



U.S. CHAMBER
Institute for Legal Reform

Privatizing Public Enforcement

*The Legal, Ethical and Due-Process
Implications of Contingency-Fee
Arrangements in the Public Sector*

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U.S. CHAMBER
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Privatizing Public Enforcement: The Legal, Ethical And Due-Process Implications Of Contingency-Fee Arrangements In The Public Sector

“Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated.”¹

A growing area of concern in civil litigation is the proliferation of arrangements under which state attorneys general (“AGs”) hire outside counsel on a contingency-fee basis to represent the state in civil litigation. Under these arrangements, the AG agrees to pay outside counsel a percentage of any judgment or settlement achieved in the case as compensation for the representation. Many AGs like to trumpet these arrangements as a win-win for their constituents, but contingency-fee

arrangements between AGs and outside counsel engender a multitude of ethical and conflict-of-interest problems. Most notably, they pose a substantial risk that outside counsel will inflate the amounts sought in lawsuits in order to maximize their own potential take in litigation – rather than the public good.

Recognizing the potential for unfairness and abuse in such arrangements, several state legislatures and attorneys general have attempted to reform the process of

¹ *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 351 (Cal. 1985).

retaining private counsel. Such reforms include added public transparency, mandatory bidding processes, and caps on fees. In addition, some states restrict donations to political campaigns by lawyers who wish to be considered for AG representations. These reforms have helped to reduce some of the risks posed by state AG-private lawyer alliances, but have not entirely solved the problem.

Another important option for fighting back against these abuses is to challenge the arrangements in court. Several defendants have mounted legal challenges against contingency-fee agreements between AGs and private lawyers on the ground that they violate the defendant's right to due process under the Fourteenth Amendment to the U.S. Constitution and analogous state constitutional provisions. These defendants have argued that because contingency-fee arrangements give outside counsel a direct personal, financial stake in the outcome of the underlying enforcement action, the attorneys will be disinclined to exercise restraint, by, for example, limiting the scope of the enforcement action if it would advance the public interest to do so. Instead, contingency-fee attorneys are likely to focus single-mindedly on maximizing the amount recovered from the defendant.

Litigants may be able to mount other challenges to such arrangements as well. In some states, separation-of-powers principles may restrict the ability of the AG to pay a share of state recoveries to private counsel because such payments may impinge on the legislature's authority over the use of state funds. In others, defendants may have standing to insist on the enforcement of state procurement requirements or other legislative or regulatory reforms. These theories offer defendants additional avenues for challenging contingency-fee arrangements between AGs and outside counsel.

This paper discusses the challenges posed by AG-private counsel arrangements and how defendants can fight back. Part I provides general background on the use of contingency-fee arrangements by state AGs and some of the problems they pose. Part II addresses efforts by various states to regulate the hiring of outside counsel, including on a contingency-fee basis. Part III considers the viability of challenging these arrangements under the Due Process Clause of the Fourteenth Amendment. Finally, Part IV outlines other potential challenges to contingency-fee arrangements between AGs and outside counsel.

CONTINGENCY-FEE CONTRACTS AND BUDGET-STRAPPED STATES

Over the past few decades, contingency-fee arrangements have led to the “creation of a new model for state-sponsored litigation that combines the prosecutorial power of the government with private lawyers aggressively pursuing litigation that could generate hundreds of millions in contingent fees.”² The genesis of this practice can be traced to litigation in the 1980s, when Massachusetts hired outside counsel on a contingency-fee basis to prosecute claims over asbestos removal.³ Since then, state AGs have used this model to mount aggressive enforcement

actions against the entire spectrum of the business community.⁴ State AGs have generally justified their use of contingency-fee counsel on the ground that they are able to maintain suits on behalf of the public that would otherwise not be possible given limited personnel resources, expertise and money.⁵ But many legal commentators have decried the ethical and constitutional problems posed by AG contingency-fee contracts, particularly when used in major tort litigation.⁶

2 Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 968 (2007).

3 William G. Ross, *The Honest Hour* at 242 (Carolina Academic Press 1996).

4 See Martin H. Redish, *Constitutional and Political Implications: Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 80 (2010) (“In the last ten years, state governments have increasingly resorted to this practice in their efforts to pursue big money claims against alleged tortfeasors.”).

5 For instance, in opposing a challenge to its retention of contingency-fee counsel in lead paint litigation, Rhode Island highlighted that twenty-nine local attorneys and ninety-two out-of-state attorneys represented the defendant. See Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913, 965 (2008); David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 315 (2001). At the same time, the Rhode Island Attorney General’s Office only had three attorneys who could work on the case. Gifford, *supra*, at 965.

6 See, e.g., Redish, *supra* note 4, at 77, 79-80; see also Editorial, *The Pay-to-Sue Business*, Wall St. J., Apr. 16, 2009, at A14; Andrew Spiropoulos, *New AG Model Harms State*, Oklahoman, July 8, 2007, at 17A; Editorial, *Prosecution for Profit*, Wall St. J., July 5, 2007, at A14; Gifford, *supra* note 5, at 965; Dana, *supra* note 5, at 315; Redish, *supra* note 4, at 77.

Contingency-fee contracts between AGs and private counsel came into vogue during the landmark tobacco litigation of the 1990s in which state AGs sued tobacco companies for alleged deceptive advertising of their products.⁷ In that litigation, 36 states retained private contingency-fee attorneys to help them prosecute their lawsuits against the tobacco industry.⁸ The litigation was highly successful from the perspective of plaintiffs' counsel, resulting in approximately \$14 billion in attorneys' fees for trial lawyers throughout the nation.⁹ Since then, contingency-fee arrangements have extended well beyond the tobacco arena and have been employed in other mass-tort contexts.¹⁰ For example, the state of Rhode Island employed outside counsel to sue former manufacturers of lead paint and pigment from 2003 to 2008.¹¹ Similarly, Oklahoma's AG hired outside firms to sue poultry companies that

allegedly polluted the state's waterways with chicken manure.¹² And in suits brought against the pharmaceutical industry, AGs have entered into contingency-fee contracts with outside counsel to prosecute a wide range of lawsuits, alleging failure to warn, fraudulent advertising or off-label promotion of prescription medications.¹³

In an effort to fully grasp the extent of this trend, three practitioners served Freedom-of-Information-Act ("FOIA") requests on the AGs of all 50 states and the District of Columbia in 2011.¹⁴ Of the 50 jurisdictions responding to the FOIA requests, 36 indicated that the AG's office was currently using, or had used, contingency-fee counsel outside of the tobacco litigation.¹⁵ The recent budget problems faced by state governments are almost certain to make these arrangements even more popular, especially as state legislatures increasingly expect AG consumer protection and Medicaid fraud

7 Lise T. Spacapan, Douglas F. McMeyer & Robert W. George, *A Threat to Impartiality: Contingency Fee Plaintiffs' Counsel and the Public Good*, In-House Defense Quarterly, Winter 2011, at 1.

8 *Id.* at 4.

9 See Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs. 587, 588-89 (2009).

10 See Redish, *supra* note 4, at 81-82.

11 See Godesky, *supra* note 9, at 589.

12 See *id.*

13 Spacapan, McMeyer & George, *supra* note 7, at 14.

14 See *id.* at 12. Forty-nine states and the District of Columbia responded to the FOIA requests. *Id.* Due to a paper work error, New York was the only state that did not reply to the FOIA request. *Id.*

15 *Id.* at 14. Of the 14 states that did not report using contingency-fee counsel, only three states had statutes that explicitly limit the ability to hire private attorneys on a contingency-fee basis. *Id.* The remaining 11 do not appear to have any statutory prohibition. *Id.*

units to contribute to their own budgets or become self-funded.¹⁶ This is all the more true because Congress has increasingly given state attorneys general authority to enforce federal laws.¹⁷ And there will be no shortage of private lawyers eager to take on those representations. As one commentator noted in the *Wall Street Journal*:

Trial lawyers love these deals. Even aside from the chance to rack up stupendous fees, they confer a mantle of legitimacy and state endorsement on lawsuit crusades whose merits might otherwise appear chancy. Public officials find it easy to say yes because the deals are sold as no-win, no-fee. They're not on the hook for any downside, so wouldn't it practically be negligent to let a chance to sue pass by?¹⁸

The result is that “trial lawyers representing public clients on contingency fee are suing businesses for billions over matters as diverse as prescription drug pricing, natural gas royalties and the calculation of back tax bills.”¹⁹

But there *is* a huge downside to these lawsuits, one to which many AGs are turning a blind eye: they create an opportunity for unseemly liaisons between public enforcement officials and private, profit-motivated lawyers.²⁰ Concern over the effects of such liaisons has generated substantial criticism over the last few years. As one former attorney general who has been an outspoken critic of these liaisons observed, “[t]hese contracts . . .

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- 16 See Dave Boucher, *Attorney General Outlines Changes to Office After New Laws Take Effect*, Charleston Daily Mail, Apr. 24, 2013, <http://www.dailymail.com/News/201304230240> (referencing a bill passed by the West Virginia legislature that would take \$7.46 million from the AG's Consumer Protection Fund and distribute it elsewhere in the state budget).
- 17 For example, state AGs can enforce the Truth in Lending Act's mortgage mandates, 15 U.S.C. § 1640(e), and the Health Insurance Portability and Accountability Act's privacy provisions, 42 U.S.C. § 1320d-5(d).
- 18 Walter Olson, *Tort Travesty*, Wall St. J., May 18, 2007, at A17.
- 19 *Id.*
- 20 For example, Mississippi Attorney General Jim Hood is a repeat hirer of contingency-fee counsel, causing that state to “lead[] the nation in contingency fee contracts.” Jim Malewitz, *Mississippi Republicans Challenge Powers of Attorney General*, Stateline, Feb. 3, 2012, <http://www.pewstates.org/projects/stateline/headlines/mississippi-republicans-challenge-powers-of-attorney-general-85899375426>. In a five-year span, Attorney General Hood retained 27 law firms to represent Mississippi in 20 separate lawsuits after partners at those firms contributed more than \$500,000 to Hood's reelection campaigns. Pay-to-Play Example, Institute for Legal Reform, <http://www.instituteforlegalreform.com/featuredtool/pay-to-play-examples>. Other AGs of both political parties also have accepted contributions from lawyers representing their state in litigation. These include Democrat AGs Gary King of New Mexico and former AG Darrell McGraw of West Virginia; and Republican AGs James “Buddy” Caldwell of Louisiana and former AGs Mark Shurtleff of Utah and Troy King of Alabama. *Trial Lawyers, Inc.: A Report on the Alliance Between State AGs and the Plaintiff's Bar 2011*, Manhattan Institute for Policy Research Center for Legal Policy (Ben Gerson, ed., Oct. 2011), available online at <http://www.triallawyersinc.com/TLI-ag.pdf> (last accessed Aug. 27, 2013). Recently, Nevada AG Catherine Cortez Masto also has been criticized for such contributions. Editorial, *What Doesn't Stay in Vegas*, Wall St. J., June 12, 2013, at A16.

“ Perhaps the most troubling consequence of these contracts is the violation of important constitutional rights of defendants, who find themselves facing lawsuits that combine the political power of the state and the financial power of deep-pocketed plaintiffs’ lawyers in the hopes of imposing substantial liability. ”

create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.”²¹ Further, contingency-fee counsel have incentives that, under any “realistic appraisal of psychological tendencies and human weakness,”²² create a structural conflict between the pursuit of justice and their personal interest in obtaining a substantial financial recovery. In particular, contingency-fee counsel “have a financial incentive to maximize money recoveries, an incentive that would be congruent with a client’s interests in private

actions but is frequently in tension with a State’s public interest role.”²³ Critics have also condemned the practice as promoting “regulation through litigation,” by empowering states to attack a wide variety of behavior by corporations merely by wielding the power of private attorneys.²⁴ But perhaps the most troubling consequence of these contracts is the violation of important constitutional rights of defendants, who find themselves facing lawsuits that combine the political power of the state and the financial power of deep-pocketed plaintiffs’ lawyers in the hopes of imposing substantial liability.

21 Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (quoting William H. Pryor Jr.).

22 *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 252 (1980) (internal quotation marks and citation omitted).

23 *Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcommittee on the Constitution of the House Comm. On the Judiciary*, 112th Cong. 48 (2012) (testimony of James R. Copland, Director and Senior Fellow, Center for Legal Policy, Manhattan Institute for Policy Research).

24 See Brief of Chamber of Commerce of the United States of America and the American Tort Reform Association as *Amici Curiae* in Support of Motion for Judgment as a Matter of Law in Light of Plaintiff’s Constitutional Violations, at 20-21; *State v. Tyson Food, Inc.*, No. 4:05-cv-00329-GKF-SAJ (N.D. Okla. June 12, 2007).

LEGISLATIVE AND REGULATORY EFFORTS TO SCALE BACK AG-PRIVATE COUNSEL CONTINGENCY-FEE ARRANGEMENTS

One potential solution to the growing problem of AG-private lawyer relationships is legislation. To date, several states have adopted procurement requirements and other restrictions applicable to the retention of private contingency-fee counsel.²⁵ For example, a number of states have adopted laws (sometimes as part of their appropriations or government sunshine laws) regarding qualifications for obtaining outside legal services.²⁶ Many of these laws are based on the model Private Attorney Retention Sunshine Act (PARSA) and the Transparency in Private Attorney Contracting (TiPAC) Act, both of which impose limits on the use of contingency-fee counsel.²⁷

Although the laws vary by state, PARSA and TiPAC laws generally mandate competitive bidding, reporting of attorney hours and

expenses incurred, and a breakdown of the corresponding hourly rate. PARSA generally requires legislative oversight or approval for contracts over \$1,000,000 (or with a value that reasonably is expected to exceed that amount) and prohibits the state from paying fees of more than \$1,000 per hour when the total fee recovery is divided by the number of hours actually worked. TiPAC laws generally require the AG to issue a finding that a contingency-fee agreement is in the best interest of the state, and that contracts and fee payments be publicly posted on the AG's website. TiPAC laws also generally place caps on the total fees outside counsel can receive, whether as a percentage of the recovery or a cumulative cap. For example, Mississippi's 2012 law prohibits, among other things, contingency-fee counsel from receiving fees as a portion of statutory penalties.²⁸

25 Contingency-fee arrangements have also been widely condemned within the federal government. Indeed, in 2007, President Bush issued an executive order banning the federal government from paying lawyers a contingency fee. *See Protecting American Taxpayers From Payment of Contingency Fees*, Exec. Order No. 13,433, 72 Fed. Reg. 28,441 (May 16, 2007). This prohibition, which remains in effect today, reflects the “policy of the United States” that the fees of lawyers representing the government should never be “contingent upon the outcome of litigation.” *Id.*

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

27 Colorado, Kansas, Minnesota, North Dakota, Texas and Virginia have passed statutes based on PARSA. Alabama, Arizona, Florida, Indiana, Iowa, Mississippi and Missouri have passed legislation similar to the TiPAC Act.

28 Miss. Code Ann. § 7-5-8(2)(c).

A number of states have also instituted “pay-to-play” laws that restrict entities that have bid or are bidding for state contracts from donating to a campaign of any officeholder (or candidate), involved in the procurement process, including AGs.²⁹ These laws often include provisions that prohibit awards of bid or no-bid contracts to any entity (or any owner thereof) that donated to an official required to approve a contract in the previous twelve months to two years.³⁰

In addition, some AGs have acted to limit the use of contingency-fee counsel through administrative regulations. For example, Georgia Attorney General Sam Olens issued an Administrative Order in May 2012 setting forth the conditions under which the state can use contingency-fee counsel,

including requirements that the AG issue a finding that a contingency-fee arrangement is in the state’s best interest, publicly solicit proposals before hiring outside counsel and publicly post contingency-fee contracts and payments on the AG’s website.³¹ Utah Attorney General John Swallow promulgated similar regulations in April 2012, and West Virginia Attorney General Patrick Morrissey issued a comprehensive outside counsel policy modeled after TiPAC that was finalized in July 2013.³² Morrissey explained that such policies “bring much-needed order and transparency” to the hiring of outside counsel.³³ If these recent developments are any indication, more AG offices will likely work to increase the transparency of contingency-fee arrangements by issuing similar rules.³⁴

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- 29 Connecticut (Conn. Gen. Stat. Ann. § 9-612); Hawaii (Haw. Rev. Stat. Ann. § 11-355); Illinois (30 Ill. Comp. Stat. § 500/50-37); Kentucky (Ky. Rev. Stat. Ann. § 121.330); Maryland (Md. Code Ann., Elec. Law §§ 14-101 to -108); New Jersey (N.J. Stat. Ann. §§ 19:44A-20.13 to .27); New Mexico (N.M. Stat. Ann. § 13-1-191.1); Ohio (Ohio Rev. Code Ann. § 3517.13); Pennsylvania (25 Pa. Cons. Stat. § 3260(a); Rhode Island (R.I. Gen. Laws §§ 17-27-2 to -3); South Carolina (S.C. Code Ann. § 8-13-1342) and West Virginia (W. Va. Code § 3-8-12(d)).
- 30 *See, e.g.*, Colo. Const. art. XXVIII, § 15; N.J. Stat. Ann. § 19:44A-20.5; Ky. Rev. Stat. Ann. § 121.330; S.C. Code Ann. § 8-13-1342.
- 31 Administrative Order (May 29, 2012), *available at* http://law.ga.gov/sites/law.ga.gov/files/imported/vgn/images/portal/cit_1210/51/15/185460301Administrative%20Order.pdf.
- 32 Utah Admin. Code r. 105-1-1 to -14; Office of the West Virginia Attorney General Outside Counsel Policy, July 16, 2013, *available at* [http://www.wvago.gov/pdf/Outside%20Counsel%20Policy%20\(final%20%20July%2016,%202013\).pdf](http://www.wvago.gov/pdf/Outside%20Counsel%20Policy%20(final%20%20July%2016,%202013).pdf).
- 33 Andrea Lannom, *AG Morrissey Outlines Policy for Outside Counsel*, State Journal (W. Va.), Mar. 29, 2013, at 19.
- 34 State procurement law may also apply to the retention of outside counsel. These laws typically mandate a bidding process for public contracts with outside vendors and set forth minimum criteria for working with the state. These laws often impose a minimum number of bids that must be submitted, and require contractors to be bonded and/or be free from any conflicts of interest with the state. Further, many state laws require a specific appropriation or approval from the legislature for contracts over a certain value (e.g., if the expected recovery is more than \$100,000). While some of these laws may exempt contracts for professional services, such as legal work, others may apply to contracts with attorneys or otherwise may be silent on the issue. *See, e.g.*, Ariz. Rev. Stat. § 41-2538; S.C. Code Ann. § 11-35-1260.

“ Caps on effective hourly rates and bans on paying fees in the form of a percentage of penalty awards would significantly limit the potential for abuse by private attorneys, who otherwise would naturally favor a litigation strategy that maximized recovery regardless of the public interest. ”

In a handful of states, other state agencies have raised concerns about standards governing the use of outside counsel. For example, in June 2012, the Missouri State Auditor released a report detailing concerns with the AG’s procedures then in effect for soliciting and rejecting bids from contingency-fee counsel, noting that Missouri law did not contain any provision allowing the AG to retain any such control over the procurement process, including authority to reject bids or solicit new ones.³⁵ The report also expressed concern that many firms that submitted proposals had contributed to the AG’s campaign, and that the AG’s office lacked documentation for the methodology used and criteria considered when selecting legal counsel. This suggests it may be worthwhile to raise concerns with similar agencies and officials in other states as well.

The legislative and regulatory efforts summarized above are an important first step towards curtailing questionable contingency-fee partnerships between state AGs and outside counsel. In particular, caps on effective hourly rates and bans on paying fees in the form of a percentage of penalty awards would significantly limit the potential for abuse by private attorneys, who otherwise would naturally favor a litigation strategy that maximized recovery regardless of the public interest. In addition, the bureaucratic requirements and the oversight provisions of various statutes governing the retention of private counsel may discourage AGs from seeking to engage contingency-fee counsel in most cases. Nevertheless, the threat posed by the use of contingency-fee counsel remains very real, particularly in jurisdictions that have not adopted these or similar reforms.

35 Missouri State Auditor Report No. 2012-55, at 4-8 (June 2012), *available at* <http://www.auditor.mo.gov/Press/2012-55.pdf>.

CHALLENGES TO CONTINGENCY-FEE ARRANGEMENTS ON DUE-PROCESS GROUNDS

Contingency-fee arrangements between AGs and private counsel have also been challenged in court, often on due-process grounds. These arguments are beginning to gain some traction, but defendants face an uphill battle in persuading courts to invalidate AG-private counsel agreements as unconstitutional.

The due-process challenge to AG-private lawyer partnerships is – at its heart – very simple: “If you got pulled over by a cop and the cop made more money if he gave you a ticket and less if he didn’t, no one would think that was fair.”³⁶ When a state AG hires a private lawyer to pursue penalties on a contingency-fee basis, it is really no different from the police officer and the ticket – and defendants have a valid due-process challenge to the arrangement. After all, by delegating the state’s punitive powers to the private lawyer, the AG has vested the lawyer with the same kind of power and discretion as the police officer possesses. But rather than encourage the

private lawyer to act in the public interest, the contingency-fee arrangement has the opposite impact: it motivates the lawyer to subordinate the public interest in favor of personal, pecuniary gain. Specifically, these arrangements create a serious risk that the private prosecutor’s financial motivation will “distract[] private counsel from the singular goal of serving the public interest – an issue that is wholly absent when governmental employees pursue the same claims.”³⁷ This kind of interest threatens the impartiality and neutrality requirements underlying the Fourteenth Amendment.

There are two potential due-process challenges to state AG-private lawyer partnerships: (1) the Due Process Clause categorically bars the use of contingency-fee counsel in quasi-criminal cases; and (2) the Due Process Clause only allows such agreements where the AG retains “control” of the litigation. Depending on the jurisdiction, defendants may consider making both, alternative arguments in a single challenge.

“ But rather than encourage the private lawyer to act in the public interest, the contingency-fee arrangement has the opposite impact: it motivates the lawyer to subordinate the public interest in favor of personal, pecuniary gain. ”

36 Liptak, *supra* note 21 (quoting Jay T. Jorgensen).

37 Faulk & Gray, *supra* note 2, at 972.

The *Per Se* Argument

The Supreme Court long ago recognized that a state violates due process when it deprives a defendant of an impartial tribunal. In *Tumey v. Ohio*,³⁸ the trial judge presiding over a Prohibition case (who was also the mayor of a city) derived his mayoral income from fines the defendant would be required to pay upon conviction. The Supreme Court unanimously invalidated the conviction on the ground that “it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.”³⁹ In so doing, the Court applied a *per se* rule based on the mere risk that the mayor could be improperly influenced by his financial self-interest, and therefore refused to engage in a factual inquiry into whether that risk had actually materialized.⁴⁰ The Court reached its conclusion after considering the history of the common law, which revealed that, for “hundreds of years the justices of the peace of England seem not to have

received compensation for court work” at all, and “judges in towns [were] paid salaries.”⁴¹ This policy made good sense: “it is certainly not fair to each defendant” that “the prospect of” losing a fee by failing to convict “should weigh against his acquittal” in the mind of a judge.⁴²

As the Supreme Court has since made clear, the impartial-tribunal requirement of due process applies not only to judges, but to plaintiffs and prosecutors in suits brought to enforce state law. In *Marshall v. Jerrico, Inc.*,⁴³ the Supreme Court warned that a “scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.”⁴⁴ This holding was consistent with the universally acknowledged principle that prosecutors and other state-appointed defenders of the public interest are subject to special obligations that go beyond the baseline ethical tenets governing all attorneys.⁴⁵ Thus, “[i]n appropriate circumstances,” the “traditions of prosecutorial discretion do not immunize

38 273 U.S. 510 (1927).

39 *Id.* at 523.

40 *Id.*

41 *Id.* at 525.

42 *Id.* at 532.

43 446 U.S. 238.

44 *Id.* at 249-50.

45 *See, e.g., id.* at 249 (“Prosecutors are also public officials; they too must serve the public interest.”); *see also, e.g., United States v. Grey*, 422 F.2d 1043, 1045-56 (6th Cir. 1970) (recognizing that a prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done”) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (same).

from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.”⁴⁶

In *Young v. United States ex rel. Vuitton et Fils S.A.*,⁴⁷ the Supreme Court “establish[ed] a categorical rule against the appointment of an interested prosecutor” to pursue a criminal contempt action on behalf of the government.⁴⁸ In that case, private attorneys were appointed to prosecute a criminal contempt action against certain individuals who violated an injunction barring them from engaging in trademark infringement.⁴⁹ These private attorneys were representatives of the company whose trademark interests had been violated.⁵⁰ The infringers were found guilty of criminal contempt.⁵¹ The Supreme Court reversed, holding that the private attorneys appointed to prosecute the criminal contempt action were subject to the same standards of impartiality as government employees.⁵² The Court explained that because the

private attorneys were appointed to represent the United States “to pursue the public interest,” they “certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.”⁵³ According to the Court, the “appointment [of the interested attorneys] illustrate[d] the potential for private interest to influence the discharge of public duty.”⁵⁴ As a result, the Court concluded that the appointment of the private attorneys was improper and reversed the lower court’s rulings.⁵⁵

These precedents would seem to support adoption of a *per se* rule against retention of contingency-fee lawyers. The outcome in *Tumey*, for example, expressly did not depend on whether the judge was in fact biased by the potential for remuneration. Although the Supreme Court in *Marshall* suggested that prosecutors are not subject to as stringent a standard of impartiality as judges,⁵⁶ the Court later made clear that this “difference in treatment is relevant to whether a conflict is found,” and “not to its gravity once identified.”⁵⁷ This language,

46 *Marshall*, 446 U.S. at 249.

47 481 U.S. 787 (1987).

48 *Id.* at 814.

49 *Id.* at 791-92.

50 *Id.*

51 *Id.* at 792.

52 *Id.* at 805-06.

53 *Id.* at 804.

54 *Id.* at 805.

55 While the Court invalidated the appointment under its supervisory authority over the federal courts, not as a matter of federal constitutional law, Justice Blackmun suggested that the appointment violated the defendant’s due-process rights. *Id.* at 814-15 (Blackmun, J., concurring) (“I would go further, however, and hold that the practice – federal or state – of appointing an interested party’s counsel to prosecute for criminal contempt is a violation of due process.”).

56 446 U.S. at 249-50.

57 *Young*, 481 U.S. at 810-11.

too, supports a categorical rule against counsel paid on a contingency-fee basis if, as Supreme Court precedent appears to dictate, having a financial interest in the outcome of the prosecution constitutes a conflict.

Nevertheless, courts have so far been hesitant to apply a categorical bar to the use of contingency-fee counsel in civil proceedings absent substantial criminal overtones to the litigation. In fact, the only ruling that has applied such a categorical bar to date is *People ex rel. Clancy v. Superior Court*,⁵⁸ a decision of the California Supreme Court that invalidated a fee agreement between a municipality and private counsel in an enforcement proceeding where counsel's pay hinged on the outcome of the lawsuit. In *Clancy*, the City of Corona, California hired outside counsel to prosecute abatement actions under a public-nuisance theory, seeking to enjoin a bookstore from selling sexually explicit materials.⁵⁹ The retention agreement provided that the private firm's hourly rate would double if the City were successful in the litigation, and the court ordered the losing party to pay the City's attorneys' fees.⁶⁰ According to the California Supreme Court, the retention agreement "[o]bviously" gave outside

counsel "an interest extraneous to his official function in the actions he prosecutes on behalf of the City."⁶¹ The court held that such an interest was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action."⁶² In reaching its decision, the court determined that attorneys representing the government must abide by the same requirements as government officials.⁶³

As part of its rationale, the court explained that the abatement proceeding closely resembled a criminal prosecution in which principles of neutrality and impartiality reign supreme.⁶⁴ In particular, such a proceeding was "brought in the name of the People," and "one who commits a public nuisance is guilty of a misdemeanor."⁶⁵ The court also emphasized the fact that the relief sought was not compensatory, but injunctive in nature, and would threaten "the continued operation of an established, lawful business."⁶⁶ Further, the relief sought "implicated both the defendants' and the public's constitutional free-speech rights" because the materials at issue "involved speech that arguably was protected in part."⁶⁷

58 705 P.2d 347 (Cal. 1985).

59 *Id.* at 348.

60 *Id.* at 350.

61 *Id.* at 351.

62 *Id.* at 353.

63 *Id.*

64 *Id.* at 352.

65 *Id.* at 352-53.

66 *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21, 32 (Cal. 2010) (describing *Clancy's* holding).

67 *Id.*

Based on these characteristics, the court determined that the close relationship between the nuisance action and a criminal proceeding “supports the need for a neutral prosecuting attorney” and a “balancing of interests.”⁶⁸ “On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes.”⁶⁹ Balancing all of these important interests, the court held that “[a]ny financial arrangement that would tempt the [] attorney to tip the scale cannot be tolerated.”⁷⁰ The court therefore invalidated the contingency-fee contract, applying a categorical bar on the use of contingency-fee counsel in quasi-criminal cases.

More recently, the California Supreme Court confirmed and further clarified that the categorical bar it adopted in *Clancy* is limited to cases that closely resemble criminal proceedings. In *County of Santa Clara v. Superior Court*,⁷¹ public entities hired private law firms to prosecute abatement actions against former manufacturers of lead paint and pigment

under a public-nuisance theory. The law firms were hired on a contingency-fee basis under ten separate contingency-fee agreements. In rejecting a categorical bar to contingency-fee arrangements in public nuisance actions, the California Supreme Court distinguished *Clancy*, concluding that “in contrast to the situation in *Clancy*,” which involved a “liberty interest [and] the right of an existing business to continued operation,” “this case is closer on the spectrum to an ordinary civil case than it is to a criminal prosecution.”⁷² The court further explained that “public-nuisance law over the course of its development has become increasingly more civil in nature than criminal.”⁷³ It therefore held that “the absolute prohibition on contingent-fee arrangements imported in *Clancy* from the context of criminal proceedings is unwarranted in the circumstances of the present *civil* public-nuisance action.”⁷⁴ Nevertheless, it invalidated the contingency-fee arrangements on other grounds, discussed in more detail in subsection B, below.⁷⁵

68 *Clancy*, 705 P.2d at 352-53.

69 *Id.* at 352.

70 *Id.*

71 235 P.3d 21.

72 *Id.* at 34-35.

73 *Id.* at 32 n.8.

74 *Id.* at 35 (emphasis added).

75 *Id.* at 41. The California Supreme Court invalidated the contingency-fee agreements at issue because they failed to contain all of the “specific provisions regarding retention of control and division of responsibility that . . . are required to safeguard against abuse of the judicial process.” *Id.* at 41. The court explained that “[a]ssuming the public entities contemplate pursuing this litigation assisted by private counsel on a contingent-fee basis . . . they may do so after revising the respective retention agreements to conform with the requirements set forth in th[e] opinion.” *Id.*

Other courts have agreed that a categorical bar on the use of contingency-fee counsel should apply only in criminal or quasi-criminal cases.⁷⁶ But there is no clear guidance on where to draw the line between quasi-criminal cases on the one hand and purely civil litigation on the other. In recent cases, litigants have argued that any case in which the government seeks only civil penalties should count as quasi-criminal in light of the punitive remedy and the potential for crippling verdicts that are out of proportion to any damage actually sustained by the government.⁷⁷ So far, however, courts have not been receptive to such arguments. Most recently, in *International Paper Co. v. Harris County*,⁷⁸ the Texas Court of Appeals declined to apply “a blanket prohibition against a governmental entity’s engagement of

private counsel on a contingent-fee basis to pursue civil litigation in which the only remedy sought [was] civil penalties.”⁷⁹ There, defendants in a penalties-only environmental enforcement lawsuit moved to enjoin Harris County from using contingency-fee counsel to prosecute the case.⁸⁰ The defendants urged the appellate court to apply a categorical bar on contingency-fee agreements in such circumstances, arguing that “[d]ue process cannot tolerate the pernicious influence of personal financial gain’ in a case in which the only remedy sought is punitive.”⁸¹ In rejecting defendants’ argument, the Texas Court of Appeals distinguished the case from *Clancy*, stressing that defendants “neither alleged nor established that the County’s lawsuit threatens the continued operation of their businesses.”⁸² Another recent case involving claims for penalties

76 *See, e.g., State v. Lead Indus. Ass’n*, 951 A.2d 428, 475 nn.48 & 50 (R.I. 2008) (noting that unlike *Clancy*, “the case presently before us is completely civil in nature” making categorical bar inapplicable, but cautioning that “we are unable to envision a criminal case where contingent fees would ever be appropriate”); *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1242-43 (Md. 1998) (distinguishing *Clancy* in part on the ground that “there are no constitutional or criminal violations directly implicated here, and, hence, there is no potential conflict of interest”).

77 *See Redish, supra* note 4, at 81 (recognizing that “many civil suits brought by government are inherently coercive in nature, whether in the form of civil fines or punitive damages” and in “these situations, the role of the Due Process Clause becomes even more significant”).

78 *Int’l Paper Co. v. Harris Cnty.*, No. 01-12-00538-CV, 2013 Tex. App. LEXIS 9188, at *44 (Tex. App. July 25, 2013).

79 *Id.* at *42.

80 *Id.* at *1-2.

81 *Id.* at *23 (citation omitted).

82 *Id.* at *44.

under a state consumer-protection statute likewise declined to apply a categorical bar on the use of outside counsel.⁸³

This precedent poses a significant obstacle for defendants seeking to convince courts to impose a categorical ban on contingency-fee arrangements in quasi-criminal cases. But a categorical bar finds support in several different policy considerations. For one thing, contingency-fee agreements pose the same potential for abuse in maximizing pay that was illuminated in *Tumey*. After all, an attorney whose compensation rests entirely on the amount of money awarded will be driven by his

financial interest rather than his obligation to pursue justice and the public interest.⁸⁴ As one outspoken critic of contingency-fee contracts explained, contingency-fee agreements place the conduct of the litigation “‘in the hands of lawyers whose direct personal interest is in maximizing the state’s, and thereby their own, monetary recovery. It is simply unrealistic to believe that such agents will give sufficient weight either to the sovereign’s abstract interest in justice and the highest standards of advocacy, or to the sovereign’s non-monetary policy objectives in pursuing litigation.’”⁸⁵

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- 83 *See Merck Sharp & Dohme Corp. v. Conway*, 861 F. Supp. 2d 802, 813-14 (E.D. Ky. 2012). On appeal, Merck argued that the categorical bar should apply in its case, not only because it was a penalties-only civil enforcement suit, but also because the state’s additional request for harsh injunctive relief made the case more like *Clancy*. *See* Brief of Plaintiff-Appellant Cross-Appellee Merck Sharp & Dohme Corp. at 39-46, *Merck Sharp & Dohme Corp. v. Conway*, Nos. 13-5792/13-5881 (6th Cir. July 5, 2013) (“Merck Brief”). The underlying case settled before the Sixth Circuit had a chance to resolve the argument. Still other cases have rejected due-process challenges altogether, albeit with little analysis. In *Commonwealth v. Janssen Pharmaceutica, Inc.*, 8 A.3d 267 (Pa. 2010), for example, the court rejected a due-process argument (over a dissent) on the ground that the defendant had no standing to raise it. And just this year, the Supreme Court of Appeals of West Virginia “summarily reject[ed]” a due-process argument on the merits in a footnote without explanation, claiming that it could not find “any case that supports a due process violation claim through the use of special assistant attorneys general in the prosecution of civil cases.” *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 630 n.20 (W. Va. 2013).
- 84 *See* Brief of Amicus Curiae Pharmaceutical Research & Manufacturers of America in Support of Plaintiff-Appellant, at 9, *Merck Sharp & Dohme Corp. v. Conway*, Nos. 13-5792/13-5881 (6th Cir. July 12, 2013) (“Research & Manufacturers Brief”); Brief of the Chamber of Commerce of the United States of America and the American Bankers Association as Amici Curiae in Support of Plaintiff-Appellant and Reversal, at 10, *Merck Sharp & Dohme Corp. v. Conway*, Nos. 13-5792/13-5881 (6th Cir. July 12, 2013); *see also* Redish, *supra* note 4, at 79-80 (explaining that attorneys bet everything on attainment of victory in contingency-fee arrangements); Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1251 n.128 (2008) (“relators’ counsel, who play an integral role in the exercise of the prosecutorial discretion delegated to relators, usually work on a contingency fee basis, and thus unquestionably are motivated by the prospect of a financial reward”).
- 85 Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments’ Tobacco Litigation*, 33 Conn. L. Rev. 1143, 1155 n.62 (2001) (quoting Testimony of Hon. Christopher Cox, Hearing on Proposed Legislation to Limit Lawyers’ Fees Resulting From Congressionally Enacted Tobacco Settlement, Subcomm. on Courts and Intellectual Property, LEXIS, Legis Library, Cngtst File).

“ Further, the traditional justifications for contingency fees do not exist with respect to state-initiated litigation. Experience has shown that AGs have resources to sue corporate tortfeasors with their own government lawyers.”

Moreover, as a doctrinal matter, cases that strictly seek penalties *are* more like criminal cases than civil cases. “When the state acts as the plaintiff in civil litigation and seeks to impose purely *punitive*, rather than compensatory relief, technical distinctions between criminal and civil litigation become far less significant,” and “the inherently coercive nature of the action triggers the social contract of liberal democracy: those imbued with public power are not permitted to act out of motivations of private gain.”⁸⁶ Indeed, statutory penalties are virtually indistinguishable from punitive damages, which the Supreme Court has recognized “serve the same purposes as criminal penalties.”⁸⁷

Further, the traditional justifications for contingency fees do not exist with respect to state-initiated litigation. Experience has shown that AGs have resources to sue corporate tortfeasors with their own government lawyers.⁸⁸ To illustrate, the AGs of some of the states in the multistate tobacco litigation chose *not* to hire contingent-fee attorneys and instead prosecuted their claims using their own resources.⁸⁹

Finally, contingency-fee agreements contravene “the appearance of fairness and transparency of process” and undermine respect for the rule of law.⁹⁰ As one court succinctly put it, “[o]ur system relies for its validity on the confidence of society; without a belief by the people that the

86 Redish, *supra* note 4, at 93 (emphasis added).

87 *State Farm. Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003); *see also, e.g., US Fax Law Ctr., Inc. v. iHire, Inc.*, 374 F. Supp. 2d 924, 928-29 (D. Colo. 2005), *aff'd*, 476 F.3d 1112 (10th Cir. 2007); *Tessier v. Moffatt*, 93 F. Supp. 2d 729, 737 (E.D. La. 1998) (“[Louisiana Unfair Trade Practices Act] is penal in nature and must be strictly construed.”); *In re Suter*, No. 2005-2118, 2005 U.S. Dist. LEXIS 26840, at *25-26 (D. Md. Nov. 7, 2005) (because overall goal of consumer protection is bolstered by restitution awards imposed as a deterrent, restitution is penal and not compensatory even if private individuals benefit from it).

88 *See Amicus Curiae* Brief of The Product Liability Advisory Council, Inc. in Support of Plaintiff-Appellant Cross-Appellee and Reversal, at 13, *Merck Sharp & Dohme Corp. v. Conway*, Nos. 13-5792/13-5881 (6th Cir. July 11, 2013) (“PLAC Brief”); Research & Manufacturer’s Brief, *supra* note 84, at 7.

89 PLAC Brief, *supra* note 88, at 14-15 (citing Editorial, *Angel of the O’s?*, Richmond Times Dispatch, June 20, 2001, at A8, at 2001 WLNR 1140793 (comparing the additional benefits gained by Virginia citizens whose Attorney General did not hire outside counsel with the money its neighbor, Maryland, lost to legal fees)).

90 Research & Manufacturer’s Brief, *supra* note 84, at 13-14.

system is just and impartial, the concept of the rule of law cannot survive.”⁹¹

Because contingency-fee agreements raise the specter that outside counsel will subordinate the public interest to their own financial stake in the litigation, these agreements belie any appearance of neutrality and undermine the public’s confidence in government.

For all of these reasons, there is a strong basis in Supreme Court precedent and in common sense for categorically barring AGs from employing contingency-fee counsel in a broad range of civil actions, particularly those that seek only punitive remedies.

The “Control” Argument

The more modest due-process challenge to contingency-fee arrangements between state AGs and private counsel is that these agreements are unconstitutional only if the AG cedes control of the litigation to private counsel. To date, most courts faced with due-process challenges have embraced this test, and have applied it loosely, finding that virtually any purported supervision or control by the AG sufficiently protects a defendant’s due-process rights.

The contours of the control test were articulated by the Rhode Island Supreme Court in *State v. Lead Industries Association (“LIA”)*.⁹² That case arose out of public-nuisance litigation brought by the Rhode Island AG against former manufacturers of lead paints and pigments. The defendants

challenged the state’s arrangement with outside contingency-fee counsel on the grounds that the retention unlawfully delegated the AG’s authority to private, self-interested parties, violated public policy, and unconstitutionally appropriated state funds to pay outside attorneys without legislative review and approval.

Although the Rhode Island Supreme Court declined to recognize a *per se* prohibition on the AG’s use of contingency-fee counsel, it emphasized that because of “the special duty of [AGs] to ‘seek justice’ and their wide discretion with respect to same, such [contingency-fee] relationships must be accompanied by exacting limitations.”⁹³ Specifically, the AG must exercise “**absolute and total control over all critical decision-making**” throughout the course of the litigation.⁹⁴ Toward this end, the court mandated that all retainer agreements with contingency-fee counsel must include provisions ensuring that:

- “the Office of the Attorney General will retain complete control over the course and conduct of the case”;
 - “the Office of the Attorney General retains a veto power over any decisions made by outside counsel”; and
 - “a senior member of the Attorney General’s staff must be personally involved in all stages of the litigation.”⁹⁵
- The court further held that these provisions are insufficient if the AG does not actually abide by them.

91 *Clancy*, 705 P.2d at 351.

92 *LIA*, 951 A.2d 428.

93 *Id.* at 475.

94 *Id.*

95 *Id.* at 477.

This control test was subsequently adopted with slight modifications by the California Supreme Court in *Santa Clara*. As discussed above, *Santa Clara* distinguished the earlier *Clancy* decision in several critical respects, notably by holding that the *per se* bar on government use of contingency-fee counsel is limited to cases that resemble criminal proceedings. Nevertheless, despite holding that *Clancy*'s categorical rule did not apply to the case before it, the California Supreme Court concluded that contingency-fee counsel still had "a conflict of interest that potentially place[d] their personal interests at odds with the interests of the public and of defendants in ensuring that a public prosecution is pursued in a manner that serves the public."⁹⁶ The California Supreme Court thus held that contingency-fee arrangements are acceptable only if "conflict-free government attorneys retain the power to control and supervise the litigation" and make "all critical discretionary decisions."⁹⁷ Relying on the Rhode Island Supreme Court's ruling in *LIA*, California's highest court held that contingency-fee retainer agreements must – at a minimum – include provisions specifying that:

- "decisions regarding settlement of the case are reserved exclusively to the discretion of [government] attorneys";
- "any defendant . . . may contact the lead government attorneys directly, without having to confer with contingent-fee counsel";
- "the public-entity attorneys will retain complete control over the course and conduct of the case";
- "government attorneys retain a veto power over any decisions made by outside counsel"; and
- "a government attorney with supervisory authority must be personally involved in overseeing the litigation."⁹⁸

Like the Rhode Island Supreme Court in *LIA*, the *Santa Clara* court also noted that government attorneys must actually exercise control over the case for the arrangement to remain valid.

96 *Santa Clara*, 235 P.3d at 36.

97 *Id.* at 36, 39.

98 *Id.* at 39-40.

Other cases, too, have applied a control test, though few have applied it in sufficient detail to provide meaningful guidance for future cases.⁹⁹ The most extensive analysis of the test was set forth recently in *Merck Sharp & Dohme Corp. v. Conway*,¹⁰⁰ which involved a challenge to Kentucky’s retention of contingency-fee counsel to sue Merck under the Kentucky Consumer Protection Act (“KCPA”) over Merck’s marketing of the prescription drug Vioxx.¹⁰¹ In its federal court lawsuit against the AG, Merck sought a categorical bar on such retentions, but the district court concluded that “the existence of a contingency fee arrangement with outside counsel does not necessarily violate the defendant’s due process rights” provided that the private counsel never “engage[] in any conduct that invade[s] the sphere of control reserved

to the AG’s office.”¹⁰² On this basis, the court nonetheless denied the AG’s motion to dismiss, concluding that Merck had sufficiently alleged lack of control.¹⁰³

Ultimately, however, the court granted the AG’s motion for summary judgment even though discovery had revealed significant gaps in the AG’s knowledge about the substance and status of its case against Merck.¹⁰⁴ Although the court found that the AG’s “unfamiliarity” with certain aspects of the underlying state court litigation was “disconcerting” and suggested that the AG’s office was “complacen[t] or laz[y],”¹⁰⁵ it concluded that “the AG’s office does not need to be intimately involved in all of the everyday work or decision-making that occurs in the [Vioxx] litigation to exercise meaningful

99 See, e.g., *Sherwin-Williams Co. v. City of Columbus*, No. C2-06-829, 2007 WL 2079774, at *1-3 (S.D. Ohio July 18, 2007) (reviewing contingency-fee agreements between cities and outside counsel and stressing the importance of vesting control over the litigation in city attorneys, including “the sole authority to authorize any settlement of any claim or complaint”); *Santa Clara*, 235 P.3d at 41 (“[N] one of the ten fee agreements in the present case contain the other specific provisions regarding retention of control and division of responsibility that we conclude are required to safeguard against abuse of the judicial process.”); *Glendening*, 709 A.2d at 1243 (rejecting due-process argument in part given “oversight of an elected State official, who ‘shall have the authority to control all aspects of [outside counsel’s] handling of the litigation,’ and whose ‘authority shall be final, sole and unreviewable’”) (quoting contingency-fee contract); *City & Cnty. of S.F. v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1135 (N.D. Cal. 1997) (declining to disqualify contingency-fee counsel because, *inter alia*, the firm “is acting here as co-counsel, with plaintiffs’ respective government attorneys retaining full control over the course of the litigation”).

100 861 F. Supp. 2d at 802.

101 See *Merck Sharp & Dohme Corp. v. Conway*, No. 3: 11-51-DCR, 2012 U.S. Dist. LEXIS 40940, at *12 (E.D. Ky. Mar. 23, 2012).

102 861 F. Supp. 2d at 814-15 (internal quotation marks and citation omitted).

103 2012 U.S. Dist. LEXIS 40940, at *12.

104 *Merck Sharp & Dohme Corp. v. Conway*, No. 3:11-51-DCR, 2013 U.S. Dist. LEXIS 73672 (E.D. Ky. May 24, 2013).

105 *Id.* at *38-39.

“ When examining a contingency-fee retainer agreement, defendants should closely review whether any clauses effectively limit the AG’s involvement in – or control over – the case. ”

control over the proceedings.”¹⁰⁶ The court found “Merck’s most compelling argument” to be that the AG’s list of 45 claimed violations of the KCPA was “identical to the one produced by the same outside counsel” in another Vioxx case brought on behalf of the State of Alaska.¹⁰⁷ But according to the court, that fact did not warrant a conclusion that the “AG [] ceded his authority to private counsel” because one of the government lawyers working on the case testified that she discussed how the KCPA applies to Vioxx with outside counsel in drafting the state’s complaint; the AG’s office retained “the right and the authority” to reject or change the list of violations and witnesses; it reviewed documents filed with the court; and it maintained settlement authority.¹⁰⁸

As the *Conway* case illustrates, the control test foists a difficult burden of proof on defendants. Nonetheless, there are several steps defendants should take to develop a strong record on this issue.

The first step is to obtain and examine the retainer agreement. These agreements may be obtained either through discovery or requests under state open-records laws.

In some states, such agreements may be available online through the AG’s website. When examining a contingency-fee retainer agreement, defendants should closely review whether any clauses effectively limit the AG’s involvement in – or control over – the case. As the *LIA* and *Santa Clara* courts both held, contingency-fee agreements must contain provisions ensuring that: (1) the AG will retain complete control over the course and conduct of the case; (2) the AG will maintain veto power over any decisions made by outside counsel; and (3) a senior member of the AG’s staff will be personally involved in all stages of the litigation. Notably, the initial agreement between the Rhode Island AG and contingency-fee counsel in *LIA* stated that outside counsel “will diligently and forcefully prosecute all claims which, in their judgment, should be asserted.”¹⁰⁹ The Rhode Island trial court determined that this clause impermissibly delegated the AG’s authority to outside counsel. Similarly, in *Santa Clara*, the California Supreme Court held that a number of agreements between local governments and contingency-fee counsel did not sufficiently guarantee government control.

106 *Id.* at *41. On appeal, Merck argued that courts and commentators have held or suggested that lack of knowledge about delegated decisions is tantamount to a lack of control for other purposes. See Merck Brief, *supra* note 83, at 48-50. The case settled before the appellate court addressed the issue.

107 *Merck*, 2013 U.S. Dist. LEXIS 73672, at *37-38 (internal quotation marks and citation omitted).

108 *Id.* at *39, *43-44, *47.

109 *State ex rel. Lynch v. Lead Indus. Ass’n, Inc.*, No. Civ.A. PB 99-5226, 2003 WL 22048756, at *1 (R.I. Super. Ct. Aug. 29, 2003) (internal quotation marks and citation omitted).

“ Provisions that require the AG to consult with outside counsel on all major litigation decisions, such as which defendants to name, what claims to allege, whether to join or opt out of a class or whether to proceed to trial, are also red flags. ”

Defendants should also scrutinize the AG’s agreement with outside counsel for provisions that effectively limit the AG’s control, notwithstanding provisions that the AG or someone in his or her office has the right to review pleadings and attend meetings and settlement conferences. Retainer provisions that have the effect of penalizing the AG for terminating outside counsel or dismissing the case are immediately suspect. To illustrate, the agreement between the Rhode Island AG and outside counsel in *LIA* provided that if outside counsel were terminated for any reason, they still would be compensated on a *quantum meruit* basis that would not be less than 16 ²/₃% of any settlement offers received by the state at the time of termination. The trial court determined that this clause would impose a prohibitive cost on the AG if he chose to fire counsel, effectively stripping the AG of control over the litigation (and likely forcing the AG to accept the settlement on the table at the time of the termination).¹¹⁰

Other control-depriving provisions may include those that convert the contingency-fee agreement to one based

on hourly rates with the entire fee due upon dismissal of counsel or the case. In addition, clauses that limit the AG’s ability to settle claims or that require outside counsel’s approval of a settlement indicate that the AG does not control the litigation. Indeed, one federal court invalidated a contingency-fee agreement on precisely this ground, explaining that a provision that precluded settlement or dismissal of the suit without the consent of contingency-fee counsel is “unconstitutional” because the provision “purport[ed] to vest in private counsel authority to prevent a settlement or dismissal of a suit.”¹¹¹ Other examples may include provisions in which the AG promises not to settle a case unless defendants agree to pay fees to contingency-fee counsel, even if defendants have agreed to provide injunctive relief that would resolve the lawsuit. Provisions that require the AG to consult with outside counsel on all major litigation decisions, such as which defendants to name, what claims to allege, whether to join or opt out of a class or whether to proceed to trial, are also red flags.

110 *Santa Clara*, 235 P.3d at 41.

111 *Sherwin-Williams Co.*, 2007 WL 2079774, at *3. The court gave the city seven days to amend the agreement to “bring [it] within constitutional boundaries.” *Id.* at *4.

“ Warning signs that control is inadequate may include outside counsel filing pleadings with minimal input or review from the AG’s office, AG staff directing communications exclusively through outside counsel or failing to accompany outside counsel to meetings, and AG staff failing to appear at court hearings and settlement discussions. ”

Even if a retainer agreement contains provisions promising government control, the AG and outside counsel must actually abide by them. As the *LIA* court made clear, irrespective of the text of the contingency-fee agreement, the AG’s office must in fact “retain[] **absolute and total control over all critical decision-making,**” such that it “appear . . . to the world at large” that such control is being exercised.¹¹² Defendants should anticipate that the AG will contend that he or she has maintained requisite control over outside counsel. As such, defendants should be diligent in compiling examples of conduct that demonstrates constraints or limitations on the AG’s control. If outside counsel block settlement negotiations or the AG and staff are only peripherally involved

in discussions during the litigation, for example, defendants should bring those facts to the court’s attention as evidence that the AG has not exercised sufficient control. Warning signs that control is inadequate may include outside counsel filing pleadings with minimal input or review from the AG’s office, AG staff directing communications exclusively through outside counsel or failing to accompany outside counsel to meetings, and AG staff failing to appear at court hearings and settlement discussions. In addition, discovery should be used throughout the litigation (including deposing AG staff or the AG personally) to gather information regarding the AG’s involvement in the case and to ensure that the AG or staff is providing sufficient oversight.¹¹³ Any

112 *LIA*, 951 A.2d at 475, 477; see also *Merck*, 861 F. Supp. 2d at 815 (“Even though there is an explicit clause reserving the AG’s authority over the Vioxx litigation,” due process would still be violated “if outside counsel could be shown to have acted in a way that indicates a lack of control on the part of the AG”).

113 Defendants should not just seek information about the AG’s decision-making process during the litigation, but should also inquire into the events that led to the initiation of the case. After all, commencement of litigation based on a sales pitch by outside counsel – as opposed to a recommendation by someone in the AG’s office – may be a precursor to the AG’s lack of control and oversight over the litigation. Defendants can use initial disclosure requirements under applicable court rules, or requests for limited discovery that may provide the court with a full understanding of whether the AG’s office initiated the case itself.

indication that outside counsel has acted as more than an “assistant” to government attorneys may be grounds to challenge the underlying contingency-fee agreement.¹¹⁴

Defendants should expect AGs to resist discovery efforts on privilege grounds. But while the *Santa Clara* court recognized that such discovery might arguably implicate the attorney-client and work-product protections, it ultimately concluded that “adherence to [control] provisions [in contingency-fee agreements] is subject to objective verification both by defendants and by the court.”¹¹⁵ Indeed, despite initial privilege objections, a 30(b)(6) deposition of a representative of the AG’s office was permitted in the *Conway* litigation.¹¹⁶ In cases where the AG succeeds in resisting discovery, challengers should alternatively request that the court conduct an *in camera* examination of any potentially relevant document or witness.

While defendants should develop the control test as an alternative due-process argument, they should also continue challenging the control test as

an inadequate and impractical means of protecting due process. There are many bases for such a challenge. As an initial matter, the control test ignores the overwhelming financial incentive that contingency fees give outside counsel to find ways, both directly and indirectly, to steer the litigation. The control test also ignores the inherent limitations on a government lawyer’s ability to control self-interested private prosecutors who inevitably play a lead role in the litigation. As one legal commentator explained, “as long as contingency fee lawyers lead the litigation, these lawyers will invariably control the development and presentation of the ‘facts’ to the [government lawyers] and their staff.”¹¹⁷ “Thus, even when the [government lawyers] are interested in securing the public interest, rather than focusing on an exclusive goal of obtaining the most amount of money, and when they devote resources to active supervision of the litigation, the [government lawyers] and their staff may lack the necessary information to shape litigation outcomes.”¹¹⁸

114 The requirement that “a public prosecution [be] pursued in a manner that serves the public” is a closely related basis for challenging contingency-fee arrangements. *Santa Clara*, 235 P.3d at 36. Just as retainer provisions that penalize the AG for settling a case or otherwise give contingency-fee counsel control over strategic litigation decisions impermissibly diminish the AG’s control over the litigation, such provisions also improperly restrict the AG’s ability to act in the public interest. Similarly, provisions restricting an AG’s ability to settle the underlying litigation also interfere with the AG’s ability to save court time and taxpayer money, in derogation of the public interest.

115 *Santa Clara*, 235 P.3d at 36, 39.

116 See, e.g., Protective Order ¶ 2, *Merck Sharp & Dohme Corp. v. Conway*, No. 3:11-51-DCR (E.D. Ky. Nov. 9, 2012) (noting that Rule 30(b)(6) deposition of the AG’s office would proceed).

117 Dana, *supra* note 5, at 329.

118 *Id.*

The control test is also impractical and unworkable. Many of the facts relevant to control are known only to the governmental entity and may be immune to review due to the attorney-client and work-product privileges. Thus, as Professor Martin Redish has explained, “it is impossible to see how a reviewing court could assure itself, in the individual case, that such control is in fact being exercised.”¹¹⁹ This problem was on display throughout the *Conway* litigation brought by Merck, in which the Kentucky AG’s office objected on privilege grounds to virtually any inquiry by Merck into the question of control.

At bottom, the “control” test is a convenient fiction that misperceives the incentives and opportunities behind contingency-fee counsel’s prosecution of enforcement actions. These incentives and opportunities pose far too great a risk that private counsel will further their own self-interest rather than pursue justice on behalf of the public.¹²⁰

119 Redish, *supra* note 4, at 106. As one potential remedy to this problem, Professor Redish has suggested that courts should impose the burden of proving control on AGs, who possess the information relevant to that question. But so far, no court has done so. Research & Manufacturers Brief, *supra* note 84, at 15.

120 Another hurdle facing defendants in challenging AG contingency-fee agreements is the difficulty of pursuing these cases in federal court, in light of various federal abstention principles. Most notably, under the doctrine established in *Younger v. Harris*, 401 U.S. 37 (1971), a federal court must abstain from hearing a case “when a state proceeding involving an important state interest is currently pending, affording the plaintiff an adequate opportunity to raise constitutional claims,” *Deja vu of Ky., Inc. v. Lexington-Fayette Urban Cnty. Gov’t*, 194 F. Supp. 2d 606, 611 (E.D. Ky. 2002). The Supreme Court has made clear that this doctrine applies to all civil proceedings in which a state is a party and is acting in its sovereign capacity. See *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977). In *Merck*, the defendant was able to avoid the *Younger* problem because it had removed the underlying case by the Kentucky AG to federal court. See *Merck Sharp & Dohme Corp. v. Conway*, 909 F. Supp. 2d 781, 786-89 (E.D. Ky. 2012). However, many AG cases are not removable to federal court, and as a result, it is likely that most of the due-process battles over state AG contingency-fee arrangements will have to be waged in state courts, which are typically less receptive to novel constitutional theories.

OTHER POTENTIAL LEGAL CHALLENGES TO AG-PRIVATE LAWYER CONTINGENCY-FEE CONTRACTS

Beyond due-process-based legal arguments, there are several other potential challenges to contingency-fee contracts that warrant consideration in the appropriate case.

Challenges Based On Separation-Of-Powers Principles

One alternative basis for challenging contingency-fee arrangements is the constitutional doctrine of separation-of-powers. State constitutions generally vest spending and appropriation power exclusively in the legislature, which should theoretically prevent the AG from awarding a portion of state litigation recoveries to contingency-fee lawyers. Statutes in some states also specifically condition the retention of outside counsel on approval by the legislature or governor. Therefore, a contingency-fee agreement that

impermissibly cedes appropriations power to the AG or that has not garnered the requisite approval may be subject to challenge.

In *Meredith v. Ieyoub*, for example, the Louisiana Supreme Court voided a series of contingency-fee agreements entered into by the AG on the ground that Louisiana's separation-of-powers doctrine prohibited the AG from entering into contingency-fee contracts absent approval by the state legislature.¹²¹ The court explained that the Louisiana legislature has the sole constitutional authority to apportion funds, and that a contingency-fee contract involving the state and outside counsel is

“ A contingency-fee agreement that impermissibly cedes appropriations power to the AG or that has not garnered the requisite approval may be subject to challenge. ”

121 *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997).

an expenditure of state funds that must be approved by the legislature. The court also noted that the legislature had made such appropriations in the past and that it was not an onerous requirement.¹²²

Aside from constitutional principles, some states have statutes that explicitly require that outside counsel be paid only out of a legislative appropriation.¹²³ Mississippi is one of these states, and in 2012, the Mississippi Supreme Court reviewed two challenges by the State Auditor to the AG's use of contingency-fee counsel based on such a law.¹²⁴ The court held that state law prohibited the AG from authorizing payment of contingency fees upon the settlement of underlying cases because state law restricts the compensation of

outside counsel to amounts appropriated by the legislature.¹²⁵ While the court declined to find the contingency-fee agreements unlawful *per se*, it also rejected the AG's argument that the payments did not violate the statute because outside counsel had negotiated with the defendants to be paid separately. Rather, the court held that Mississippi law requires that the full amount recovered as a result of state litigation must be paid into the state treasury, with the legislature to approve the appropriation of contingency fees.¹²⁶

In the same vein, a number of states require contracts with outside counsel to be approved by the legislature,¹²⁷ or the governor or Board of Examiners,¹²⁸

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- 122 Defendants have mounted additional challenges to the Louisiana AG's use of contingency-fee counsel in the wake of *Meredith*, but the courts in those cases have not specifically addressed *Meredith*'s command as to separation of powers. See, e.g., *Foti v. Janssen Pharmaceutica, Inc.*, No. 04-3967, 2006 WL 6639296 (La. Dist. Ct. June 29, 2006) (electing not to apply the holding of *Meredith* given lack of evidence regarding the AG's arrangement with outside counsel); *Foti v. Bayer Corp.*, No. 04-439 (La. Dist. Ct. Sept. 27, 2004) (holding, without exposition, that the AG's agreement with outside counsel violated the Louisiana Constitution). Most recently, the challenge by GlaxoSmithKline to the Louisiana AG's use of outside counsel argues that the arrangement, in addition to violating due process by giving private counsel a share of civil penalties, also improperly skirts *Meredith*'s separation-of-powers rule by assigning the AG's right to recover attorneys' fees to private counsel in lieu of a contingency fee. The company asserts that such an assignment amounts to an expenditure of state funds that requires legislative authorization. That case is currently on appeal after the trial court declined to rule on the merits. See *GlaxoSmithKline LLC v. Caldwell*, No. 2012-CA-1790 (La. 1st Cir. Ct. App., argued Mar. 21, 2013).
- 123 These states include Louisiana (*Meredith*, 700 So. 2d 478), Mississippi (Miss. Code Ann. § 7-5-7) and Tennessee (Tenn. Code Ann. § 8-6-106).
- 124 *Pickering v. Langston Law Firm, P.A.*, 88 So. 3d 1269 (Miss. 2012); *Pickering v. Hood*, 95 So. 3d 611 (Miss. 2012).
- 125 *Langston Law Firm, P.A.*, 88 So. 3d at 1290.
- 126 *Id.* at 1284.
- 127 These states include Alabama (Ala. Code §§ 29-2-41, 41-16-79); Arkansas (Ark. Code Ann. § 25-16-702(b)(2)); Kansas (Kan. Stat. Ann. § 75-37,135(a)); Nevada (Nev. Rev. Stat. Ann. § 228.110) and Texas (Tex. Gov't Code Ann. § 2254.103(e)).
- 128 These states include Arkansas (Ark. Code Ann. § 25-16-702); Idaho (Idaho Code Ann. § 67-1409); Kentucky (Ky. Rev. Stat. Ann. § 12.210(1)); Maryland (Md. Code Ann., State Gov't § 6-105(b)); Minnesota (Minn. Stat. § 8.06); North Dakota (N.D. Cent. Code § 54-12-08.1), Tennessee (Tenn. Code Ann. § 8-6-106) and Wisconsin (Wis. Stat. § 20.930).

which also limits an AG’s authority to compensate counsel. A Nevada statute, for example, provides that no officer (which, under the state constitution, includes the AG) may employ outside counsel to represent the state unless either the AG is conflicted from undertaking the representation or “an act of the Legislature specifically authorizes the employment of” the outside attorneys.¹²⁹ The law further renders void any agreement with outside counsel that violates the statute.¹³⁰ The statute is the subject of a case before the Nevada Supreme Court, with a decision expected in late 2013.¹³¹

Defendants considering a separation-of-powers challenge should examine the relevant state constitution to determine whether the AG has impermissibly usurped the legislature’s power-of-the-purse by entering into a contingency-fee arrangement. In addition, defendants should also consult state law to determine whether the AG is required by statute to obtain legislative or executive approval before entering any agreement or paying any fees to outside counsel. If the contingency-fee arrangement was not approved by the required body (or bodies) or there was no appropriation for the contract, a court may void the agreement pursuant to state law.

Challenges Based On State Regulatory And Statutory Requirements

Another possible basis for challenging the use of contingency-fee counsel is to invoke the legislative reforms detailed in Part II, above. Defendants sued by a state in which such reform has been implemented should always examine whether the contingency-fee contract satisfies applicable appropriations, bidding or contracting regulations and statutes.

For example, in a recent challenge to the Louisiana AG’s retention of contingency-fee counsel, GlaxoSmithKline (“GSK”) argued among other things that the agreement violated various provisions of Louisiana procurement law by promising a cut of any recovery without prior legislative approval.¹³² Specifically, GSK invoked three statutory provisions that the agreement ignored: (1) La. Rev. Stat. Ann. § 46:440.1(B) (“all monies received by the state pursuant to a civil award granted or settlement under the provisions of” state Medicaid law “shall be deposited into the [Medical Assistance Programs Fraud Detection Fund]” of the state treasury); (2) La. Rev. Stat. Ann. § 49:259(C) (allocating a

129 Nev. Rev. Stat. Ann. § 228.110.

130 *Id.*

131 As it has in prior cases before state supreme courts, the National Chamber Litigation Center, along with the Chamber of Reno, Sparks, and Northern Nevada and the American Tort Reform Association, filed an amicus brief in that case supporting the challenge to the Nevada AG’s use of contingency-fee counsel.

132 See Original Brief on Behalf of Appellant GlaxoSmithKline LLC at 26, *GlaxoSmithKline LLC v. Caldwell*, No. 2012-CA-1790 (La. 1st Cir. Ct. App. Nov. 26, 2012).

portion of the AG's litigation recoveries to the State treasury's Department of Justice Claims Recovery Fund); and (3) La. Rev. Stat. Ann. § 39:32(C)(2) (requiring legislative approval for professional services contracts entered into by the state).¹³³ As GSK argued in its briefing, "these requirements" were designed "to provide a check on the Attorney General's ability to contract with private counsel," and the AG's failure to comply with them requires invalidation of the agreement.¹³⁴ The underlying lawsuit by the state against GSK ultimately settled in July 2013, mooting GSK's challenge to the AG's retention of outside counsel.¹³⁵

In pursuing similar challenges, defendants should consult public sources, make requests under state open records laws, and lodge discovery requests in order to obtain information regarding the execution of the agreement. As part of this process, defendants should determine whether there was a bidding process in the first place, whether outside counsel were properly vetted and free from conflicts of interest, and whether the AG obtained the requisite approval from the legislature.

Defendants should also investigate whether the AG or state agency has internal guidelines or policies applicable to government contracting. These materials generally can be acquired through state open records laws or formal discovery

requests. Upon obtaining these materials, defendants should evaluate whether the bidding process and resulting contingency-fee agreement comply with these policies. Defendants should also look closely at the AG's campaign contribution records (which are often available online from the state election commission or on websites like opensecrets.org) to ascertain whether outside counsel contributed to the AG's campaign, and if so, whether such contributions violated the state's "pay-to-play" prohibitions or otherwise reveal inappropriate influence.

Challenges Based On The Reasonableness Of The Contingency Fee

At a minimum, the contingency fee specified in the contract with outside counsel may be subject to challenge on the ground that it is unreasonable. As the Rhode Island Supreme Court explained in *LIA*, payment of contingency fees is always "subject to oversight and scrutiny by the courts before payment is made," and "[c]ourts have the inherent authority to review attorney contingent fee contracts in order to prevent unreasonableness . . . even when the parties themselves have not challenged the validity of the fee arrangement."¹³⁶ In scrutinizing the fee specified in the contract, many courts will

133 *Id.* According to GSK, these requirements can be excused only with legislative approval. *Id.* (citing La. Rev. Stat. Ann. § 39:32(C)(2) (providing that "[n]o contract for professional, personal, or consulting services shall be entered into unless said contract was submitted in the budget request as provided in this Subsection except for a contract thereafter specifically approved by the legislature"))).

134 *Id.*

135 See Joe Gyan, Drug maker agrees to \$45 million settlement with La., *The Advocate*, Aug. 3, 2013, <http://theadvocate.com/home/6608447-125/drug-maker-agrees-to-45>.

136 951 A.2d at 479-80.

“ To mount a challenge based on the reasonableness of the contingency fee, defendants will likely need to show that the fee is unreasonable on its face, is unreasonably high when reduced to an hourly rate based upon work performed, or is unsupported by documentation of the work actually expended on the matter. ”

look to Rule 1.5 of the ABA Model Rules of Professional Conduct,¹³⁷ which sets forth a number of important factors, including the time and labor required; the novelty and difficulty of the questions involved; the fee customarily charged in the locality for similar legal services; and the experience, reputation, and ability of the lawyer or lawyers performing the services. A few states have also enacted statutes imposing reasonableness requirements for costs and fees paid to AG-appointed counsel, including that they not “exceed recognized [hourly] bar rates for similar services.”¹³⁸

To mount a challenge based on the reasonableness of the contingency fee, defendants will likely need to show that the fee is unreasonable on its face, is unreasonably high when reduced to an hourly rate based upon work performed,

or is unsupported by documentation of the work actually expended on the matter. Defendants should request at an early stage in the case that the court require outside counsel to maintain detailed time records to substantiate the work performed and to present such records for examination by the court at the case’s conclusion.¹³⁹ Notably, the PARSA and TiPAC laws described in Part II require such reporting and limit the effective hourly rate that may be paid. These laws may serve as guidance even in states without such laws in determining what is reasonable. Other factors in the reasonableness of attorneys’ fees may include whether contingency-fee counsel have been promised a share of statutory penalties in addition to damages, as such penalties can greatly inflate the value of an award and lead to an improper windfall.

137 The Model Rules have been adopted by every state except California.

138 See Miss. Code Ann. § 7-5-7; see also Iowa Code § 13.7; Kan. Stat. Ann. § 75-37,135(a); Tex. Gov’t Code Ann. § 2254.108.

139 In order to avoid such scrutiny, contingency-fee lawyers have sought to bifurcate settlement payments into separate agreements – a specific amount for payments to the government and another for payments to outside counsel. The Mississippi Supreme Court recently criticized the AG’s attempt to have contingency-fee counsel negotiate their compensation directly with settling defendants, holding that such fees were in fact part of the state’s recoveries that should have been paid into the treasury. *Langston Law Firm, P.A.*, 88 So. 3d 1269; *Hood ex rel. State*, 95 So. 3d 611. Defendants should be aware of the potential that courts will review all settlement agreements, including separate side-agreements, in assessing the reasonableness of fees.

CONCLUSION

Over the last several years, state AGs have continued to turn to outside counsel to prosecute lawsuits on a contingency-fee basis. This practice not only raises serious ethical considerations and facilitates the formation of unseemly political relationships between state officials and outside lawyers, but also runs contrary to important constitutional and legal principles. In light of these implications, some state legislatures and attorneys general have sought to reform the practice of hiring outside counsel on a contingency-fee basis by enacting laws and instituting policies that require greater transparency, impose compulsory bidding processes, and limit the amount of fees recoverable by outside counsel. While these reforms are laudable, they have not eliminated the abuses – or the legal and constitutional consequences – posed by AG-private counsel contingency-fee arrangements. In addition to pressing for more legislative and regulatory reform at the state level, defendants should also consider mounting legal challenges to the retention of contingency-fee counsel in court. One possibility is bringing suit on the ground that these arrangements violate the defendant’s right to due

process under the Fourteenth Amendment to the U.S. Constitution and analogous state constitutional provisions. As several defendants have already argued, contingency-fee arrangements between state AGs and private lawyers contravene due-process principles – particularly in penalties-only cases – by giving outside counsel a direct pecuniary interest in the outcome of the underlying litigation, depriving defendants of fair, neutral and impartial judicial proceedings. Defendants facing AG litigation led by contingency-fee counsel should also consider challenges based on other legal principles. In particular, defendants should closely examine separation-of-powers, statutory and regulatory restrictions on the use of outside counsel, including PARSA and TiPAC laws, as well as “pay-to-play” and campaign-finance statutes to determine whether the AG complied with the law in retaining contingency-fee counsel. These strategies represent powerful tools for ensuring that government litigation is conducted in the interest of justice and for the good of the people, not the benefit of private counsel.



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