Peter Karsten, *Enabling The Poor To Have Their Day In Court: The Sanctioning Of Contingency Fee Contracts, A History to 1940*, 47 DePaul L. Rev. 231 (1998).

7 Stephen Landsman, *The History of Contingency And The Contingency Of History*, 47 DePaul L. Rev. 261, 261-62 (1998).

8 Karsten, *supra* at 250–258.

9 Landsman, *supra*.

10 John Beisner and Gary Rubin, *Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation*, U.S. Chamber Institute for Legal Reform (Oct. 24, 2012), available at http://www.instituteforlegalreform.com (arguing for limitations on third party funding, including prohibitions of investor control of cases, communications between third-party funding group and lawyers without the inclusion of the client, and law firm ownership of third-party funding groups, as well as full disclosure of funding contracts in litigation).

11 David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 317-318 (2001).

12 Brent R. Austin and David Simon, *Increasing Scrutiny of Gov't. Contingency Fee Deals*, Law 360, Nov.1, 2010, available at http://www.law360.com/articles/204496/increasing-scrutiny-of-gov-t-contingent-fee-deals.

13 http://www.urbandictionary.com/define.php?term=Pile%20On.

14 Bill Vlasic, *Toyota Agrees to Settle Lawsuit Tied to Accelerations*, New York Times, Dec. 26, 2012.

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