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

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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.[2] 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.[3]

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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[2] *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.

[3] 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.[4]

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

[4] 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,[5] 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.[6] 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,[7] 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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5 Allan Kanner & Tibor Nagy, *The Use of Contingency Fees In Natural Resource Damage and Other Parens Patriae Cases*, Toxics Law Reporter, Aug. 12, 2004, at 745.

6 Va. Code Ann. § 2.2-510.1 (2003).

7 *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.[8] 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.[9] 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.[10]

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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[8] Barry Miller, *Case Study in Tobacco Law: How a Fee Jumped in Days*, N.Y. Times, Dec. 15, 1998.

[9] Daniel Wise, *New York Tobacco Fee Hearing Has Lawyers Smoking,* New York Law Journal, July 26, 2002.

[10] 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."[11] 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.[12]

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.[13] Thus, the public does pay in a very direct and substantial way for the lawyers who operate under

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[11] *See*, *e.g.*, *Marshall v. Jerrico*, 446 U.S. 238, 249-50 (1980).

[12] *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).

[13] 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.[14] 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.[15] 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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[14] Kevin Stack, *Tobacco Industry's Dogged Nemesis*, N.Y. Times, Apr. 6, 1997.

[15] 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."[16] 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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[16] 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.[17] Eight states have expressly decided not to adopt the rule.[18]

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

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

[17] Delaware Rules of Professional Conduct; Idaho Rules of Professional Conduct.

[18] 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.[19] 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.[20] 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.[21]

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.[22] Alaskan courts have granted the attorney general nearly unlimited discretionary control over the legal business of the state.[23] In a case challenging the attorney general's ability to appoint special prosecutors, an Alaska appellate court noted that

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19 Ala. Code §§ 29-2-41, 29-2-41.2(b) (2004).

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

21 *Id.* at 423.

22 Alaska Stat. § 36.30.015 (2004).

23 *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.[24] 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.[25] 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.[26] However, this cap is significantly weakened by an exception: the cap does not apply where a court sets the attorneys' fee award.[27]

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[24] *Id.* at 633.

[25] 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."

[26] 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.").

[27] *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.[28] 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.[29] 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."[30] 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."[31] Contingency fee arrangements have specifically been permitted in tort cases.[32] 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."[33]

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[28] 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.").

[29] Cal. Gov. Code § 12520.

[30] *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740 (1985).

[31] *Id.* at 749.

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

[33] 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,[34] 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.[35]

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."[36] 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.[37]

7. Connecticut

Connecticut grants its attorney general authority to "procure such assistance as he may require."[38] 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

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.[39] Furthermore, Connecticut law provides that all funds recovered in a legal action are the property of the client, not his attorney.[40] 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.[41] In fact, courts have even approved a program through which private attorneys (paid by their private employers) act as volunteer prosecutors.[42] 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.[43]

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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[39] *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).

[40] *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.").

[41] Del. Code Ann. tit. 29, § 2507.

[42] *Seth v. State*, 592 A.2d 436 (Del. 1991).

[43] Model Rules of Prof'l Conduct R. 7.6 (2000).

the legislature.[44] 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.[45] 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.[46] The attorney general's authority to employ outside counsel is exclusive.[47] However, the governor has the power to direct the Department of Law to institute and prosecute matters in the name of the state.[48] 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.[49] For other purposes, however, the attorney general must employ private counsel on a fixed-price or hourly-fee basis.[50]

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

45 *Id.*

46 Ga. Code Ann. § 45-15-4 (2004).

47 *Id*.

48 *Id*. § 45-15-35.

49 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."[51] 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."[52]

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.[53]

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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.").

[50] *Id.*

[51] Idaho Code § 67-1406; 67-1409.

[52] *Id.*

[53] 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[54] – 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.[55] 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.[56] 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.[57] 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.[58] In determining reasonableness, the court is

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54 *Julian v. State*, 23 N.E. 690 (Ind. 1890).

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

56 Kan. Stat. Ann. § 75-37, 135(a) (2001).

57 *Id.* § 75-37, 135(d).

58 *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.[59]

17. **Kentucky**

Kentucky law expressly permits contingent fee arrangements with private attorneys engaged by the state, subject to approval by the governor.[60] 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.[61] Although the attorney general is authorized to hire outside counsel by statute,[62] 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.[63] 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,[64] a contingent fee contract with law firms engaged for an environmental lawsuit was unconstitutional.

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59 *Id.*

60 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.").

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

62 La. Rev. Stat. Ann. § 49.258.

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

64 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.[65]

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.[66] Contingent fee contracts with private counsel were challenged and upheld during the state's tobacco litigation in the 1990s.[67] 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.[68] 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.[69] Earlier this month, a

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

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

67 *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).

68 *Id.*

69 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.[70]

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.[71] Nevertheless, they recommended the large award.

23. **Minnesota**

Minnesota's attorney general has broad power to conduct civil litigation on behalf of the state.[72] 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.[73] 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.[74] The state attorney general may

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

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

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

73 Minn. Stat. § 8.15(3) (2005).

also retain private attorneys to sue the federal government when the federal government owes money to the state.[75] Attorneys hired for this purpose are entitled to a contingency fee of 25% when any awards are paid to the state.[76] 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.[77]

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.[78]

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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[74] 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.

[75] 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).

[76] Minn. Stat. § 8.09-10.

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

[78] *Id.*

and "in no event" exceeds "recognized bar rates for similar services."[79] 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.[80] 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.[81] 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,[82] as well as cases suggesting that the legislature is the sole authority over the public treasury.[83]

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,[84] 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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79 Miss. Code. Ann. § 7-5-7.

80 *Pursue Energy Corp. v. Miss. State Tax Comm'r*, 816 So. 2d 385 (Miss. 2002).

81 *Id.*

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

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

84 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."[85] 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.[86] 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.[87] 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.[88]

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.[89]

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

86 *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).

87 *Neel*, 114 S.W.3d at 272.

88 *Id*. at 276.

89 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.[90]

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.[91] 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.[92] 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."[93] Again, statutes make no specific

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[90] *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).

[91] "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).

[92] N.H. Rev. Stat. Ann. § 7:12 (2004).

[93] 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,[94] 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.[95] 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.[96]

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.[97]

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.[98] 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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94 "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).

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

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

97 N.M. Stat. Ann. § 36-1-19.

98 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.[99]

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."[100]

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.[101] 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.[102]

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.[103] 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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99 Wise, *supra* note 9.

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

101 N.C. Gen. Stat. § 114-2.3 (2004).

102 N.C. Gen. Stat. § 147-17(a).

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

counsel in cases in which fees may exceed $150,000.[104] 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."[105]

35. **Ohio**

Ohio law permits the attorney general to hire special counsel, so long as they are paid from funds "appropriated for that purpose."[106] 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.[107] 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.[108] 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.[109] The State Controlling Board, which must approve contracts above

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104 N.D. Cent. Code § 54-12-08 (1999).

105 *See* 1999 Senate Standing Committee Minutes, Feb. 10, 1999 at 1-2.

106 Ohio Rev. Code Ann. § 109.07 (2005).

107 Ohio Rev. Code Ann. § 109.08.

108 Ohio Rev. Code Ann. § 109.11.

109 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.[110]

36. **Oklahoma**

Oklahoma has a detailed statute describing the process by which the state may engage private legal services.[111] 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.[112] 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.[113] Those statutes include a tobacco-specific provision under which the state can recover "reasonable" attorney's fees.[114] In the tobacco cases

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

111 Okla. Stat. tit. 74, § 20i (2005).

112 Okla. Stat. tit. 62, § 15.

113 Or. Rev. Stat. § 180.140 (2003).

114 *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.[115]

38. **Pennsylvania**

Like Oregon, Pennsylvania law provides for recovery of reasonable attorneys' fees in connection with ongoing enforcement of the tobacco agreement.[116] 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. [117]

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

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."[120] 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.[121] The defendants

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115 *Id*. § 180.205.

116 35 Penn Cons. Stat. § 5702.308 (2004).

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

118 71 Penn. Cons. Stat. § 826.6.

119 *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.")

120 R.I. Gen. Laws § 42-9-1 (2004).

121 *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.[122]

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[123] – 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.[124]

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.[125] To hire outside legal counsel, the attorney general must ensure that work is done pursuant to a written contract.[126] South Dakota law also specifies that contingency fees may be used to reimburse legal counsel who recover on delinquent accounts of private prison industries.[127] 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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122 Brief of Washington Legal Foundation at 13, *State v. Lead Industries Assoc.*, No. 2004-63-MP (R.I. 2004).

123 S.C. Code Ann. § 1-1-1030 (2003).

124 *Id*. § 8-13-1342.

125 S.D. Codified Laws § 1-11-5 (2004).

126 *Id*. § 1-11-15.

127 *Id*. § 24-7-19.

be in the interest of the state.[128] The statute granting the governor this authority requires compensation for outside counsel to come from "the treasury of the state not otherwise appropriated."[129] 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.[130]

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.[131]

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

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128 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.").

129 *Id*.

130 *Id*. § 40-3-209.

131 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. [132] Texas caps hourly rates at $1000 per hour and adopts a lodestar method for fee computation.[133] 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.[134]

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.[135] 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.[136]

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.[137] 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.[138] Utah courts upheld the use of contingency fee counsel in the state's tobacco litigation.[139]

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132 *Id*.

133 *Id*.. § 2254.106(a)-(b).

134 *Id.* § 2254.106(c).

135 *Id*. § 2254.104(a)-(b).

136 *Id.* § 2254.104(c).

137 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.

138 *Id*.

139 *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.[140] In 1998, the Vermont legislature granted the attorney general authority to hire contingent fee attorneys to bring tobacco suits.[141]

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.[142] 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."[143]

46. **Virginia**

Virginia is the only state that requires public, competitive bidding for all contingency contracts for legal counsel that exceed $100,000.[144] 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.[145] The legislative report accompanying the law estimated that the competitive bidding requirement would result in savings because the

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140 Vt. Stat. Ann. tit. 3, § 153-4.

141 Tobacco Medicaid Reimbursement Act, 1998 Vt. Acts & Resolves No. 142.

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

143 *Id.*

144 Va. Code Ann. § 2.2-510.1 (2003).

145 *Id.*

reform encourages "legal services firms to submit lower prices for representing the Commonwealth's state agencies than they otherwise would." [146]

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.[147]

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.[148] However, other trial courts (in the contexts of other matters) have refused to nullify contingent fee agreements.[149]

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.[150]

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

147 Wash. Rev. Code § 43.10.067.

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

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

150 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*."[151] 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."[152]

50. **Wyoming**

Wyoming law grants its attorney general authority to engage contingency counsel for state litigation.[153] Contingency fees must be distributed through a fund administered by the attorney general.[154] 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."[155]

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

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

153 Wyo. Stat. Ann. § 9-1-639 (2004).

154 *Id.*

155 *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.