

# HUSCH BLACKWELL

## Contingency Fee Plaintiffs' Counsel and the Public Good?

This article first appeared in *In-House Defense Quarterly*, Winter 2011

By Douglas F. McMeyer, Lise T. Spacapan and Robert W. George

Doug F. McMeyer  
312.775.0404  
[douglas.mcmeyer@huschblackwell.com](mailto:douglas.mcmeyer@huschblackwell.com)

# Table of Contents

<b>Overview</b>	<b>1</b>
<b>Scope of the Litigation</b>	<b>1</b>
<b>Constitutional and Statutory Implications</b>	<b>3</b>
<b>Court Examination of the Propriety of These Relationships</b>	<b>5</b>
<b>Legislative and Executive Responses to Contingency Fee Arrangements</b>	<b>9</b>
<b>The Playing Field Dramatically Shifts When the State, Rather Than a Private Plaintiff, Brings an Action</b>	<b>13</b>
<b>Selection and Supervision of Counsel</b>	<b>17</b>
<b>Conclusion</b>	<b>18</b>

## Overview

State prosecutors are obligated to maintain impartiality when wielding the power of the state in pursuit of justice. Nonetheless, anytime a company's actions are under scrutiny by the state, it is easy to appreciate a target defendant's skepticism about whether the prosecutor is politically motivated or is truly impartial. The recent expansion of an alarming breed of litigation—where state attorneys general hire contingency fee lawyers to represent the interests of the state—means that corporate defendants must worry about a previously inconceivable threat to prosecutorial impartiality: personal financial gain. When contingency fee attorneys are engaged by the state, the self-interest of the contingency fee lawyer, who might make a personal fortune if successful, may cloud the good faith assessment of the public interest that an impartial prosecutor is required to make in the interests of justice.

Despite what would seem to be obvious legal and political concerns arising from this practice, we identified only a handful of states in which courts analyzed the propriety of a state attorney general's retention of contingency fee lawyers. Further, we found only 10 states with statutes expressly addressing the practice. To get a better sense of the frequency and nature of these arrangements, we served FOIA requests (or the state public records corollary) on the attorneys general of all 50 states and the District of Columbia. *See* Appendix A. As of the date this article was submitted, 49 states and the District of Columbia had responded to this request, although in a variety of ways with varying degrees of detail (due to a paper work error, New York was the only state who did not reply to the FOIA request). The attached chart, Appendix B, summarizes the responses received. Our chart reflects only what the states provided. We did not independently verify the information.

The FOIA responses reflect wide state-by-state variations in the practice of retaining private contingency fee counsel to represent the state's interests. This article presents an overview of the problems these public contingency fee contracts present and references the FOIA responses in an attempt to shed additional light on the scope and variations in this practice.

## Scope of the Litigation

The lawsuits brought by the states against the tobacco companies in the 1990s taught a number of lessons. It taught the attorneys general the ease of pursuing litigation using the resources and efforts of contingency fee counsel, rather than the states' employees. It also taught the plaintiffs' bar how lucrative it can be to have a state as a client. Data from our FOIA requests show not only that the contingency fee bar is willing to represent the states, but also that members actively identify possible cases and solicit work on behalf of the states. Thus, a union now exists between some states—seeking to redress wrongs, reshape industries, or refill empty coffers—and private firms that seek to meet the needs of the states while advancing their own agenda and generating personal revenue.

Today, the scope of these contingency fee cases is as broad as tort law itself. Public cases are brought by private contingency fee lawyers as environmental cases asserting CERCLA, trespass, nuisance and unjust enrichment (*State of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769 (10th Cir. 2009)); traditional “public nuisance” cases (*State of Rhode Island v. Lead Industries Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008) and *County of Santa Clara v. Superior Court*, 50 Cal. 4th

35 (Cal. 2010)); collection cases; securities fraud cases; asbestos abatement cases; product liability cases; and traditional personal injury cases.

## **Tobacco**

In the high-stakes litigation the states brought against the tobacco industry, some 36 states engaged private contingency fee attorneys. These so-called “special assistants” were retained to help the states prosecute their cases. A Congressional Research Study was conducted to survey the various fee arrangements that were instituted by the states. See Congressional Research Service (CRS), *Attorneys’ Fees in the State Tobacco Litigation Cases*, September 23, 1997. The CRS study reports the fee arrangements for the majority of states involved in the tobacco litigation and displays the significant variance in the fee arrangements utilized by the states.

### ***Fee Arrangements in the Tobacco Litigation***

Many states constructed tiered contingency fee arrangements where one percentage was used for a recovery up to a certain dollar amount, and progressively higher recovery ranges contained progressively lower fee percentages. *See, e.g.*, Alaska CRS at 2. Other states simply provided a flat fee for all recovery. *See, e.g.*, Utah CRS at 12. Finally, some states simply stated that the “special assistants” were entitled to “reasonable attorneys fees.” *See, e.g.*, Mississippi CRS at 8. The various fee arrangements in the first tier of recovery ranged between 10 and 25 percent and the diversity of percentages was no less dynamic in the higher ranges. Given the size of the awards to the states, the fees contingency fee counsel stood to receive was astounding. For instance, the contingency fee attorneys retained by Maryland stood to receive \$4 billion if the state succeeded in bringing its \$16 billion claim against the tobacco industry. *Phillip Morris Inc. v. Glendening*, 349 Md. 660, 669 (Md. 1998).

Ultimately, however, the contingency fee contracts did not control the fee awards. Instead, the states settled with the tobacco companies and entered into the “Master Settlement Agreement” (MSA), which required that the companies pay “reasonable attorneys’ fees to the private outside counsel.” *State of New York v. Phillip Morris, Inc.*, 308 A.D. 2d 57, 60 (N.Y.A.D. 2003). The MSA called on the tobacco companies and the private attorneys to attempt to negotiate a fee agreement. If an agreement could not be reached, the parties submitted to final, binding and non-appealable arbitration. *Id.* The arbitration panel was not limited to considering any lodestar or hourly rate in making awards, and the awards were independent of the settlement amounts received by the states. *Id.* The MSA required the award to remain confidential. *Id.* at 61.

### ***The Attorneys’ Fees Awarded in New York***

Because of their confidential nature, the vast majority of fee awards in tobacco litigation are unknown. New York is an exception. New York State received a settlement of \$25 billion. The state’s outside counsel asked for an award of between five and seven percent, which translated to an award between \$1.25 billion and \$1.75 billion. The arbitration panel awarded the attorneys just 2.5 percent of the recovery—still an astounding \$625 million. *Id.*

## **Lead Paint**

Following the tobacco cases, the contingency fee arrangement was repeated in cases against other industries. The best known examples are the cases against the lead-paint industry. In Rhode Island, California and elsewhere, states, cities and municipalities filed suits through contingency

fee attorneys against the industry alleging a public nuisance related to children ingesting lead paint.

In one such case, the State of Rhode Island adopted the tobacco litigation model and hired two outside firms to prosecute a case against multiple defendants. The firms were to be compensated with 16 2/3 percent of any recovery. *See* Appendix B. After the longest jury trial in Rhode Island's history, the jury returned a verdict against the paint manufacturers. The required abatement would have cost the defendants billions of dollars and netted untold millions for the contingency fee attorneys. *See* Thomas R. Bender, *et al.*, *The Mouse Roars! Rhode Island High Court Rejects Expansion of Public Nuisance*, The Washington Legal Foundation (November 15, 2010) <http://www.wlf.org/upload/FinalBenderFaulkGray.pdf>. In 2008, however, the Supreme Court of Rhode Island reversed the verdict on appeal and in the process landed a striking blow to the unchecked expansion of public nuisance litigation. *State of Rhode Island v. Lead Industries Association, Inc.*, 951 A.2d 428 (R.I. 2008).

### **Modern Expansion of States' Use of Contingency Fee Lawyers**

Of the 50 responses to our FOIA request, 36 responses reported that they were using or had used—outside of the tobacco context—contingency fee counsel. Of the 14 states that did not report the use of contingency fee attorneys, only three states had statutes that explicitly limited the ability to engage outside counsel on this basis. The remaining 11 have no apparent statutory prohibition. *See* Appendix B.

The FOIA responses we received indicate that the tobacco model has been extended since the late 1990s to a host of other industries and situations. Some cases, such as the lead-paint cases, are well publicized. Other cases may not be well known. In the wake of the economic meltdown, many states are forming these arrangements to help recover funds that were invested as part of the state employee retirement systems or were wrongly paid out as part of state entitlement spending. There are cases for environmental damage, actuarial malpractice, deceptive lending, asbestos abatement and product liability. States are bringing cases against the pharmaceutical industry for everything from product liability to advertising the off-label use of prescription medications. A significant group of cases involve the average wholesale price litigation (AWP) in which the states are suing pharmaceutical companies for allegedly artificially inflating the prices paid for prescription medications. Some states are prosecuting these cases directly, but many are using contingency fee counsel.

### **Constitutional and Statutory Implications**

A defendant faced with a case brought by contingency fee counsel on behalf of a state has a host of arguments that could be raised in an effort to disqualify the counsel. In this article, we do not attempt to outline these challenges in detail, but we highlight some primary legal questions that should be preserved and ultimately addressed in the courts: federal constitutional and state constitutional and statutory challenges.

### **Federal Constitutional Issues**

A host of scholars raise real and substantial questions regarding the constitutionality of these fee arrangements, *See* “Constitutional and Political Implications: Private Contingent Fee Lawyers and Public Power” by Martin H. Redish on page 29; David M. Axelrad, and Lisa Perrochet,

*Public Nuisance: Public Entity Litigation and Contingency Fee Counsel*, Public Nuisance Law (November 15, 2010), <http://www.nuisancelaw.com/learn/contingency%20fee-counsel>; Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77 (2010); and Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913, 914 (2008).

### ***Due Process Concerns***

The primary concern raised by scholars is whether it is a violation of procedural due process when a state retains a self-interested lawyer who stands to gain personally from successful litigation brought on behalf of the state. Essentially, the argument to be made is that when a contingency fee lawyer prosecutes a case on behalf of the state, the process ceases to be fair because the state's power is combined with the lawyer's perverse financial incentive to maximize damages, and not simply to see justice done. The California Supreme Court limits this perverse incentive, in certain circumstances. The court, in *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740 (CA. 1985), specifically addressed the need for a prosecutor to be disinterested noting that

a prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly.

Indeed, the court stated that the attorney general's duty "to govern impartially is as compelling as its obligation to govern at all." *Id.* at 746.

### ***The "Phantom Notion" of Supervision***

Every court that has upheld a direct challenge to this arrangement has done so, at least in part, on the basis that the attorneys general maintain control of the litigation and supervise the litigation. In *City and County of San Francisco v. Phillip Morris*, the Northern District of California allowed a contingency fee relationship to go forward because the contingency fee counsel was "acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation," *City and County of San Francisco v. Phillip Morris*, 957 F. Supp. 1130, 1135 (N.D. Ca. 1997). The court further noted that because plaintiffs' public counsel are actually directing this litigation, the court finds that the concerns expressed... regarding overzealousness on the part of private counsel have been adequately addressed." *Id.*

It is difficult, however, if not impossible, to analyze the degree of actual supervision being exercised by the states because the communications between the state attorneys general and the contingency fee lawyers typically are protected by attorney-client privilege and the work product doctrine. The California requirement that the defendants be able to contact a responsible attorney in the attorney general's office directly can help alleviate that concern, but even this is insufficient to actually show substantive involvement by the attorney general's office in the case. As one commentator puts it, as "a practical matter, it is impossible to see how a reviewing court could assure itself, in the individual case, that such control is in fact being exercised." Reddish,

*Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. at 106.

The California Supreme Court bypassed this issue by stating that it refused to believe that parties would not abide by the terms of their contract. *Santa Clara*, 50 Cal. 4th at 62. As at least one scholar notes, the use of “an ‘honor system’ by the very party whose behavior threatens to violate the Constitution is hardly an effective means of implementing judicial review.” *Reddish Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. at 106.

### ***Potential for Quid Pro Quo Accusations***

In addition to the potential unconstitutionality of the relationship itself, there is also the occasional appearance of a quid pro quo relationship between private contingency fee counsel and the politicians who have the discretion to award the contracts. The *Wall Street Journal* has run several articles on this concern. In the first of the articles, the paper reported that Pennsylvania’s Office of General Counsel negotiated a deal to retain a law firm, at the same time the firm was contributing over \$90,000 to the governor’s campaign. *The State Lawsuit Racket*, Wall St. J., April 8, 2009, at A12. The *Wall Street Journal* ran several other articles on what it called “pay to sue.” The paper noted that the same firm that had donated so heavily in Pennsylvania also made donations totaling \$205,000 in four other states where the firm had or was developing contracts. *The Pay-to-Sue Business*, Wall St. J., April 16, 2009, at A14; and *Pay to Sue on the Docket*, Wall St. J., July 28, 2009, at A14.

### **State Statutory and Constitutional Challenges**

There are also state constitutional and statutory challenges that can be raised. Such challenges will be unique to the state, but a common area of focus may be that these arrangements violate the separation of powers because they allow the attorneys general to allocate a potentially large percentage of state funds to a private party without legislative authorization.

In addition, some states may have separate causes of action that could be raised as a collateral attack on the fee arrangement. *See, e.g., Kinder v. Nixon*, 2000 WL 684860, No. WD 56802 (MO Ct. App, May 30, 2000) (discussed below). For instance, an action could be brought on behalf of state taxpayers to enjoin the expenditure of funds that would be required to oversee the contingency fee counsel. Though varied, these state constitutional and statutory arguments should not be overlooked by defendants.

### **Court Examination of the Propriety of These Relationships**

In most states, the courts have not addressed the propriety of these relationships. With one known exception—Wisconsin—the courts that have addressed these arrangements have allowed them to proceed. The courts have, however, used varied rationales for allowing these relationships. Furthermore, just because a court allowed a contingency fee arrangement to go forward in one type of case does not mean that the court will allow it to go forward in every type of case. In distinguishing cases that appear to prohibit these relationships, courts note the diversity of liberty interests and types of remedies that can be sought by the state in public nuisance cases. Moreover, historic cases that allowed these relationships may be distinguishable from the modern cases based on whether the state brought the action in a proprietary or

sovereign capacity. See generally Teresa Gillen, *A Proposed Model of the Sovereign/Proprietary Distinction*, 133 U. Pa. L. Rev. 661 (1985). Clearly, the body of law is *not* well settled and there are very significant constitutional and practical challenges regarding the impropriety of these relationships that the courts have not yet addressed head on. As this article goes to press, the authors are aware of a petition for *writ of certiorari* that is pending before the United States Supreme Court following the California Supreme Court's decision in *County of Santa Clara v. Superior Court*, 50 Cal, 4th 35, 235 P.3d 21 (2010). See Abigail Rubenstein, *High Court Urged to Take on Contingency Fees Suit*, Law 360, <http://www.law360.com/productliability/articles/212180> (December 3, 2010).

***Rhode Island v. Lead Industries Association, Inc.*—Allowed Because Attorney General Maintained “Absolute and Total Control”**

In Rhode Island, the state supreme court upheld the contingency fee relationship between the state and the private attorneys. The court's opinion included an entire section discussing the unique role of the attorney general and how that role is distinguished from that of the usual advocate, and yet the court still allowed a private, self-interested party to assume that role so long as the attorney general controlled the litigation. *State of Rhode Island v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428, 471- 74 (R.I. 2008).

The court concluded that the attorney general was not precluded from hiring contingency fee counsel “so long as the Office of Attorney General retains absolute and total control over all critical decision-making in any case in which such agreements have been entered into.” *Id.* at 475. According to the court, the “case-management authority of the Attorney General” must be “final, sole and unreviewable” where a contingency fee agreement is involved. *Id.* at 476.

The court also stated that to be valid, a contingency fee contract must, at a minimum, make it clear that the attorney general: 1) maintains “complete control over the course and conduct of the case;” 2) “retains a veto power over any decisions made by outside counsel;” and 3) ensures “that a senior member of the attorney general's staff must be personally involved in all stages of the litigation.” *Id.* at 477. The court went on to reject the argument that the contingency fee arrangement violated Rhode Island's law on appropriations, noted that judicial oversight of the fee award was essential, and concluded that the contract at issue met these basic thresholds and was therefore valid. *Id.* at 477-80.

***County of Santa Clara v. Superior Court*—Allows the Relationship in Principle but Remands for Inadequate Contracts**

In a similar vein, the Supreme Court of California generally upheld a contingency fee arrangement and in the process distinguished an earlier decision that had held that “all attorneys prosecuting public-nuisance actions must be ‘absolutely neutral.’” In *Santa Clara*, the court distinguished the decision in *Clancy*, 39 Cal. 3d D 740 (1985), in which a municipality sought to close an adult book store by declaring it a public nuisance. In distinguishing *Clancy*, the court noted the broad range of liberty interests that may be at stake in various kinds of public nuisance suits. Ultimately, the court concluded that when a case is quasi-criminal in nature and seeks the closure of a business, the prosecutor must be neutral. However, in cases where the liberty interest at stake is akin to that which would be found in an ordinary civil case, contingency fee arrangements are valid “if neutral, conflict-free government attorneys retain the power to control and supervise the litigation.” *Santa Clara*, 50 Cal. 4th at 58. See also *San Francisco*, 957 F.

Supp. at 1135 (adopting a similar rationale to distinguish *Clancy* from a state tobacco case). The court further stated that “critical decisions... may not be delegated to private counsel possessing an interest in the case, but instead must be made by government attorneys.” *Id.* at 61.

In an effort to provide some guarantee of active supervision, the court gave specific direction on how to enhance the contracts that form these relationships. The court stated that more was required than “boilerplate language regarding ‘control’ or ‘supervision.’” Instead, the retainer agreements must specify “certain critical matters regarding the litigation that contingency-fee counsel must present to government attorneys for decision.” *Id.* at 63. The court went on to provide a non-exclusive list of provisions that must be included in the contract: 1) the right to settle must be controlled by the state; 2) defense counsel must have the right to contact the lead government attorney directly without consulting with the contingency fee counsel; 3) government attorneys must retain complete control over the course and conduct of the case; 4) government attorneys must retain a veto power over any decision of the outside counsel; and 5) a government attorney with supervisory authority must be personally involved in overseeing the litigation. *Id.* at 63-64.

The court then remanded the case to the trial court because the agreements presented were deficient under the court’s newly announced standard. The court gave the public entities a chance to continue the litigation after submission of appropriate retention agreements. *Id.* at 65. Justice Werdegar, concurring, noted that even with these provisions in place, he saw a potential for the attorneys to choose a less valuable money judgment as opposed to the more valuable abatement because absent such a money judgment, the public entities could not afford to pay their attorneys. *Id.* at 65-66.

### ***Kinder v. Nixon*—Rejecting a Taxpayer Attack**

In *Kinder v. Nixon*, 2000 WL 684860 (Mo. Ct. App. 2000), two individual taxpayers challenged the legality of a contingency fee arrangement the state entered into in the tobacco cases. The challenge was based on three elements: the legality of paying the contingency fee attorneys without appropriation from the legislature; a state statute prohibiting state officials from receiving personal pecuniary benefit; and a purported rule that prevented assistant attorneys general from being compensated by funds at stake in the litigation. Missouri’s intermediate appellate court rejected all three claims.

The court rejected the claim that the contract violated the power of the purse by expending funds without appropriation. First, the court noted that the contract did not require payment be made without appropriation. Moreover, the court noted that the law in the state presumes that the public officials will act lawfully and therefore not make payment without appropriation. Additionally, the court noted that the violation was speculative because the MSA provided for separate negotiations regarding attorney’s fees that would not come from any award received by the state. *Id.* at \*6-11.

The appellate court’s rationale, that essentially accepted the argument that the judgment constituted state funds, is distinct from that adopted by Maryland’s high court in *Phillip Morris Inc. v. Glendenning*, 349 MD 660 (1998). In *Glendenning*, the court reasoned that the “gross recovery from the tobacco litigation is not ‘State’ or ‘public’ money subject to legislative appropriation until the State has fulfilled its obligation under the Contract, collected the

recovery, net of the contingency fee and litigation expenses, and deposited the funds in to the State Treasury.” *Glendening* at 682.

The *Kinder* court also found inapplicable the state’s statute that prohibits state officials from receiving personal pecuniary benefit from actions which end favorably. In doing so, the court relied upon the fact that control of the proceeding was vested in the attorney general. Therefore, the court concluded that the statute is inapplicable because the contingency fee counsel was no more than an attorney representing a client. *Kinder* at \*11-12.

Finally, the court rejected the argument that the contingency fee counsel contract violated a state rule prohibiting assistant attorneys general from being paid from funds that are at stake in the litigation. The court initially rejected the argument that the relevant case law created a rule. The court went on to note that even if there were a rule, the particular agreement fell outside of the scope of the cases that had created the rule. Finally, the court reasoned that even under the plaintiffs’ interpretation, the contract was valid because it called for the attorney’s fee to be calculated based on the monetary award, and not to come *from* the award thus making it possible for the legislature to appropriate funds to pay the contingency fee attorneys. *Id.* at \*13-14. The court never addressed the fact that through use of these contracts, the attorney general had obligated the state to expend these resources without authorization to do so.

#### ***Oklahoma v. Tyson Foods*—Allowed Without Discussion**

In 2005, the State of Oklahoma used private-contingency fee counsel to bring suit against eight out-of-state poultry companies for allegedly contaminating the Illinois River Watershed with pollution from chicken manure that had been used by contract farmers as a fertilizer. In the contract between the state and the contingency fee counsel, the state promised to pay its contingency fee attorneys up to 50 percent of all monetary recovery after costs. Tyson challenged this fee arrangement, but, due to a number of complicating factors, the court did not address the motion until two years into the litigation. When the court did finally address the motion, it denied Tyson’s motion without comment.

#### ***Commonwealth of Pennsylvania v. Janssen Pharmaceutica*—Defendants Lacked Standing to Challenge the Relationship**

Most recently, the Pennsylvania Supreme Court entertained a challenge to a contingency fee arrangement, but allowed the fee arrangement to go forward because the defendants lacked standing to challenge the contract. At issue in the case was the retention by the Office of General Counsel—the State of Pennsylvania’s attorney who is controlled by the executive branch—of contingency fee attorneys to prosecute a case against the makers of Risoerdal, an anti-psychotic medication. *Commonwealth of Pennsylvania*, No. 24 EAP 2009, 2010 WL 4366452 (PA Aug. 17, 2010). The defendant, Janssen Pharmaceutica, argued that the arrangement was unconstitutional and specifically noted that attorneys from the private firm of Bailey Perrin Bailey LLP (Bailey) were the only attorneys to enter appearances. The complaint itself was signed by Bailey’s local counsel, not by an official of the state government. Finally, Janssen noted that the contract was problematic because the ability to settle for non-monetary damages was restricted by the contract requirement that any settlement include reasonable compensation for Bailey. *Janssen*, 2010 WL 4366452 at \*1-2. Despite the seemingly clear-cut conflicts of interest and limits on state control, the majority of the court dismissed Janssen’s challenge without addressing the constitutional issues. The court found that Pennsylvania’s unique

statutory scheme prohibited anyone from challenging the state's legal representation other than the state agency being represented.

In dissent, Justice Saylor found that Janssen's constitutional claims were sufficient to provide standing because Janssen had a "substantial, direct, and immediate interest in disqualifying Bailey Perrin and precluding the Commonwealth from pursuing relief through similar contingent-fee contracts with outside counsel." *Janssen*, 2010 WL 4366452 at \*9-11. Thus, while Justice Saylor's dissent did not address the merits of Janssen's argument, it concluded that Janssen had standing to be heard.

### **Other Cases**

In addition to the cases discussed above, the authors are aware of other cases—many of which are unpublished trial court orders—that impact this discussion. Two notable cases arose in New Jersey and Wisconsin.

In response to our FOIA request, New Jersey produced, *inter alia*, an amended contingency fee contract. The contract was amended in response to a 2004 New Jersey trial court order in the case of *New Jersey Society for Environment v. Campbell*, MERL-343-04. Though the authors were unable to locate the order, the text of the contract's amendments indicates that the trial court found that the contingency fee contract used by New Jersey was inadequate. To rectify this deficiency, the amended contract added conditions including that all filings be co-signed by a liaison from the attorney general's office; fees paid must adhere to the Rules of Professional Conduct; the fee arrangement must comport with New Jersey Court Rule 1:21-7 (which caps contingency fees within the state); and if the amount in controversy or in recovery exceeds \$2 million, the award must be approved by the court.

Also in response to our FOIA request, a representative from the Wisconsin governor's office reported that during the tobacco litigation, a state trial court orally ruled that the state's contingency fee contract was unconstitutional. The court's order was not reduced to writing and the authors were unable to obtain a copy of the transcript. Therefore, the precise grounds for the holding are not known. Because the state settled the case as part of the MSA shortly after the trial court's order, the attorneys' fee issue was never appealed.

The authors are also aware of decisions in other jurisdictions that were rendered during the tobacco litigation, for instance in Ohio. These cases are, however, for the most part unreported trial court orders that were rendered moot by the MSA. *See Kinder*, 2000 WL 684860 at \*2 (noting that the Missouri attorney general added a count for a declaratory judgment on the contingency fee arrangement as the tobacco defendants "consistently and repeatedly challenged the validity of contingent fee contracts").

### **Legislative and Executive Responses to Contingency Fee Arrangements**

In the majority of states, the regulation of these relationships is, at best, informal and controlled in large part through the discretion exercised by elected officials. However, there are a few states whose legislative or executive branches have considered these relationships and acted on or proposed legislation to limit or otherwise control their nature.

## **Legislative Responses**

Several states have statutes specifically governing the formation and operation of contingency fee arrangements. Others have expressly rejected such arrangements.

### ***Texas—Allows with Limits***

In Texas, the legislature requires that before the attorney general enters into a contingency fee contract, the state agency that referred the matter must approve and sign the contract. Where the contract was not referred to the attorney general by a state agency, the governor must authorize and sign the contract. *See* Texas Statutes §2254.103. Even then, Texas requires that government officials make specific findings of fact including that 1) there is a substantial need for the legal services; 2) the services cannot be adequately performed by the attorneys and supporting personnel of the state; and 3) the services cannot reasonably be obtained from attorneys in private practice under a contract providing “only for the payment of hourly fees, without regard to the outcome of the matter.” *Id.* These findings of fact must also be presented to the “Legislative Budget Board” if the potential recovery is greater than \$100,000. *Id.* Therefore, under Texas law, before a significant contingency fee contract may be entered, both the executive and legislative branches must authorize the action.

### ***Wyoming—Allows with Limits***

Wyoming does not include much detail in its contingency fee statute, but nevertheless requires the attorney general and the governor to cooperate before a case may be brought. The Wyoming statute states that “[w]ith the approval of the governor the attorney general may retain qualified practicing attorneys to prosecute fee-generating suits for the state if expertise in a particular field is desirable.” W.S. 1977 §9-1-603(b). Thus, there is no required finding of facts and no legislative oversight of these relationships.

### ***Colorado—Allows***

Colorado generally allows these relationships, but requires the contingency fee counsel submit records monthly and places some limitations on the fees that can be awarded. Under Colorado law, the private counsel must submit a monthly statement to the government entity that hired him or her stating the number of hours of services provided and the nature of such services. At the conclusion of the case, the hourly rate is calculated by dividing the award by the number of hours of legal service that were provided. In no event may the award given exceed an hourly rate of \$1,000 per hour. C.R.S.A. §13-17-304.

### ***Arizona—Allows***

The Arizona statute provides that contingency fee counsel are to be paid a set hourly rate of \$50 per hour “contingent upon and payable solely out of the recovery obtained” in the suits initiated. A.R.S. §41-191. This fee may be set aside where the “court in which the case is pending has the authority to set a fee in conjunction with a given case.” Not surprisingly, all current Arizona contingency fee cases are collection matters.

### ***Arkansas—Allows with Limits***

Arkansas has two statutes that deal with contingency fee attorneys. The first does not specifically reference contingency fee counsel, however, it places limits on the hiring of “special counsel” and requires the governor’s approval. The statute further provides that the compensation “shall be fixed by the court where the litigation is pending.” A.C.A. §25-16-702. The second statute

deals specifically with collections cases and caps the contingency fee at 25 percent. A.C.A. §25-16-708.

***Kansas—Allows with Limits***

Kansas’s “Sunshine Act” provides that where an attorney is hired by the state on a contingency fee basis, the fees shall be approved by the judge “after an evidentiary hearing and prior to final disposition of the case by the district court.” At this hearing “any individual may provide information to the court and be heard before the court with regard to the reasonableness of attorney fees paid.” The statute also provides a list of factors that the court shall consider in determining what constitutes reasonable compensation. The factors included are: time and labor required; novelty and difficulty of the question; skill requisite to perform the legal service properly; likelihood that acceptance of this work precluded other employment by the attorney; fee customarily charged for similar services; amount obtained in the result; time limitations imposed by the client or circumstances; nature and length of the relationship with clients; and experience and reputation of the attorney(s). K.S.A. 75-37, 135.

***North Dakota—Allows with Limits***

North Dakota has one of the most restrictive statutes regarding the hiring of outside counsel on a contingency fee basis. The statute prohibits the attorney general from appointing or allowing to be employed any contingency fee counsel where the “amount in controversy exceeds one hundred fifty thousand dollars” unless the attorney general receives prior approval from “the emergency commission.” The “emergency commission” consists of the governor, the secretary of state, the majority leaders of the state’s house and senate, and the chairs of the senate and house appropriations committees. <http://www.nd.gov/sos/emergency-commiss/authority-membership.html> (November 24, 2010). The statute goes on to prohibit government agencies from forming contingency fee contracts without the appointment of a special assistant attorney general. NDCC 54-12-08.1.

***Wisconsin—Allows***

The State of Wisconsin places the authority to form these contracts in the hands of the governor. The statute provides wide discretion to the governor’s decision to employ outside counsel and allows the governor to appoint the outside counsel to assist the attorney general or to act in the attorney general’s place. However, as noted below, the fact that the governor has the authority does not suggest how he or she may choose to exercise that authority.

***Louisiana—Failed to Pass Law That Allows***

Louisiana allows contingency fee contracts in collections cases and with regard to schools. Recently, in the wake of the Deepwater Horizon spill, Louisiana’s Attorney General, Buddy Caldwell, has advocated allowing these relationships more globally. Bill Barrow, *Attorney General Seeks Cash, Power to Hire Outside Lawyers in Fight Against Gulf Oil Spill*, Nola.com, [http://www.nola.com/news/gulf-oil-spill/Index.ssf/2010/05/attorney\\_general\\_seeks\\_cash\\_po.html](http://www.nola.com/news/gulf-oil-spill/Index.ssf/2010/05/attorney_general_seeks_cash_po.html). November 16, 2010, Caldwell argued that this change in the law was needed so that he could hire “the best lawyers” and achieve “something close to a level playing field.” Despite the attorney general’s advocacy, the legislation failed to pass. *See* S.B. 731 (2010).

### ***Missouri—Recently Passed Law That Allows***

In response to our FOIA request, Missouri did not report any current contingency fee contracts. However, the state did report pending RFPs. Missouri explained that the new RFPs were for assistance in AWP litigation. The state further explained that though it formerly handled all AWP litigation in-house, budget cuts had recently forced changes to the office such that it could no longer afford to bring these cases directly. Accordingly, the state reported that the legislature recently changed the law to allow contingency fee arrangements. *See* S.B. 844; H.B. 1868; V.A.M.S. 37.900. The statute does not reference the retention of outside counsel, let alone on a contingency fee basis. The attorney general’s office, however, confirmed that this is the statute that provides them with its newfound legislative authorization.

### **The “Inherent Powers” States**

Most states do not have statutes expressly governing the formation of contingency fee relationships. In these states, however, there is usually a statute that governs the general powers of the attorneys general. The legal justification for the attorneys general in these states to form these relationships is based not upon a statutory authorization but upon the “inherent power” of the office. Thus, because these states have no specific governing legislation, they may be considered generally open to the formation of these relationships on whatever terms they feel are just. Rhode Island is perhaps the best example of a state with no specific legislation governing the formation of contingency fee contracts. When the Rhode Island Supreme Court found that the contingency fee arrangement in the lead paint case was allowed, it did not cite to any statutory authority, but instead noted that “the attorney general is vested with all powers that the office possessed at common law... with all powers inherent at common law,” *Rhode Island*, 951 A.2d at 471. The court found that this common law power was sufficient to allow for the retention of contingency fee counsel without additional authorization.

### **Executive Branch Responses/ Policy Responses**

Even in the “inherent powers” states, some executives and courts adopt policies that forbid or severely curtail retention of contingency fee lawyers. The best known policy is the executive order that President George W. Bush entered forbidding the federal government from entering into contingency fee agreements. *See* Exec. Order No. 13433, 72 Fed. Reg. 28441 (May 16, 2007). President Obama’s administration has retained this policy. It is, however, important to note that absent legislation on this issue, any future president could repeal this order.

In Wisconsin, the governor is vested with the power to appoint special counsel. *See* Wis. Stat. §14.11. In response to our FOIA request, a representative from Governor Doyle’s office reported that the governor does not allow these contracts in Wisconsin. The representative relayed that the governor had been the state’s attorney general during the tobacco litigation and that before the state settled with the tobacco industry, a state trial court had ruled that Wisconsin’s contingency fee arrangement was unconstitutional. Because the state entered into the MSA, this decision was never challenged. Nonetheless, the governor adopted a policy not to engage contingency fee counsel.

The Colorado Attorney General has urged his fellow attorneys general to use caution when hiring contingency fee counsel and adopted a policy where contingency fee counsel will not be retained where the “state’s police power is being asserted.” *See* John Suthers, *Avoiding Contingency Fee Land Mines*, *Washington Times*, December 2, 2010.

<http://www.washingtontimes.com/news/2010/dec/2/avoiding-contingency-fee-landmines/> (December 6, 2010). In response to our FOIA request, Attorney General Suthers' office stated that it had not actually engaged any attorneys on a contingency fee basis and that it would only do so where the police power was not in question and where it would be cost prohibitive to develop the required expertise in house.

In New Jersey, the courts adopted a rule that curtails the use of contingency fees, caps the award percentages, and regulates the formation of these relationships. New Jersey's response to our FOIA request indicates that at least one trial court ruled that contingency fee counsel hired by the attorney general must also abide by the court's rule. *See* New Jersey Court Rules 1:27-7.

Finally, even though a state may be authorized by statute to engage contingency fee counsel, the state does not necessarily choose to engage in these relationships. North Dakota allows, albeit with restrictions, contingency fee agreements. Yet, in response to our FOIA, the state replied stating that it does not engage contingency fee lawyers. Likewise, Texas adopted a statute specifically authorizing these relationships, again with restrictions, but a search of the state's contracts did not reveal any contingency fee contracts.

### **The Playing Field Dramatically Shifts When the State, Rather Than a Private Plaintiff, Brings an Action**

For a full appreciation of the importance of these relationships, it is important to understand why the plaintiffs' bar pursues state representation and why there are serious risks to defendants when a private contingency fee attorney is retained to handle an action for the state as opposed to representing a plaintiff in an ordinary private plaintiff tort action.

### **Vague Requirements of What Constitutes a Public Nuisance**

First, although not unique to the context of attorney general suits, many of these cases involve a claim of "public nuisance," which is historically a vague and ill-defined tort. Michael T. Nilan and Peter D. Gray, *Public Nuisance and Product Liability: A Comparison*, Public Nuisance Law (November 16, 2010) <http://www.nisancelaw.com/learn/public-nuisance-product-liability/> ("public nuisance is 'incapable of any exact or comprehensive definition.'"). The Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts §821B(1). California defines a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." West's Ann. Cal. Civ. Code §3480.

This vague definition suffers from two critical weaknesses. First, the elements are largely undefined and open to a significant degree of interpretation. Accordingly, everything from declaring oneself to be a "registered interior designer" (225 ILCS 310/25) to being a traveling sales person (Miss. Code Ann. §19-3-83) to the "uncontrolled breeding of dogs and cats" (McKinney's Agriculture and Markets Law §377-a) has been declared a public nuisance. What constitutes a public nuisance is so open that many states have attempted to wedge product liability suits into public nuisance clothes. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913 (2008).

The second major weakness in the definition of public nuisance is the amorphous nature of the injured party. To sustain a public nuisance action, the injuries sustained can vary widely. Thus, public nuisance actions do not have the same limiting requirements that class certification provides a defendant in the context of a class action. These protections are absent despite the fact that the number of plaintiffs and total amount in controversy may be even greater when the plaintiff is the state itself.

Moreover, public nuisance suits are most often brought under a theory of *parens patriae*. *Parens patriae* is doctrine of standing that allows the state to seek relief for damages to a broader range of natural resources “because it does not require state ownership of such resources.” *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1243 n.30 (10th Cir. 2006). Therefore, private contingency fee counsel may be able to bring actions on behalf of the state for harms to property that the state does not even own.

### **The State’s Burden of Proof May Be Relaxed**

In addition to often invoking the vague and ill-defined tort of public nuisance, the state enjoys express advantages over the private litigant. There are, however, additional strategic advantages that the contingency fee counsel enjoys as a result of the fact that they represent the states and not a private plaintiff, even though the harm alleged could be identical for both the state and private parties.

### ***Recovery Is Not Based on Individual Injuries***

One of the benefits contingency fee counsel enjoy when bringing these cases under a public nuisance theory is that the burden of showing particular injury is relaxed. In a public nuisance action, because a collective right has been harmed or interfered with, the action is not premised upon individual injuries. Michael T. Nilan and Peter D. Gray, *Public Nuisance and Product Liability: A Comparison*, Public Nuisance Law (November 16, 2010) <http://www.nuisancelaw.com/learn/public-nuisance-product-liability>. If it can be shown that a public right has been infringed, then the whole populous is presumed to have been injured, and not simply individual persons. If a private plaintiff brings a public nuisance claim, he or she must show special injury. Furthermore, the state does not have to overcome the same hurdles as private plaintiffs who seek class certification status.

### ***May Not Require a Showing of Culpability***

Similarly, unlike in product liability, a public nuisance claim can fail to allege a defective instrumentality and still be a viable claim. Some jurisdictions do not even “require a demonstration of the defendant’s culpability or fault.” Michael T. Nilan and Peter D. Gray, *Public Nuisance and Product Liability: A Comparison*, Public Nuisance Law (November 16, 2010).<http://www.nuisancelaw.com/learn/public-nuisance-product-liability>.

### ***Some Typical Defenses Are Unavailable Against the State***

In many states, the state is not subject to certain typical equitable defenses and time limitations. As noted by the Supreme Court, “equitable defenses such as laches... may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest.” *California v. American Stores Co.*, 495 U.S. 271, 296 (1990).

Estoppel is another of the defenses that may not be available to a defendant when litigating against the state. As noted by the Oklahoma Supreme Court, the “doctrine of estoppel is not ordinarily applicable to state agencies operating under statutory authority.” The court noted that a “more compelling policy or interest must be advanced before estoppel may be invoked against either the state or a public agency.” *Strong v. State ex rel. the Oklahoma Police Pension and Retirement Bd.*, 115 P.3d 889, 893-94 (Okla. 2005). *See also, U.S. v. Mendoza*, 445 U.S. 154 (1984) (applying and discussing the doctrine of “nonmutual collateral estoppel”). Therefore, a defendant maybe unable to use estoppel even where a state previously took a contrary position or where the state litigated a similar issue and lost.

Another advantage enjoyed by contingency fee counsel is the elimination of the statute of limitations. Under the doctrine of *nullum tempus occurrit regi (reipublicae)*, meaning “time does not run against the republic,” a state is exempt from the statute of limitations when it brings suit to protect the public’s rights. *See Broselow v. Fisher*, 319 F.3d 605, 608-09 (3d Cir. 2003); and *Commonwealth, ex rel. Corbett v. Citizens Alliance for Better Neighborhoods, Inc.*, 983 A.2d 1274 (Pa, 2009). The elimination of the statute of limitations defense can greatly expand the damages exposure faced by defendants in cases brought by or on behalf of a state.

### **Fees**

Last, but certainly not the least benefit to the plaintiffs’ bar, is the likelihood that the private contingency fee lawyer can recover even greater awards when representing the state than he or she could when representing the corresponding private plaintiffs’ class. Lieff, Cabraser, Heimann & Bernstein, a plaintiffs’ firm that was hired to represent the State of Alaska in its suit against AOL Time Warner, brags on its website that it was able to obtain a verdict for the state that was “50 times more than class members achieved,” <http://www.lieffcabraser.com/media/pnc/0/media.600.pdf>. In response to our FOIA request, one assistant attorney general in Montana echoed this sentiment stating that he believes that his state is able to negotiate lower contingency fee arrangements than private parties, because the sheer scope of representing the state increases the amount in controversy dramatically. Thus, private contingency fee attorneys can reap greater rewards even though the percentage of recovery is significantly lower.

Though, as described below, the fee structures vary widely, the firms stand to receive far more than their actual expenses. In fact, very few contingency fee contracts tie the fee received to the actual effort expended by the firm. In one sense, these “above cost” recoveries are justifiable because they are designed to reward the plaintiffs’ firms for taking the risk of no recovery if the case is lost. In another sense, however, these recoveries are inappropriate as the state is literally taking money away from its citizens and funding potential future litigation that may not be brought on the state’s behalf and may not be in the state’s best interest.

In addition to the immense scope of state representations, commentators also suggest that companies are more likely to settle suits against states than they are suits against private litigants because state attorneys general wield “disproportionate bargaining power in negotiations arising in *parens patriae* litigation.” Few corporations “are capable and willing to risk trial when the plaintiff is a state (or a consortium of state attorneys general operating in concert) that may collect billions of dollars as a result of harms allegedly suffered by millions of its residents.” Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913, 915-16 (2008).

### ***The Direct Solicitation of State Business***

Perhaps the value of these cases to the private plaintiffs' bar is best illustrated by the bar's unsolicited pitching of potential cases directly to the states. Often the cases pitched are for "harms" that the state itself has not recognized. In response to our FOIA request, Wisconsin—which does not hire contingency fee counsel—reported that it had just conducted a similar public records search for a plaintiffs' firm that was interested in pitching a case to the state. The plaintiffs' attorney claimed to have mined data of state overpayments worth tens of millions of dollars. The plaintiffs' attorney, however, refused to divulge any more information before the state agreed to sign a contingency fee agreement. Further, the authors understand that at meetings conducted by attorney general associations, like the National Association of Attorneys General, plaintiffs' bar representatives regularly pitch their particular suit or services and solicit attorneys general to allow them to bring litigation in the name of the state under contingency fee arrangements.

### ***Modern Contingency Fee Arrangements***

The FOIA responses detailed significant variance in fee arrangements not simply from state to state, but often within the state as well.

In 2004, Alaska hired a firm to sue AOL Time Warner. Under the contract, the firm was entitled to 8.5 percent of any pre-trial recovery and 13.5 percent of any recovery had after trial. In 2007, Alaska hired a different firm to bring a case against Le-Nature's Inc. and Wachovia. In that contract, Alaska agreed to pay between 20 and 33 percent of any recovery. Both low- and high-end awards were on top reimbursement costs.

Mississippi has to a greater extent than any other state embraced the contingency fee litigation model. Mississippi supplied 23 contracts in response to our FOIA request—the next highest state total was New Jersey with 18. The state has moved well beyond the "reasonable fees" it relied upon in the tobacco cases and replaced that fee arrangement with a highly detailed four-tiered fee structure that details the amount of recovery to be had 1) prior to the initiation of litigation; 2) after filing but before the completion of discovery; 3) after completing discovery but before the start of trial; and 4) after the commencement of trial. In addition to the tiers, Mississippi also has a flexible rate within each tier based on the amount of recovery. For sums up to \$25 million, private attorneys are entitled to 15 percent prior to the initiation of litigation and 25 percent after trial commences.

New Mexico, on the other hand, has continued to base its contracts on awards of "reasonable fees." This language does not necessarily constitute a meaningful limitation. New Mexico has the third highest number of cases at 12.

Connecticut disclosed only one case in response to our FOIA request, but commented that there were other cases where there was no contingency fee per se, but that the statute under which the suit was initiated allowed the court to award the private plaintiffs' firms reasonable fees upon successful completion of the action. Connecticut did not consider these to be "contingency fee contracts" because there was no set percentage and the fees did not come from the award itself but as a separate statutorily authorized award.

## **Selection and Supervision of Counsel**

One of the most significant problems identified by courts and commentators is the method of selection of private attorneys and the means of supervising them. The FOIA responses we received highlighted some critical problems and deficiencies in the hiring of contingency fee counsel as well as in supervision of the cases brought under these arrangements.

### **Selection of Contingency Fee Counsel**

Several states provided copies of either their policies or of recent RFPs for the retention of outside counsel. These policies and RFPs underscore the discretion maintained by attorneys general in determining which firm to hire. For instance, an RFP provided by Kansas includes a non-exclusive list of factors to be considered. These factors include cost; adequacy and completeness of the proposal; vendors' understanding of the proposal; compliance with the terms and conditions of the request; experience in providing like services; qualified staff; methodology to accomplish tasks; and response in the format required by the RFP. Thus, of the eight factors provided, only one, cost, is truly an objective measure of the proposal.

Though one candidate may charge significantly less than another, this is not always sufficient to guarantee success. Subjective factors may come into play in the attorney general's selection of counsel. For example, internal emails produced by Alaska demonstrate that a lower fee to the taxpayers does not always translate into being the presumptive front runner for selection. In fact, in one particular case, the most expensive of the three firms under consideration was viewed as the favorite due to trial experience, although all three firms had substantial experience in the area.

Kentucky produced score sheets for a few of its RFP responses. Each bid was judged on a 100 point scale. The "technical" portion constituted 70 of these 100 points and the "cost score" constituted the remaining 30 points. In at least one instance, a firm with a higher cost to the state received a better overall score, and thus the contract. The higher score was the result of the subjective factors that were contained in the "technical" portion of the score sheet. Despite the potential flaws in the RFP process, it has the advantage of having a degree of transparency.

Conversely, some states expressly stated that they do not have any formal process for the selection and retention of outside contingency fee counsel. Montana reported that it has no formal selection process. It defended this choice by stating that it does not use the RFP process because it wants the flexibility to go with the most qualified firm, rather than the lowest bidder.

### **Supervision of Outside Counsel**

Direct and active supervision is the key factor courts have considered in upholding the legality of these arrangements. Though it is difficult to obtain information regarding the supervision of these cases, anecdotal data exists to suggest that there are problems with supervision.

Vermont produced two contracts where firms were retained on behalf of the state's retirement system to monitor pending securities cases to determine whether there were any cases in which the state should join. The state disclosed that at least one of these agreements resulted in a case being brought on a contingency fee basis. The state explained there was no contract for

this retention. Instead, the state simply joined an existing lawsuit as a plaintiff and agreed to pay no more than 19.9 percent of its recovery to the firm retained.

Additionally, defense attorneys in *Oklahoma v. Tyson Foods* reported very little direct participation of attorneys from the attorney general's office prior to the motion to disqualify the contingency fee counsel. It was further reported that after Tyson argued that the contingency fee arrangement was unconstitutional, there was always someone present from the attorney general's office at depositions, hearings, and eventually at trial. These representatives rarely directly engaged in the discovery or litigation process and appeared primarily to be attending out of obligation. At trial, the attorney general gave a brief opening statement on the first day of trial but then was absent from the courtroom for all but three or four days of the five-month trial.

In the *Santa Clara* case, the California Supreme Court specifically noted two of the contingency fee contracts provided to the court expressly "grant[ed] private counsel 'absolute discretion in the decision of who to sue and who not to sue, if anyone and what theories to plead and what evidence to present.'" *Santa Clara*, 50 Cal. 4th at 45. It was not until the parties got to the court that private counsel offered to amend the agreements to give complete control to the public entities they represented. *Id.*

It is worth noting that not a single contract that was produced in response to our FOIA requests would meet the California Supreme Court's enumerated list of contractual requirements. The best that can be said is that the majority of these contracts contained boilerplate language regarding control of the litigation being vested in the attorney general's office. This boilerplate language is, however, not sufficient to "ensure that public attorneys exercise real rather than illusory control over contingent-fee counsel." *Id.* at 63.

In one instance, however, the sufficiency of the contractual terms could not even be judged. New Hampshire, in response to our FOIA request, reported that they had one contingency fee contract but that they would not disclose it as litigation was pending and "[t]o do so prior to the conclusion of the case... would impose severe prejudice upon the state and its citizens with regard to this pending litigation."

## **Conclusion**

Several commentators have addressed the apparent dichotomy between the "need" to hire private counsel because of their expertise, and the need to show that the attorney general has the expertise to closely supervise the management of the case. The California Supreme Court bypassed this argument by stating that "we decline to assume that private counsel intentionally or negligently will violate the terms of their retention agreements by acting independently and without the consultation of the public-entity attorneys or that public attorneys will delegate their fundamental obligations." *Id.* at 62. This seems to beg the question: Why should citizens assume that fundamental obligations are—or are not—being fulfilled without oversight? At the very least, the authors believe that states should not retain contingency fee lawyers absent some public method for review and confirmation that the public interest is, indeed, being served and that public justice—rather than personal pecuniary gain—is driving the litigation.

It is important to note that our FOIA requests were limited to litigation on the state level. As the *Santa Clara* case demonstrates, there also are cases being brought by city and county attorneys using the contingency fee model. The thousands of pages of responses and dozens of phone calls that the authors received in response to the FOIA requests to the states shed light on a practice that appears to be gaining momentum, but has been the subject of very little scrutiny or oversight to date.

© 2011 DRI. All rights reserved.

**Appendix A. FOIA request sent to state attorneys general**

October 7, 2010

**VIA U.S. MAIL**

NAME  
Attorney General of  [STATE]   
ADDRESS LINE 1  
ADDRESS LINE 2

Douglas Ford McMeyer  
Tel 312.775.0404  
Fax 312.655.1501  
douglas.mcmeyer@huschblackwell.com

**RE: REQUEST FOR DOCUMENTS RELATED TO THE STATE OF  
\_\_\_\_\_ HIRING OR CONTRACTING WITH PRIVATE ATTORNEYS ON  
A CONTINGENCY FEE BASIS.**

Dear NAME:

I am working on a scholarly article that deals with State Attorneys General hiring outside counsel to represent the State or the People of the State on a contingency fee basis. This article is in the public interest and is not related to any litigation or commercial activity.

To aid in drafting this article, I am sending this document request to you to request any and all documents that have to do with the State hiring, retaining, or otherwise contracting with any private counsel to represent the State or the People of the State on a contingency fee basis.

Specific examples of the types of documents I am looking for are:

- documents that identify cases in which the State has hired private counsel on a contingency fee basis including documents that will:
  - identify the types and subject matter of the cases;
  - the firms hired in those cases; and
  - that provide information on the current status of those cases;
- policies regarding the retention and supervision of outside counsel;
- retainer agreements;
- contracts for services; and
- documents relating to the selection of outside counsel including:
  - requests for proposals; and
  - bidding process documents.

October 7, 2010

Page 2

Our intent in requesting these documents is not to burden the State. We are merely trying to gain a greater understanding of these relationships, their frequency, the types of firms being hired, and commonalities in the types of cases.

Please respond to this request within five (5) business days.

I would prefer to receive these documents in an electronic format. You may email them to me at [douglas.mcmeyer@huschblackwell.com](mailto:douglas.mcmeyer@huschblackwell.com). If the documents are unavailable in an electronic format, you may mail the copies to my attention at the address above.

Because this article is being written in the public interest and is not associated with any commercial purpose or litigation, we respectfully request that any fees be waived with regard to this request.

If you have any questions or need additional information, I may be reached by telephone at (312) 775-0404 or by email at [douglas.mcmeyer@huschblackwell.com](mailto:douglas.mcmeyer@huschblackwell.com)

Thank you in advance for your prompt attention to my request.

Sincerely,

Douglas F. McMeyer

DFM:cs

## Appendix B. DRI Master Chart of Contracts

State	Response	Legislation/Nature	Contract	Nature of Case
Alabama	Phone		Not Provided	AWP
Alaska	Documents Email Phone		Contracts: 8 Fee Range: 5–33% Special Terms: AG Retains Control	Actuarial-Malpractice; AWP; Fraudulent-Accounting; Pharmaceuticals; Securities; Tobacco
Arizona	Documents Email Letter	<b>A.R.S. §41-191</b> Provides authority for contingency fee cases in certain circumstances.	Contracts: 9 Fee Range: 15–45% Special Terms: State to Pay Hourly Rates If State Terminates Litigation; AG Retains Control	Debt-Collection; Tobacco
Arkansas	Documents Email Letter Phone	<b>A.C.A. §25-16-702</b> Generally allows with some restrictions; <b>A.C.A. §25-16-708</b> Authority for collections cases	Contracts: 3 Only Provided Complaints	Pharmaceuticals
California	Letter		State Does Not Engage Contingency Fee Attorneys	n/a
Colorado	Phone	<b>C.R.S.A. §13-17-304</b> Requires monthly billing statements and caps fees at an hourly rate of \$1000	State Does Not Currently Engage Any Contingency Fee Attorneys	n/a
Connecticut	Letter Phone		Contracts: 5 Contracts Not Provided	Class-Action; Environmental-Asbestos; Pharmaceuticals; Tobacco
Delaware	Letter		State Does Not Engage Contingency Fee Attorneys	n/a
District of Columbia	Letter		State Does Not Engage Contingency Fee Attorneys	n/a
Florida	Email		State Does Not Engage Contingency Fee Attorneys	n/a
Georgia	Letter Phone		State Only Engages Contingency Fee Attorneys for Collections (not provided)	n/a
Hawaii	Documents Email Letter		Contracts: 2 Fee Range: 15% Special Terms: Some Caps on Recovery; AG Will Appoint Specific Deputy AGs; AG Retains Control	AWP; Tobacco
Idaho	Documents Email Letter		Contracts: 2 Fee Range: 15–19% Special Terms: Some Caps on Recovery; AG Retains Control	AWP; Pharmaceuticals; Tobacco
Illinois	Documents Letter		Contracts: 3 Fee Range: 6–15% Special Terms: Some Caps on Recovery; AG Retains Control	AWP; Securities; Tobacco
Indiana	Documents Letter Phone		Contracts: 8 Fee Range: 5–33.33% Special Terms: Some Caps on Recovery; AG Retains Control	Debt-Collection; Medicaid; Tobacco

State	Response	Legislation/Nature	Contract	Nature of Case
Iowa	Documents Email Phone		Contracts: 1 Fee Range: 5–12% Special Terms: AG Retains Control	AWP; Tobacco
Kansas	Documents Letter	<b>K.S.A. 75-37, 135</b> Provides specific framework for determining the reasonableness of fees.	Contracts: 2 Fee Range: 15% Special Terms: State May Pay Hourly Rates In Some Cases; AG Retains Control	AWP; State-Public-Education-Funding; Tobacco
Kentucky	Documents Email		Contracts: 3 Fee Range: 2–25% Special Terms: AG Retains Control	AWP; Pharmaceuticals
Louisiana	Documents Email Letter Phone	<b>La. R.S. 47:1512</b> Authority for Collections cases; <b>HB 923 (2010)</b> Provides Authority for School Districts to hire Counsel regarding tax credits; <b>SB 731 (2010)</b> Failed—would have provided AG the authority.	Contracts: 2 Special Terms: Reasonable Fees; AG Retains Control	Tax-Collection; Tobacco
Maine	Documents Email Phone		Contracts: 2 Contracts Not Provided	Debt-Collection; Personal-Injury
Maryland	Email Phone		State Does Not Engage Contingency Fee Attorneys	Tobacco
Massachusetts	Documents Email Letter Phone		Contracts: 8 Contracts Not Provided	Securities
Michigan	Documents Letter		Contracts: 4 Fee Range: 7–25% Special Terms: AG Retains Control	Debt-Collection; Environmental; Pharmaceuticals; Securities
Minnesota	Letter		State Does Not Engage Contingency Fee Attorneys	n/a
Mississippi	Documents Phone		Contracts: 23 Fee Range: 1–25% Special Terms: AG Retains Control	Accounting-Fraud; Antitrust; AWP; Insurance-Claims; Natural-Resources; Pharmaceuticals; Securities; Tobacco
Missouri	Letter	<b>V.A.M.S. 37.900</b> Does not specifically mention outside counsel or contingency-fee arrangements, but AG identified as source of authority.	No Contracts Provided Provided Copies of 3 pending RFPs	AWP

State	Response	Legislation/Nature	Contract	Nature of Case
Montana	Phone		Contracts: ? Fee Range: 20–33.33% (?) Special Terms: AG Retains Control	AWP; Employee-Benefits; Tobacco
Nebraska	Documents Letter	<b>Neb. Rev. St. §73-204</b> Generally allows contingency-fee arrangements with notice and proper authorization	Contracts: 1 Fee Range: 20–30% Special Terms: AG Retains Control	Securities
Nevada	Documents Email Letter		Contracts: 3 Fee Range: 10–15% Special Terms: AG Retains Control	Deceptive-Lending; Pharmaceuticals
New Hampshire	Letter		Contracts: 1 Contract Not Provided—Claimed Privilege	Environmental
New Jersey	Documents Email Phone	<b>NJ Court Rule 1:21-7</b> Governs the formation of contingency-fee agreements and caps award percentages based on ranges of recovery. Provides all awards in suits with greater than \$2 million sought or recovered must be approved by the court.	Contracts: 18 Fee Range: 2–25%; Hourly Rates Contingent on Successful Litigation Special Terms: Some Caps on Recovery; AG Retains Control	Environmental- Monitoring; Securities
New Mexico	Documents Letter		Contracts: 12 Special Terms: AG Will Support Claims for Reimbursement to the Court; AG Retains Control	Environmental; Pharmaceuticals; Securities-Monitoring; Tobacco
New York	Letter		States Does Not Engage Contingency Fee Attorneys	n/a
North Carolina	Email		State Reports No Contracts Since 2001	n/a
North Dakota	Letter	<b>NDCC, §54-12-08.1</b> Places strict limits on the retention of contingency-fee counsel	State Does Not Engage Contingency Fee Attorneys	n/a
Ohio	Phone		Not Provided	Debt-Collection; Securities-Monitoring
Oklahoma	No Response		Contracts Not Provided Fee Range: 33.33–50%	Environmental
Oregon	Documents Email Letter		Contracts: 6 Fee Range: 10–33% Special Terms: AG Retains Control	Antitrust; Securities;
Pennsylvania	Documents Letter Phone		Contracts: ? (Provided a Sample Set) Fee Range: 15–25% Special Terms: Some Caps on Recovery; AG Will Appoint Specific Deputy AGs; AG Retains Control	AWP; Pharmaceuticals; Tobacco

State	Response	Legislation/Nature	Contract	Nature of Case
Rhode Island	Documents Email		Contracts: 2 Fee Range: 16.66% Special Terms: AG Retains Control	Lead Paint
South Carolina	Documents Email		Contracts: 6 Fee Range: 3–23% Special Terms: Addendum Allows Special Counsel to Receive Civil Penalties If Court Approved; AG Retains Control	AWP; Environmental; Pharmaceuticals
South Dakota	Phone		States Does Not Engage Contingency Fee Attorneys	n/a
Tennessee	Email	<b>Tenn. Code Ann. Section 8-6-106</b> Allows the appointment of a Special AG w/proper approval	Contracts: (?) Not Provided	Debt-Collection
Texas	Phone Email	<b>Tex. Gov't Code §2254-101 et seq.</b> Allows the practice but places limits on its exercise	Contracts: 0 State Website Reveals No Contracts	n/a
Utah	Documents Email Phone		Contracts: 4 Fee Range: 15–33% Special Terms: AG Retains Control	Pharmaceuticals; Tobacco
Vermont	Documents Email		Contracts: 1 Fee Range: 19.9% Special Terms: AG Retains Control	Securities-Monitoring; Tobacco
Virginia	Documents Email Phone		Contracts: ? (Provided a Sample Set) Fee Range: 30–35% Special Terms: AG Retains Control	Products Liability; Taxpayer Fraud
Washington	Documents Email Letter		Contracts: 11 Fee Range: 3–40% Special Terms: Some Caps on Recovery; AG Retains Control	Debt-Collection; Environmental-Asbestos; Securities; Securities-Monitoring; Social-Security-Benefits-Recovery; Tobacco; Tort/Breach of Contract; Workers-Compensation
West Virginia	Letter		State Does Not Engage Contingency Fee Attorneys	n/a
Wisconsin	Email Phone	<b>Wis. Stat. §14.11</b> Places authority to appoint special counsel in Governor's hands	State Does Not Engage Contingency Fee Attorneys	n/a
Wyoming	Email	<b>W.S.1977 §9-1-603</b> Specific Authority; Requires Governor's Approval	State Reports No Contracts Since 2003	n/a