Analysis&Perspective

According to attorneys Mark A. Behrens and Donald J. Kochan, in recent years a new phenomenon has taken hold—regulation through litigation—that violates the bedrock principle of separation of powers upon which our entire system of government is based. Special interests and the plaintiffs' bar have discovered that the courts can serve as a forum for the advancement of their own concentrated interests, even if those interests are opposed by a majority of the public. State and local governments have begun to sponsor such "Big Government" suits in an effort to regulate entire industries, and build the public coffers through tax increases that are imposed outside the democratic process, the authors say.

Too often these partnerships between public officials and private personal injury contingency fee lawyers are consummated behind closed doors. Because there is no public oversight, the attorney selection process can easily be abused for personal gain and political patronage. In this Analysis & Perspective, the authors suggest that rules be adopted to require open and competitive bidding and greater public oversight in government retention of private legal services.

Let The Sunshine In: The Need For Open, Competitive Bidding In Government Retention of Private Legal Services

BY MARK A. BEHRENS AND DONALD J. KOCHAN*

Regulation through litigation depends in part on a new link between public officials and politically influential personal injury lawyers. In the state Medicaid recoupment lawsuits against tobacco companies, the partnership between governments and private personal injury lawyers was unprecedented, powerful — and lucrative. Ultimately, the litigation resulted in a historic global settlement which included $246 billion in damages and $8.2 billion in fees so far for the private attorneys — most of whom worked on a contingent fee basis.[1]

In most jurisdictions, when government entities contract for goods and services the bidding generally is done through an open and competitive process. Federal and state "sunshine" laws ensure that these transactions are above-board and result in the best use of taxpayer dollars.

In the state tobacco lawsuits, however, many state attorneys general disregarded such practices and, instead, negotiated contingent fee contracts — behind closed doors — with hand-picked private personal injury lawyers. These contracts stipulated that in lieu of a flat or hourly fee, the private lawyers were guaranteed a percentage of any trial judgment or settlement amount. Some contingency fee personal injury lawyers have earned astronomical fees as a result — sometimes amounts equal to as much as $105,022 an hour per lawyer![2]

Examples from several states illustrate the nature of the problem. In Kansas, for example, Attorney General Carla Stovall hired her former law partners at Entz & Chanay to serve as local counsel in the State's tobacco suit — without the benefit of competitive bidding or public oversight, and despite the firm's reported lack of expertise in product liability matters. Stovall has said that she asked her former law firm to take the case "as

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[1] *See* Elaine McArdle, *Trial Lawyers, AGs Creating a New Branch of Government*, Lawyers Weekly USA, July 12, 1999, at 3.

[2] *See* Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, Legal Times, Feb. 1, 1999, at 27 (hereinafter "*Tobacco Robbery*").

a favor."[3] That "favor" has now garnered Stovall's former firm $27 million in legal fees — the equivalent of $2,700 per hour — for simply acting as local counsel in the State's case.[4]

Questions regarding the hiring of outside counsel also have received attention in Pennsylvania in the wake of that state's tobacco suit. Two of Pennsylvania's biggest law firms, Philadelphia's Duane, Morris & Heckscher and Pittsburgh's Buchanan Ingersoll will split $50 million in fees over the next five years for their work in the case.[5] Each firm will receive the equivalent of $1,323 per hour for its work, even though Pennsylvania joined when the national tobacco litigation was ending and most of the pioneering work had been done by others.[6] Both firms ranked among Attorney General Mike Fisher's biggest campaign donors, placing in the top 10 on a list of more than 200 contributors. Both firms also gave to Fisher's inaugural committee.[7] When asked how he selected the two firms, Fisher said "there was a familiarity factor," and "that was how the decision was made."[8]

Even in states like Maryland, where Attorney General J. Joseph Curran sought and received gubernatorial approval to enter into a contingency fee agreement with a private personal injury attorney, the deal created controversy from the outset. Attorney General Curran initially agreed to pay attorney Peter Angelos 25 percent of any recovery by Maryland. In the end, Maryland was to receive approximately $4.6 billion of the national settlement, which would have entitled Angelos to more than $1 billion in fees under his contract. But, before the settlement was final, Angelos persuaded the Maryland Legislature to change substantive law — by abolishing all the affirmative defenses the tobacco industry could raise. In return for ensuring a "slam dunk" victory for Angelos and essentially eliminating any "contingency" in the state's case — the Maryland Legislature reduced Angelos's contingency fee to 12.5 percent of any settlement or recovery. Angelos is contesting that reduction. He is demanding the equivalent of $30,000 per hour for his firm's work on the case, even though "[h]is billing records show that nearly a quarter of the billable hours were performed by neophyte lawyers supplied by a temp agency who worked for $12 an hour."[9] Thus, even in Maryland, where there *is* a process for hiring private attorneys, the process did not go far enough to adequately protect the public.

The government's use of private personal injury lawyers to do the public's legal work is relatively new; it is a practice that raises troubling questions and creates several fundamental public policy problems.

First, governments and private contingency fee attorneys are guided by conflicting goals and principles. As the Supreme Court of the United States explained more than sixty years ago, an attorney for the state "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."[10] This duty is imperative in light of the government's unique ability, in narrowly defined circumstances, to use coercive power against private citizens.[11]

In contrast, private contingency fee personal injury attorneys are motivated by profit. Their inclination is to push the law into new and uncharted territory to obtain the maximum recovery — regardless of whether the legal principles advocated benefit society as a whole.

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Furthermore, in the public official/private attorney alliance there is a strong potential for fraud and abuse. At a minimum, the partnership can raise the appearance of impropriety. For example, in 1996, then-Texas Attorney General Dan Morales hired five firms to file his state's tobacco litigation. Four of these firms together had contributed nearly $150,000 in campaign contributions to Morales from 1990 to 1995.[12] The tobacco settlement awarded the lawyers 15 percent of the State's $15.3 billion recovery — about $2.3 billion, which ultimately was increased by an arbitration panel adjudicating the fee dispute to $3.3 billion.[13] Such blatant preferential treatment by Morales of firms that supported him politically creates, at the very least, the appearance of impropriety.

Recently, in Washington State, the State's antitrust chief, Jon Ferguson, announced that he was leaving his post to join the private Seattle law firm of Chandler, Franklin & O'Bryan to work on a class action against the tobacco industry. Ferguson and the Chandler firm's Steve Berman led Washington State's lucrative lawsuit against the tobacco companies. When asked why he was leaving his post to go work for the firm that handled the State's case, Ferguson succinctly explained: "Steve Berman got $50 million and I got a plaque."[14] Apparently, Ferguson also had a very good job waiting for him at the firm.

Even in Maryland, where ostensibly the attorney general conducted an open bidding process, the lawyer who was awarded the contract — Peter Angelos — is someone who has made generous political contributions. The award of the tobacco contract to Angelos

[3] *See* Scott Rothschild, *Lawmakers Accuse Attorney General of "Cronyism"*, Wichita Eagle, Jan. 25, 2000.

[4] *See* John L. Peterson, *Attorneys for Kansas Collect $55 Million In Tobacco Case, Stovall's Ex-Firm Expects $27 Million*, Kansas City Star, Feb. 1, 2000, at B1.

[5] *See* Glen Justice, *A Tobacco Windfall for PA Lawyers*, Philadelphia Inquirer, Apr. 2, 1999, at 1999 WL 11401543.

[6] *See* Glen Justice, *Critics Protest Monumental Legal Fees in Pennsylvania Tobacco Case*, Philadelphia Inquirer, Oct. 4, 1999, at 1999 WL 22020992.

[7] *See id.*

[8] *Id.*

[9] *$30,000 an Hour*, Wall St. J., July 5, 2000, at A22.

[10] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[11] *See* Levy, *Tobacco Robbery*, at 29.

[12] *See* Levy, *Tobacco Robbery*, at 27.

[13] *See* Bruce Hight, *Lawyers give up tobacco fight*, Austin American-Statesman, Nov. 20, 1999, at A1.

[14] *For the record*, Wash. Post., Feb. 14, 2000, Wash. Bus., at 35.

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could lead some to speculate that the bidding process, while fair on paper, was "rigged" in his favor.

Moreover, even in cases where such contracts are legitimately negotiated, private multimillion or multibillion dollar agreements between contingency fee personal injury lawyers and attorneys general may not result in the selection of the best person at the best cost. Different, less costly attorneys' fee arrangements could be negotiated by government officials if marketplace open bargaining becomes the norm and if better oversight is instituted by states.

Finally, the deals between attorneys general and private personal injury lawyers have spawned bitter fee disputes. These disputes have occurred in Kansas, Maryland, Florida, Texas, and other states.[15] These controversies force government officials to waste taxpayer dollars, divert their attention from other matters, or engage in unnecessary litigation. The potential for such costly fee disputes would be reduced if attorney fee agreements were made with greater public oversight.

Solving the Problem

Responding to charges of perceived political cronyism and a need for reform, the bar and state legislatures have begun to move toward solutions. For example, in February 2000, the American Bar Association adopted a resolution which states: "A lawyer or law firm should not accept a government legal engagement or an appointment by a judge if a lawyer or law firm makes a political contribution . . . for the purpose of obtaining or being considered for that type of engagement or appointment." Often termed the "pay to play" rule, in theory and if adopted by states, the ABA ethical rule would restrict some arrangements entered into between plaintiffs' lawyers and state attorneys general such as those described earlier. The rule attempts to prevent political patronage by precluding attorneys from making political contributions in order to receive a government contract.

The ABA ethical rule holds out promise for reform, but whether it will have teeth is questionable. Any effect it will have will only come if states choose to adopt it into their own legislation or ethical codes. Furthermore, Professor Lester Brickman has explained that the standards and guidance provided by the ABA on what constitutes a "reasonable fee" under its rule governing legal fees essentially set standards so that no fee can be considered unreasonable.[16] According to the studies of Brickman and others, there is no case by case enforcement for even grossly excessive fees — this in a climate where attorneys are walking away with fees as high as $3 billion. With almost no evidence of effective discipline under ABA fee rules, it is at best questionable whether the pay-to-play rule will actually alter any of the undesirable incentives, behavior, or processes in the current system of government retention of private contingency fee attorneys.

A more direct and effective solution to the problem of government officials negotiating secretive contingency fee arrangements with private personal injury attorneys has been proposed by the American Legislative Exchange Council ("ALEC"), the nation's largest bipartisan membership association of state legislators, numbering over 3,000. ALEC's model "Private Attorney Retention Sunshine Act," would do the following:

1. Create legislative oversight of large contingent fee agreements — those in excess of $1 million.

2. Provide State taxpayers the opportunity to comment on the terms of such agreements at public hearings.

3. Require attorneys to keep accurate and detailed records of the time they spend on any work done on behalf of the State.

4. Cap the hourly rate for any contingent fee attorney working for the State at $1,000 per hour.

ALEC's model bill would *not* prohibit an attorney general from hiring outside counsel, either on an hourly or contingent fee basis. The attorney general would still be free to utilize whichever arrangement he or she believes would be the most appropriate for the state in a given circumstance. Moreover, by permitting attorneys' fees to be awarded up to the equivalent of $1,000 per hour, attorneys general should have no problem finding competent counsel willing to take on future litigation.

ALEC's model bill has attracted strong support. "Attorney retention sunshine" legislation was adopted in both states that considered it in 1999 — Texas and North Dakota.[17] In 2000, legislation was enacted in Kansas,[18] and introduced in several other states (Colorado, Iowa, Maryland, Missouri, and Pennsylvania).

In addition to bringing open and competitive bidding to government contracts for private legal services and thereby solving some of the problems associated with the current system, the ALEC proposal also serves other public policy goals better than the ABA's pay-to-play ethics rule. First, the ALEC legislative proposal is not

[15] *See* Scott Shane, *Judge to Rule on Dispute Over Legal Fees*, Baltimore Sun, Dec. 10, 1999, at 2B; Levy, *Tobacco Robbery*, at 29.

[16] *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 Fordham L. Rev. 247 (1996).

[17] *See* N.D. Stat. § 54-12-08.1 (West 1999); Texas Govt. § § 404.097, 2254.101-2254.109 (1999).

[18] *See* Kan. H.B. 2627 (signed by Governor on Apr. 20, 2000).

subject to the questionable enforcement mechanisms of bar associations. Second, it is not subject to difficult questions of interpretation involved in judicial evaluation of attorney behavior. Third, the ALEC proposal does not restrict or chill any First Amendment rights of attorneys to fully contribute to the political process. Finally, under the pay-to-play rule, some attorneys who might otherwise be the most qualified to represent the interests of a state and able to do so in a fair manner might be precluded from taking on a government contract. This is not an issue under the ALEC proposal, which simply requires all fee arrangements to be above board and publicly disclosed.

Conclusion

The organized bar and state legislatures have begun to recognize that serious problems exist with the retention of private personal injury contingency fee attorneys to bring lawsuits on behalf of governments, regardless of additional problems regarding the legitimacy of the lawsuits themselves. The alliance between private attorneys and public officials will no doubt continue.

ALEC's "Private Attorney Retention Sunshine Act," modeled after effective and common sense rules for government contracting in other arenas, provides a sound solution to the problems states have experienced in the wake of the nationwide tobacco litigation. If states choose to continue to pursue this new found avenue of regulation and taxation, they should be required to do so in a manner that is consistent with the principles of good government. The process should be open to the public eye and utilize fair procurement rules. The ABA's new model ethical rule also merits consideration, but it should be viewed as a supplement, not a substitute, for ALEC's carefully crafted legislative solution.

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