

State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?

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Around the nation, a lack of government resources and/or expertise has forced state attorneys general to resort to outsourcing of prosecutorial efforts in order to ensure that the needs of the state and its citizens are adequately represented. Such arrangements have often been challenged on the grounds that they violate either state constitution separation of powers provisions, or the demands the neutrality doctrine places on government officials. As the relevant case law indicates, the neutrality doctrine in particular raises valid concerns about the propriety of contingency fee arrangements; concerns that have yet to be adequately addressed by any of the reforms proposed to date. This Note presents a novel set of best practices for state attorneys general who choose to utilize contingency fee agreements. The best practices in this Note are intended to do what other reform suggestions have failed to achieve. They constitute innovative ways of honoring the principles of the neutrality doctrine through a reimagining of contingency fee arrangements to prioritize government control and authority.

I. INTRODUCTION

The American legal system has traditionally permitted individuals to hire attorneys on a contingency fee basis.¹ The contingency fee arrangement has long been regarded as the means by

* J.D. Candidate 2009, Columbia Law School. The author wishes to thank James Tierney, Tam Ormiston, and members of the 2008 Advanced Seminar on State Attorneys General for their feedback and advice, as well as the staff of the *Columbia Journal of Law and Social Problems* for their editorial assistance.

1. Kenneth A. Ewing, *Quantum Meruit in Ohio: The Search for a Fair Standard in Contingent Fee Contracts*, 18 U. DAYTON L. REV. 109, 109 (1992).

which individuals who lack the economic resources to hire private attorneys may be granted access to the legal system and a legal advocate.² Under such an arrangement, the attorney is not paid unless his client “wins”; if the client does not prevail, the attorney charges no fee.³ If the client wins, the attorney collects a percentage of the amount awarded.⁴

The use of contingency fee arrangements has spread to government, with state attorneys general hiring private counsel on a contingency fee basis to manage and try certain cases on behalf of the state.⁵ State attorneys general justify their use of private attorneys on the grounds that they are able to bring suits on behalf of the citizens of their states that would otherwise be impossible due to a lack of personnel resources, expertise, and money.⁶ Proponents of the system also point out that while some attorneys general employ contingency fee arrangements in a wide array of cases and contexts, most of the attorneys general who use them do so sparingly.⁷

The use of private attorneys on a contingency fee basis by state attorneys general is often associated with the tobacco litigation of the 1990s. Following the Master Settlement Agreement (“MSA”) of 1998, trial attorneys across the nation received \$14 billion in attorney fees under the \$246 billion tobacco settlement.⁸

2. Robert S. Peck & John Vail, *Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. SCH. L. REV. 323, 328 (2006–2007) (“If it were not for contingent fees, indigent victims of tortious accidents would be subject to the unbridled, self-willed partisanship of their tortfeasors.” (quoting Pennsylvania Justice Michael A. Musmanno)).

3. MODEL RULES OF PROF’L CONDUCT R. 1.5 (2007).

4. *Id.*

5. Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. TIMES, July 9, 2007, at 10.

6. *Id.* Critics of the agreements point out that “former New York Attorney General Eliot Spitzer was considered one of the most aggressive and activist state attorney generals. . . . Yet, General Spitzer did not enter into contingency fee agreements with private lawyers as a matter of principles and practice.” Brief of Chamber of Commerce of the United States of America & the American Tort Reform Ass’n as Amici Curiae in Support of Motion for Judgment as a Matter of Law in Light of Plaintiff’s Constitutional Violations at 20–21; *Oklahoma v. Tyson Food, Inc.*, No. 05-cv-00329-GKF-SAJ (N.D. Okla. June 12, 2007) [hereinafter Brief of Amici Curiae]. Similarly, in the multi-state tobacco suits, some attorneys general, such as that of Virginia, opted not to utilize private counsel and instead pursued the litigation with available resources. *Id.*

7. Interview with James Tierney, Dir., Nat’l State Att’y’s Gen. Program at Columbia Law Sch., in New York, N.Y. (Jan. 20, 2008).

8. John O’Brien, *Bush Bans Contingency Fee Arrangements*, LEGAL NEWSLINE, May 17, 2007, <http://legalnewsline.com/news/195296-bush-bans-contingency-fee-arrangements>.

In the years following the MSA, private attorneys have continued to represent government interests through contingency fee contracts.⁹ In Rhode Island, for example, Attorney General Patrick C. Lynch and former Attorney General Sheldon Whitehouse used private attorneys to represent the state in a fight against lead paint manufacturers from 2003–2008.¹⁰ In 2007, Oklahoma Attorney General W.A. Drew Edmondson retained three plaintiffs' attorney firms to take on poultry companies he claimed had polluted the state's waterways with chicken manure.¹¹ In California, several counties have hired private attorneys on a contingency fee basis to file a class action lawsuit based on a public nuisance claim against former lead paint and pigment manufacturers.¹²

The practice is not without opposition. Many contingency fee arrangements are criticized on the basis of the personal and political connections between state attorneys general and the private firms retained to represent the state.¹³ The arrangements are also lamented by some critics for enabling "regulation by legislation."¹⁴ Most common, however, are two particular allegations: 1) that the contingency fee agreements violate state separation of powers doctrines; and 2) that the standard of neutrality required of government attorneys is violated when private attorneys, with their own agendas, strategies, and goals, represent state interests.¹⁵

9. John O'Brien, *Blumenthal Tops Group's List of 10 Worst AGs*, LEGAL NEWSLINE, Jan. 24, 2007, <http://legalnewsline.com/news/189593-blumenthal-tops-groups-list-of-worst-ags>.

10. *See State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008).

11. Rob Luke, *Lawyers Get Finger-Lickin' Ruling in Oklahoma AG's Chicken Suit*, LEGAL NEWSLINE, June 18, 2007, <http://legalnewsline.com/news/196868-lawyers-get-finger-lickin-ruling-in-oklahoma-ags-chicken-suit>.

12. *See Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842 (Ct. App. 2008).

13. *O'Brien*, *supra* note 9.

14. To the Chamber of Commerce, contingency fee arrangements constitute an undesirable system of "regulation through litigation." Brief of Amici Curiae, *supra* note 6, at 22. The organization argues that despite the claims of many state attorneys general during the tobacco litigation that it was a "unique" situation, "states and localities have hired contingency fee lawyers to attack a wide range of manufacturers and service providers." *Id.* Thus, there is a concern that there is no foreseeable end or limitation on such arrangements as "these 'new style' cases give the state executive branch a new revenue source without having to raise taxes." *Id.*

15. In all activities of a prosecutor, "his duties are conditioned by the fact that he 'is the representative not of any [sic] 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

Most reviewing courts have concluded that contingency fee arrangements between state attorneys general and outside counsel are permissible if certain criteria are met.¹⁶ In fact, it seems that explicit contractual language coupled with assurances of continued government control may be enough to satisfy the judiciary.¹⁷ But the fact that state attorneys general are public officials, most often elected by the people to represent the public interest, necessitates a stronger reform effort from each office that utilizes such contracts. The requisite standard of neutrality for state attorneys general demands that each time private attorneys are afforded the opportunity to represent state interests, steps are taken to ensure actual, as opposed to theoretical, government control. Because reviewing courts are generally reluctant to outline particular mechanisms for achieving and maintaining such control, innovation and a desire to “do better” must come from within the state attorneys general offices themselves.¹⁸ Without an effective response to the problems presented by these contingency fee arrangements, the integrity of each state’s justice system is compromised.¹⁹ Because contingency fee agreements that com-

that justice shall be done.” *Clancy v. Superior Court*, 39 Cal. 3d 740, 746 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). The *Clancy* court continued on to explain that such duties are not limited to criminal prosecutors: “[a] government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.” *Clancy*, 39 Cal. 3d at 746 (quoting MODEL CODE OF PROF’L RESPONSIBILITY EC 7-14 (2009)).

16. See generally *Santa Clara*, 74 Cal. Rptr. 3d at 842; *Kinder v. Nixon*, No. WD 56802, 2000 WL 684860 (Mo. Ct. App. May 30, 2000); *State v. Hagerty*, 580 N.W.2d 139 (N.D. 1998); *State v. Lead Indus. Ass’n*, 951 A.2d 428 (R.I. 2008).

17. *Santa Clara*, 74 Cal. Rptr. 3d at 848–49 nn.6–9; *Lead Indus.*, 951 A.2d at 477; *State v. Lead Indus. Ass’n*, No. PB 99-5226, 2005 WL 374459, at *3 (R.I. Super. Ct. Jan. 6, 2005).

18. The National Association of Attorneys General (“NAAG”) has begun to formulate a response to the complicated issues that accompany the use of contingency fee agreements. At the NAAG Chief Deputy Seminar on May 15, 2008, a presentation dedicated to the management of relationships with outside counsel offered advice and tips to offices across the country. Although the presentation touched on issues of control, the majority of the presentation focused on ensuring cost effective representation. NAAG has yet to engage in an in-depth exploration of the intersection of the neutrality doctrine and contingency fee agreements. *Managing Contracts with Outside Counsel*, Address at the NAAG Chief Deputy Seminar (May 15, 2008) (on file with author).

19. “Not only is a government lawyer’s neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. 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.” *Clancy*, 39 Cal. 3d at 746.

port with the doctrine of neutrality are likely to be upheld, a set of best practices designed to ensure that relationships between state attorneys general and outside counsel meet the requisite standard of neutrality is the focus of this Note. In formulating best practices for state attorneys general, the relationship between corporate counsel and outside legal counsel in the private sector is a helpful starting point because of analogous concerns regarding continued control and oversight.

Part II of this Note explores the context of a contingency fee agreement, explaining the factual background and legal arguments surrounding a contingency fee contract entered into by the Oklahoma Attorney General and outside counsel for the purpose of bringing suit against members of the poultry industry. This particular case study illuminates the arguments most commonly made by those on both sides of the contingency fee debate. Part III discusses three cases in which the Supreme Courts of Louisiana and Rhode Island and a California Court of Appeal struck down or questioned the validity of contingency fee arrangements between government entities and outside counsel. Part IV describes three models for improving the current system that have been proposed in the past and explains why they represent an inadequate response to the problems posed by contingency fee arrangements, given the importance of the neutrality doctrine for government officials. Part V presents a novel set of state attorneys general best practices, informed by the analogous relationship between in-house corporate counsel and outside legal providers, which focuses on maintaining the standard of neutrality required of those in public office when entering into a contingency fee agreement.

II. OKLAHOMA SUES THE POULTRY INDUSTRY: TWO DIFFERENT TAKES ON THE CONTINGENCY FEE ARRANGEMENT

In order to better understand the nature of contingency fee agreements between state attorneys general and outside counsel, a detailed examination of the context surrounding one particular arrangement helps bring to light many of the arguments, legal and otherwise, utilized by those on both sides of the contingency fee debate. This particular case study is not included to provide insight into the judiciary's response to contingency fee agree-

ments, as the reviewing court's reasoning is unavailable.²⁰ Rather, it offers the reader unique insight into the reasons a state attorney general might choose to utilize such a fee structure, along with the arguments most commonly made by those who both defend and disparage such arrangements. It is only with a thorough understanding of both a state attorney general's reasoning for entering into a contingency fee relationship and the reasoning of those who support and criticize the agreements that a realistic and responsive set of best practices may be constructed. Part II.A explores the background and reasoning behind the decision of fourth term Oklahoma Attorney General, Drew Edmondson, to pursue a suit on behalf of the state against members of the poultry industry. Part II.B examines the defendants' legal challenge to the Attorney General's use of contingency fee attorneys to represent state interests. Part II.C details the Attorney General's response to the defendants' assertions that the underlying contingency fee arrangement violates both due process and separation of powers.

A. OKLAHOMA'S CLAIM AGAINST THE POULTRY INDUSTRY

On June 13, 2005, Oklahoma Attorney General W. A. Drew Edmondson announced that he was filing suit in United States District Court against members of the poultry industry for polluting Oklahoma waters.²¹ The complaint alleged violations of the Federal Comprehensive Environmental Response Compensation and Liability Acts, state and federal nuisance laws, trespass, and Oklahoma Environmental Quality and Agricultural Codes.²² Specifically, the Attorney General alleged that runoff resulting from improper dumping and storage of poultry waste has polluted Oklahoma streams and lakes.²³ According to Attorney General Edmondson, the amount of phosphorous dumped on the ground every year in the Illinois River watershed is equivalent to the

20. Minute Sheet, *Oklahoma v. Tyson Food, Inc.*, No. 05-cv-329-GKF-SAJ (N.D. Okla. June 15, 2007). Judge Frizzell's decision was not accompanied by a written order so his particular method of reasoning remains unknown.

21. Press Release, Okla. Office of the Att'y Gen., AG Sues Poultry Industry for Polluting Oklahoma Waters (June 13, 2007), <http://www.oag.state.ok.us/oagweb.nsf/srch/7DB11B73010BFF99862572B4006F60FB>.

22. *Id.*

23. *Id.*

waste of 10.7 million people — more than the populations of Arkansas, Kansas and Oklahoma combined.²⁴ The Attorney General felt that the consequences of the pollution had devastating effects on the region.²⁵ His stated goal was to hold the poultry industry accountable for the conditions it had created.²⁶

Edmondson explained that by filing the lawsuit the state is “asking the court to force these companies to stop polluting and repair the damage they have already done” because “clean water is our most important natural resource, not only for public water supply and recreation, but also for the future of agriculture, industry and tourism.”²⁷ He did, however, qualify the goals of the litigation with the acknowledgment that “many hardworking Oklahomans are employed by this industry and . . . a viable industry is important to their future.”²⁸ Accordingly, he assured the citizens of Oklahoma that the poultry companies can conduct their business in compliance with the law and remain viable if they choose to do so.²⁹ Edmondson went on to retain three private law firms to represent the interests of the state in the pending litigation on a contingency fee basis.³⁰

24. *Id.*

25. Edmondson pointed out that the Illinois River watershed provides drinking water to twenty-two public water suppliers in eastern Oklahoma. He also claimed that as a result of the pollution, seventy percent of northeastern Oklahoma’s Lake Tenkiller is “oxygen dead,” which means fish and other life cannot survive the conditions. Another lake in eastern Oklahoma, Lake Francis, can no longer be used for recreational purposes because it is no more than a marsh today. *Id.*; see also Tim Talley, *Oklahoma Attorney General Stresses Water Quality at Conference*, THE MORNING NEWS, Nov. 14, 2006, available at <http://www.nwaonline.net/articles/2006/11/20/news/111506okwater.txt>.

26. Edmondson pointed out that although Tyson Foods, one of the fourteen defendants, spends \$75 million each year on advertising, the poultry industry as a whole gave only \$1.2 million to the Scenic Rivers Commission to conduct restorative work along the Illinois River, a figure Edmondson states is nowhere near the total cost of damage. Press Release, Okla. Office of the Att’y Gen., *supra* note 21.

27. *Id.*

28. *Id.*

29. *Id.*

30. See Luke, *supra* note 11. The contract at issue guarantees at least thirty-three and one third percent of the total value of any monetary damages recovered to outside counsel but allows for a recovery of up to fifty percent. Motion of Tyson Foods, Inc. et al. for Judgment as a Matter of Law in Light of Plaintiff’s Constitutional Violations at 2, Oklahoma. v. Tyson Foods, Inc., No. 05-cv-00329-GKF-SAJ (N.D. Okla. Feb. 28, 2007) [hereinafter Motion of Tyson Foods].

B. A CHALLENGE TO THE USE OF CONTINGENCY FEE COUNSEL

On February 18, 2007, before the case advanced to trial, the defendants filed a motion for judgment as a matter of law, alleging that the Attorney General's use of outside counsel on a contingency fee basis violated federal and state due process law and the separation of powers provision of the Oklahoma Constitution.³¹

First, the defendants alleged that such an agreement was at odds with the requirements of due process and the neutrality required of government officials, because,

the Contract provide[d] a monetary incentive to the Contingency Fee Lawyers to maximize damages at the expense of any equitable remedies or other non-monetary resolution. . . . The Contingency Fee Contract is at war with the public interest and the rules and standards governing how public officials prosecute litigation in the name of the People.³²

The defendants argued that “[i]t is well established that constitutional due process forbids judges . . . from having any financial interest in the outcome of the cases on which they labor,” and argued that this rationale for disqualification should extend to government attorneys as well.³³ They asserted that a government attorney is required to pursue and protect the public interest, which at times may mean refusing to bring a case, dismissing allegations, and seeking settlements or damages which do not maximize the state's monetary gains.³⁴ The defendants also noted that the contract entitles outside counsel to “first priority” in recovering expenses and places them “second in priority” for recovery of attorneys' fees, leaving the state's interests to be fulfilled

31. Motion of Tyson Foods, *supra* note 30.

32. *Id.* at 2–3.

33. *Id.* at 6.

34. *Id.* at 7. A government attorney “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 . . . is not that it shall win a case, but that justice shall be done.” *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

last.³⁵ Finally, they pointed to recent public examination and criticism of such agreements as further evidence of a due process violation.³⁶

An amici curiae brief the Chamber of Commerce filed jointly with the American Tort Reform Association (“ATRA”) focused on similar neutrality concerns.³⁷ The organizations expressed dismay with contingency fee arrangements, arguing that they validate “private attorneys who are clothed in the mantle of state authority, but who are unrestrained by the constitutional checks and ethics obligations on the exercise of that authority.”³⁸ To the Chamber of Commerce, the interests of private attorneys and attorneys for the state are inherently divergent and irreconcilable,³⁹ as contingency fee attorneys are motivated by financial incentives to maximize recovery for their clients, while attorneys general may successfully represent the interests of the state with no monetary gains.⁴⁰

Many justify contingency fee arrangements by pointing out that because the state lacks the requisite resources to file suit, the interests of the people would go unrepresented without such arrangements.⁴¹ The amici curiae brief, however, quoted Eleventh Circuit Judge William H. Pryor in a statement he made when he was Attorney General of Alabama, arguing that,

[g]overnments are wealthy, because they have the power to tax and condemn. Governments also control access to the legal system. The use of contingency fee contracts allows governments to avoid the appropriation process and create the illusion that these lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the Contracts.⁴²

35. Motion of Tyson Foods, *supra* note 30, at 12.

36. *Id.* at 14.

37. Brief of Amici Curiae, *supra* note 6.

38. *Id.* at 1–2.

39. *Id.* at 2.

40. *Id.*

41. *Id.*

42. *Id.* at 4–5.

Thus, the Chamber of Commerce argued that if the lawsuit against the poultry industry is meritorious and worthwhile, the state has the power to raise the requisite funds and bring suit itself without the intervention of private attorneys.⁴³

Second, the defendants alleged that the contract violates Oklahoma's separation of powers doctrine.⁴⁴ By entering into a contingency fee arrangement, they argued, the Attorney General appropriates state resources, a role reserved for the legislature.⁴⁵ Their brief asserted that Edmondson had "deliberately and knowingly entered into the Contingency Fee Contract in direct contravention of the Oklahoma Constitution in order to line the pockets of his favorite private attorneys and campaign contributors."⁴⁶ Citing *Meredith v. Ieyoub*⁴⁷ as support, the defendants argued that "it is irrefutable that any monies the state may recover in this case are state revenues that must be deposited into the state treasury."⁴⁸ Failing to do so, and instead prioritizing the payment of outside counsel, therefore constitutes a violation of the state's system of checks and balances.⁴⁹

C. OKLAHOMA'S ARGUMENT IN SUPPORT OF THE ARRANGEMENT

In its response brief, Oklahoma argued that, because it lacked the personnel and financial resources to bring suit itself, retention of outside counsel on a contingency fee basis was necessary to ensure that the interests of the state were protected.⁵⁰ Oklahoma also emphasized the common law powers of the attorney general and directed the court to an Oklahoma statute granting the attorney general the authority to contract with private attorneys when the attorney general's office lacks the personnel or

43. *Id.* at 5.

44. *Id.* at 16.

45. *Id.* at 18.

46. *Id.*

47. *See infra* Part III.A.

48. Brief of Amici Curiae, *supra* note 6, at 21.

49. *Id.*

50. State of Oklahoma's Response to Motion of Tyson Foods, Inc. et al. at 1, *Oklahoma v. Tyson Food, Inc.*, No. 05-cv-00329-GKF-SAJ (N.D. Okla. Mar. 19, 2007) [hereinafter *State of Oklahoma's Response*].

resources to provide the representation required.⁵¹ Specifically, the Attorney General disputed the allegation that the contract violated Oklahoma's separation of powers doctrine with the assertion that no state money was at issue, rendering a legislative appropriation unnecessary.⁵² The brief characterized the decision to enter into a contingency fee contract as an "executive function, properly within the authority of the Attorney General and aimed at recovering money for the State, not spending it."⁵³ Thus, although Article V, § 55 of the Oklahoma Constitution requires that the legislature appropriate all state resources, the recovery from the case would not be paid into the treasury until the costs and fees were deducted from the state's share of the money.⁵⁴

Addressing the neutrality concern and due process allegation, Oklahoma first posited that the defendants' application of the due process disqualification principle to government attorneys was dubious, noting that the defendants had extended the reach of the principle "to government attorneys with almost no citation."⁵⁵ Nevertheless, Oklahoma continued on to assume the validity of the due process contention, but argued that they were not in violation by pointing to the Tenth Circuit case, *Erikson v. Pawnee County Board of County Commissioners*,⁵⁶ in which the court held that "the participation of a privately retained attorney in a state criminal prosecution does not violate the defendant's right to due

51. The statute explains that agreements entered into pursuant to that authority must contain the basis for or method of calculating the fee, including, "when applicable," the hourly rate of the attorneys. *Id.* at 11. The Attorney General argued that "[b]y requiring the contract to include 'when applicable' the hourly rate for each attorney, the legislature clearly contemplated that under certain circumstances an hourly rate would not be 'applicable' as the basis or method of calculating the fee." *Id.* (emphasis in original). Thus, the state explained, such contingency fee arrangements are expressly sanctioned by the legislature. *Id.* at 10–11; see OKLA. STAT. tit. 74, § 20i(A)(3) (2002) ("An agency or official of the executive branch may obtain legal representation by one or more attorneys . . . [i]f the Attorney General is unable to represent the agency, or official due to a conflict of interest, or the Office of the Attorney General is unable or lacks the personnel or expertise to provide the specific representation required by such agency or official, contracting with a private attorney or attorneys pursuant to this section.").

52. State of Oklahoma's Response, *supra* note 50, at 21.

53. *Id.* at 23.

54. *Id.* at 22. "[T]he recovery in this case cannot be 'paid out of the treasury of this State' until it is first paid into the treasury. That will happen, pursuant to the Contract, after costs and fees are deducted and the state's share of the money is available to the State." *Id.* (emphasis in original).

55. *Id.* at 17.

56. 263 F.3d 1151 (10th Cir. 2001).

process under federal law unless the private attorney effectively controlled critical prosecutorial decisions.”⁵⁷ Therefore, Oklahoma argued, application of the principle articulated in *Erikson* to their case leads to the conclusion that due process is maintained so long as the attorney general participates in the ensuing litigation and *retains control* over critical decisions.⁵⁸ Because Edmondson’s office was an active participant in the litigation and the language of the contract made it abundantly clear that the Attorney General retained complete control over the litigation, Oklahoma asserted that there was no violation.⁵⁹

In June of 2007, Judge Gregory Frizzell ruled against the poultry producers that had challenged the use of contingency fee attorneys, finding a violation of neither the state separation of powers doctrine nor the neutrality standard.⁶⁰ For the most part, reviewing courts have tended to align with Judge Frizzell and uphold such arrangements.⁶¹ Judicial support for the practice,

57. State of Oklahoma’s Response, *supra* note 50, at 13 (emphasis in original omitted); see *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001).

58. State of Oklahoma’s Response, *supra* note 50, at 14 (emphasis added).

59. *Id.* at 14–16.

60. Minute Sheet, *supra* note 20.

61. *Philip Morris v. Glendenning*, 709 A.2d 1230 (Md. 1998), is often touted as the archetypal court decision upholding a contingency fee agreement. There, the defendants in Maryland’s tobacco litigation had challenged a contingency fee contract between private counsel and the Maryland Attorney General for the purpose of representing Maryland’s interests in the tort litigation. *Id.* at 1231. The court’s opinion upheld the contingency fee contract, holding that there was neither a separation of powers violation, nor sufficient neutrality concerns to warrant voiding the contract. *Id.* at 1240–44. Interestingly, the court based its decision solely on the constitutional and statutory powers of the Attorney General; in Maryland, the office of attorney general is not accompanied by common law powers. *Id.* at 1237. As to the defendant’s separation of powers claim, the court agreed with the Attorney General’s conclusion that the situation was extraordinary and deemed his decision to hire contingent fee counsel non-reviewable; “[p]rinciples behind . . . constitutional separation of powers . . . place limits on a court’s power to review or interfere with the conclusions, acts or decisions of a coordinate branch of government made within its own sphere of authority.” *Id.* at 1239 (quoting *Hamilton v. Verdow*, 414 A.2d 914, 921 (Md. 1980)). In addressing the neutrality issue, the court acknowledged the power of the doctrine and explained that the “[i]nfluences which could affect the mind of one in a position of public trust are so subtle and difficult to appreciate, that in the end our decision must be guided by the general principle that no public officer who has a pecuniary interest, direct or indirect, in the outcome of the case should participate in that matter.” *Glendenning*, 709 A.2d at 1242 (quoting *Montgomery County Bd. of Appeals v. Walker*, 180 A.2d 865, 868 (Md. 1962)). But the court went on to point out that whether or not a disqualifying interest actually exists is a factual inquiry, and eventually concluded that there was no violation based on the facts before the court. *Id.* at 1243–44. For other examples of courts rejecting challenges to contingency fee agreements, see *Kinder v. Nixon*, No. WD

however, is not unanimous, and even reviewing courts that ultimately decide to permit contingency fee agreements have expressed a certain level of discomfort with them.⁶² Three cases in which the validity of contingency fee arrangements has been questioned are explored in Part III below.

III. THE JUDICIARY'S STRUGGLE WITH CONTINGENCY FEE ARRANGEMENTS

Contingency fee arrangements between state attorneys general and outside counsel are unlikely to disappear any time soon and challenges to their legitimacy will likely continue to surface. Understanding the nature of the jurisprudence that both voids and validates such arrangements will prove to be of particular importance to state attorneys general as they decide whether and how to implement best practices in individual offices. In order to more accurately assess the implications of both the separation of powers doctrine and the neutrality standard for contingency fee agreements, a detailed examination of the case law in three states is helpful. Part III.A explores the use of a contingency fee arrangement in Louisiana and the Supreme Court of Louisiana's holding that the contract constituted a violation of the state separation of powers doctrine. Part III.B tracks a challenge to the use of contingency fees in California and a California Court of Appeal's conclusion that the fee structures are permissible despite neutrality concerns. Part III.C follows five years of challenges to a contingency fee agreement in Rhode Island and explores the reasoning behind the Supreme Court of Rhode Island's ultimate decision to permit such a relationship between the attorney general and outside counsel.

56802, 2000 WL 684860 (Mo. App. W.D. 2000) and *State v. Hagerty*, 580 N.W.2d 139 (N.D. 1998).

62. *See generally* *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008); *Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842 (Ct. App. 2008); *Kinder v. Nixon*, No. WD 56802, 2000 WL 684860 (Mo. App. May 30, 2000); *State v. Hagerty*, 580 N.W. 2d 139 (N.D. 1998) *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997).

A. LOUISIANA

A contingency fee arrangement between the Louisiana Attorney General and private law firms for the purpose of investigating and prosecuting environmental damage claims was struck down in 1997 by the Supreme Court of Louisiana in light of the state court's concern for the integrity of the state's separation of powers doctrine.⁶³ The fee contract was between the Louisiana Attorney General, Richard P. Ieyoub, and two private law firms.⁶⁴ It designated the private attorneys as Special Assistant Attorneys General, and specified that they were to investigate and prosecute environmental damage claims in Louisiana on a contingency fee basis.⁶⁵ The fee arrangement stipulated that the private firms would be awarded twenty-five percent of the gross recovery, subject to a cap of \$10 million per claim (total claims were not to exceed 1,000), in addition to reimbursement of all "Qualifying Expenses."⁶⁶ The Louisiana Independent Oil and Gas Association ("LIOGA") brought suit seeking a declaration that the agreement was invalid along with an injunction preventing its implementation and enforcement.⁶⁷

The Louisiana Supreme Court began its opinion with a reference to the state's separation of powers doctrine, located in Article II, § 2 of the Louisiana Constitution — "[e]xcept as otherwise provided by this constitution, no one of these branches, nor any person holding office on one of them, shall exercise power belonging to the others."⁶⁸ In light of the separation of powers doctrine and the fundamental understanding that all matters pertaining to state funds are the domain of the state legislature, the court rejected the Attorney General's argument that in the absence of a law prohibiting the attorney general from entering into such contingency fee contracts, the arrangements are permissible. Instead, the court emphasized that "under the separation of powers

63. *Meredith*, 700 So. 2d at 482 (La. 1997). It should be acknowledged that, because each state will have its own separation of powers doctrine in its state constitution, it may be hard to generalize across state lines. This is particularly true with regard to Louisiana since it is a civil law jurisdiction. 15 Am. Jur. 2d *Common Law* § 10 (2008).

64. *Meredith*, 700 So. 2d at 479.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 481.

doctrine, unless the attorney general has been expressly granted the power in the constitution to pay outside counsel contingency fees from state funds, or the legislature has enacted such a statute, then he has no such power.”⁶⁹ The court found the state constitution lacked the requisite grant of power, disputing the Attorney General’s claim that his power to institute suit on behalf of the state implies the power to enter into contingency fee arrangements.⁷⁰

The court then noted that the legislature provided the attorney general with an express grant of power to enter into contingency fee agreements with outside counsel in particular circumstances, e.g., labor and worker’s compensation cases and public land actions.⁷¹ The court, however, not only found that the legislature had failed to provide the attorney general with a similar statutory grant of power for environmental damage cases, but that the legislature had constructed a statutory provision indicating its intent to the contrary.⁷² La.R.S. § 30:2205 provides that,

[a]ll sums recovered through judgments, settlements, assessments of civil or criminal penalties, funds recovered by suit or settlement from potentially responsible parties for active or abandoned site remediation or cleanup . . . shall be paid into the statute treasury and shall be credited to the Bond Security and Redemption Fund.⁷³

To the court, the statute was a “clear and unambiguous” mandate that all funds recovered from cases pertaining to environmental legislation were to be paid into the state treasury, leaving no room for the notion that the attorney general was permitted to first deduct the fees of contingency fee attorneys from judgments or settlements.⁷⁴ Thus, the court held that the contingency fee contract was invalid under Article II, § 2 of the state’s constitution, unless or until the state legislature chooses to enact a statute expressly authorizing such an arrangement.⁷⁵

69. *Id.*

70. *Id.* at 482.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 483.

The Louisiana Court of Appeals later reinforced the holding. In *Ieyoub v. W.R. Grace & Co.-Conn.*, the court struck down a contingency fee arrangement between Attorney General Ieyoub and a private law firm for the purpose of pursuing civil claims on behalf of the state against asbestos manufacturers and their insurers.⁷⁶ The decision was based on the separation of powers concern articulated in *Meredith*.⁷⁷ The court concluded that neither the Louisiana constitution nor the legislature expressly authorized the attorney general to enter into such a contract.⁷⁸

B. CALIFORNIA

In 2007, the Superior Court of California considered whether a county attorney may hire a contingency fee attorney to represent the county in litigation.⁷⁹ Although the case involved representation of a county rather than the state, the relationship and underlying case law is instructive — a private attorney was retained on a contingency fee basis to do work intended for government attorneys, that of representing the interests of the people.⁸⁰ Rather than rest his decision on the separation of powers doctrine, Judge Komar relied on *Clancy v. Superior Court*, a 1985 decision in which the Supreme Court of California articulated a standard of neutrality for government attorneys.⁸¹ In *Clancy*, a private attorney was hired by the city of Corona to bring public abatement actions on behalf of the city on a contingency fee basis.⁸² The *Clancy* court pointed out the private attorney's economic interest in the outcome of the case⁸³ and concluded that the contract's specific designation of the private attorney as an independent con-

76. *Ieyoub ex rel. State v. W.R. Grace & Co.-Conn.*, 708 So. 2d 1227 (La. Ct. App. 1998).

77. *Id.* at 1230.

78. *Id.*

79. *Santa Clara v. Atl. Richfield Co.*, No. 1-00-cv-788657, slip op. at 2 (Cal. Super. Ct. Apr. 4, 2007), available at http://pdfserver.amlaw.com/ca/april_4_ruling.pdf.

80. *Id.*

81. *Id.*

82. *People ex rel Clancy v. Superior Court*, 39 Cal. 3d 740, 745 (1985).

83. *Id.* at 746 (“When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function.”).

tractor was insufficient to overcome the court's concern regarding the requisite standard of neutrality.⁸⁴

Judge Komar ultimately concluded that the county had failed to persuasively distinguish *Clancy*.⁸⁵ Although the county insisted that government attorneys retained and continued to exercise authority and control over the case, Judge Komar explained that “[o]versight by the government attorneys does not eliminate the need for or requirement that outside counsel adhere to the standard of neutrality.”⁸⁶ He also articulated his concern that it would be difficult to determine:

a) how much control the government attorneys must exercise in order for a contingent fee arrangement with outside counsel be permissible, b) what types of decisions the government attorneys must retain control over, e.g., settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel.⁸⁷

Given these difficulties, Judge Komar held that outside counsel must be precluded from operating under a contingency fee arrangement on behalf of the government.⁸⁸ He emphasized that the government's claim of insufficient resources was an irrelevant factor in determining the validity of the arrangement.⁸⁹

Judge Komar's ruling was overturned in 2008, when California's Sixth District Court of Appeal held that *Clancy* does not bar the use of private counsel under a contingency fee arrangement if the government retains control over all decision-making.⁹⁰ The

84. *Id.* at 747 (“[A] lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official.”).

85. *Santa Clara*, No. 1-00-cv-788657, at 3.

86. *Id.*

87. *Id.*

88. *Id.* at 4.

89. *Id.* “The standard of neutrality should apply, however, regardless of the wealth of either the government lawyer or defendant.” *Id.*

90. *Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842, 853 (Ct. App. 2008), *petition for review granted*, 188 P.3d 579 (Cal. July 23, 2008). At the time of publication, the appeal was pending before the Supreme Court of California.

Court of Appeal distinguished *Clancy*, pointing out that the private counsel at issue did not have decision-making authority or the power to control the litigation.⁹¹

The court announced an exacting standard, explaining that “where private counsel are merely *assisting* government attorneys in the litigation . . . and are explicitly serving in a *subordinate* role, in which private counsel *lack any decision-making authority or control*, private counsel are not *themselves* acting ‘in the name of government.’”⁹² Thus, when private counsel do not supplant the role of the government attorneys, their interest in maximizing contingent fees cannot upset the balance of interests that government attorneys are bound to uphold and protect.⁹³

Applying this standard, the court analyzed the facts surrounding the contingency fee arrangements and concluded that the requisite “limited, subordinate” role of private counsel was evidenced in the fee agreements themselves.⁹⁴ The court noted that in five of the seven agreements at issue, the language explicitly provided that the government attorneys “retain final authority over all aspects of the [l]itigation,” and that the private counsel had submitted declarations supporting the notion that the public entities’ in-house counsel retained “complete control.”⁹⁵ While the two remaining fee agreements initially seemed to grant “absolute discretion” to private counsel, the court found that their shortcomings had been rectified by the two cities in question.⁹⁶ Concluding that the language of the fee agreements and accompanying assurances from private counsel adequately established that the private counsel served in a sufficiently subordinate role, the Court of Appeal set aside Judge Komar’s order and upheld the fee arrangements.⁹⁷

91. *Id.* at 853.

92. *Id.* at 850 (emphasis in original).

93. *Id.*

94. *Id.* at 848.

95. *Id.* at 849–50 (internal quotation marks omitted).

96. *Id.* at 849. Oakland asserted that it retained “complete control” over the litigation, and assured the court that it was revising its fee agreement to so reflect. *Id.* at 849 n.8. The private counsel retained by the city of Solano disavowed the language of the fee agreement and asserted that the government “maintained and continues to maintain complete control over all aspects of the litigation.” *Id.* at 849 n.7.

97. *Id.* at 853.

C. RHODE ISLAND

Concern for maintaining the integrity of the neutrality standard also surfaced when a similar contingency fee arrangement was challenged in Rhode Island. Because Rhode Island, unlike Louisiana and California, vests the office of the attorney general with common law powers (as do the clear majority of states),⁹⁸ the Rhode Island Supreme Court's opinion is arguably the most influential precedent available and is likely to have an impact that decisions focusing more on individual state rules and statutes are unable to have.

The defendants in *State v. Lead Industry Association* argued that the decision of former Attorney General Sheldon Whitehouse to hire private attorneys to represent the state in litigation against lead paint manufacturers on a contingency fee basis violated public policy.⁹⁹ The Attorney General had hired outside counsel because the state lacked adequate resources to finance a demanding suit to confront its perceived public health crisis.¹⁰⁰ The original agreement gave private counsel sixteen and two-thirds percent of any monies received from the litigation.¹⁰¹ The paint manufacturers directed the court's attention to the Retainer Agreement, which they claimed had delegated "*complete control*" of the litigation to contingency fee counsel, effectively rendering the attorney general powerless over prosecution of the instant action.¹⁰² The court readily concluded that the Attorney General had, through the language of the Retainer Agreement, ceded all of the powers of his office to private attorneys.¹⁰³ Rather than invalidate the contract, however, the court gave the Attor-

98. William C. Haflett, Jr., *Tice v. Department of Transportation: A Declining Role for the Attorney General?*, 63 N.C. L. REV. 1051, 1053 (1985) ("The specific powers and duties vested in the office [of the attorney general] vary greatly among the states. Although some states restrict the attorney general's common-law powers by express statutory or constitutional language, the large majority of states have chosen to recognize the existence of these powers.").

99. *State v. Lead Indus. Ass'n*, No. PB 99-5226, 2003 WL 22048756, at *2 (R.I. Super. Aug. 29, 2003).

100. *State v. Lead Indus. Ass'n*, 898 A.2d 1234, 1235 (R.I. 2006).

101. *Id.*

102. *Lead Indus.*, 2003 WL 22048756, at *1 (emphasis in original).

103. *Id.* at *2.

ney General the opportunity to amend the contract to eliminate the problem.¹⁰⁴

Approximately one and a half years later, in January of 2005, the parties returned to the Superior Court to again address the validity of the fee arrangement.¹⁰⁵ The court acknowledged that the “requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process.”¹⁰⁶ The court noted, however, that while the United States Supreme Court has acknowledged the potential for a conflict of interest when the government is represented by counsel who holds a financial interest in the outcome of the litigation, it has also refrained from establishing a bright line rule on the issue.¹⁰⁷ Ultimately, the Rhode Island court denied the paint manufacturers their motion for a stay.¹⁰⁸

In June of 2006, the Supreme Court of Rhode Island granted certiorari to review the issue once more.¹⁰⁹ The court noted that the original Retainer Agreement had been edited in response to the Superior Court’s 2003 ruling to include a provision stipulating that the attorney general would at all times retain “full control” of the litigation,¹¹⁰ but ultimately ruled that the issue was non-justiciable under the constitutional rule of strict necessity.¹¹¹ The court stated that while the defendant’s argument that the arrangement violated both Fourteenth Amendment Due Process rights and Rhode Island’s separation of powers doctrine “in-

104. *Id.* at *3.

105. *State v. Lead Indus. Ass’n*, No. PB 99-5226, 2005 WL 374459 (R.I. Super. Ct. Jan. 6, 2005).

106. *Id.* at *2 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 240 (1980)).

107. *Lead Indus.*, 2005 WL 374459, at *2.

108. *Id.* at *3. In reaching its decision, the court took note of both *Philip Morris v. Glendening*, 709 A.2d 1230 (Md. 1998) and *Clancy v. Superior Court*, 39 Cal. 3d 740 (1985).

109. *State v. Lead Indus. Ass’n*, 898 A.2d 1234, 1237 (R.I. 2006).

110. *Id.*

111. *Id.* at 1239. In articulating the rule of strict necessity, the Supreme Court of the United States has explained, “[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.” *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944).

clude[d] novel questions of constitutional law,” it would postpone review because immediate review was not unavoidable.¹¹²

The long and winding road of the Rhode Island contingency fee debate came to an end in July of 2008, when the Rhode Island Supreme Court upheld the general validity of contingency fee agreements between the attorney general and outside counsel.¹¹³ The lengthy and well-reasoned opinion articulated clear standards for contingency fee contracts and a mechanism for review.¹¹⁴ Interestingly, the court did not need to reach the issue of contingency fee arrangements because it held that a public nuisance claim was not an appropriate cause of action for the plaintiffs, ending the underlying lead paint litigation.¹¹⁵ Nevertheless, the court issued an opinion on the issue of first impression, noting that the particular subject is “one of extreme public importance”¹¹⁶ that is “capable of repetition, yet evades review.”¹¹⁷

The court’s analysis emphasized the special nature of the Office of the Attorney General in Rhode Island, which is vested with all of the powers inherent at common law.¹¹⁸ Accordingly, the ancient and powerful office is instilled with broad discretion and duties beyond those of private attorneys: the attorney general has a “special and enduring duty to ‘seek justice,’” a duty that entails more than serving as an advocate for the state.¹¹⁹ It is the duty of the attorney general to ensure “*that justice shall be done.*”¹²⁰

In light of the broad discretion granted to the attorney general, and the fact that the duties of and standards for private attorneys are different than those of government attorneys, the court explained that in order for a contingency fee to be valid, the outside counsel must serve a subordinate role: “it is vital that the Office of the Attorney General have absolute control over the course of any litigation originating in that office.”¹²¹ Moreover, in

112. *Lead Indus.*, 898 A.2d at 1239.

113. *State v. Lead Indus. Ass’n*, 951 A.2d 428 (R.I. 2008).

114. *Id.* at 476–77.

115. *Id.* at 468–69.

116. *Id.* at 470.

117. *Id.* at 470 (quoting *State v. Cosores*, 891 A.2d 893, 894 (R.I. 2006)).

118. *Lead Indus.*, 951 A.2d at 470–71.

119. *Id.* at 471.

120. *Id.* at 472 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) (emphasis in original).

121. *Lead Indus.*, 951 A.2d at 476. The court’s opinion referenced and adopted the holding from *Philip Morris Inc. v. Glendening*, 709 A.2d 1230 (Md. 1998) that where a

addition to having control over the litigation, “he or she must *appear* to the citizenry of Rhode Island and to the world at large to be exercising such control.”¹²²

The court set forth three particular limitations that should be expressly included in any contingency fee agreement between the attorney general and private counsel: (1) that the attorney general retain complete control over the course and conduct of the case; (2) that the attorney general retain a veto power over any decisions made by outside counsel; and (3) that a senior member of the attorney general’s staff be personally involved in all stages of litigation.¹²³ In offering these “exacting limitations,” the court took care to note that the limitations are not exhaustive, and that the inclusion of such precautions would not necessarily guarantee that a contingent fee contract will survive judicial review.¹²⁴ Ultimately, however, the court ended five years of litigation on the issue with its broad holding that the,

Attorney General is not precluded from engaging private counsel pursuant to a contingent fee agreement in order to assist in certain civil litigation, so long as the Office of the Attorney General retains *absolute and total control over all critical decision-making* in any case in which such agreements have been entered into.¹²⁵

Meredith, Santa Clara, and the Rhode Island litigation illustrate that contingency fee relationships between state attorneys general and private attorneys may be accompanied by vexing legal and ethical implications. A desire to avoid potential violations of state separation of powers doctrines and the possible degradation of neutrality standards for government attorneys has resulted in both declarations that such arrangements are invalid and a sense that even those fee arrangements that are upheld must be strictly monitored. In an effort to make contingency fee arrangements more palatable, three organizations have formu-

contingency fee arrangement is involved, the case-management authority of the Attorney General must be “final, sole and unreviewable.” *Lead Indus.*, 951 A.2d at 476; *see supra* note 61.

122. *Lead Indus.*, 951 A.2d at 477 (emphasis in original).

123. *Id.*

124. *Id.* at 471 n.52.

125. *Id.* at 475 (emphasis in original).

lated suggestions for systemic reform. These proposals, along with their shortcomings, are discussed in Part IV below.

IV. PROPOSED REFORMS TO THE CONTINGENCY FEE SYSTEM

Three formal means of reforming the current relationship between state attorneys general and private counsel have been proposed by organizations who agree that the current system is broken.¹²⁶ These proposed reforms, however, are an inadequate response to the complex standard of neutrality government attorneys are expected to meet. Upon examination, it becomes clear that a promising best practices proposal must be more responsive to the issues raised by the neutrality doctrine. Part IV.A surveys the methods and priorities of the previously proposed reforms. Part IV.B examines why the three reform proposals are an insufficient response to the problems posed by the use of contingency fee arrangements and explains why this Note centers reform on the concerns raised by the neutrality doctrine.

A. PREVIOUSLY PROPOSED REFORMS

The ATRA, a national organization dedicated exclusively to tort and liability reform, has formulated a “transparency code.”¹²⁷ This proposal emphasizes transparency throughout the contracting process and ensuing relationship, outlining five principles for state attorneys general. The first is disclosure: the idea that contracts and their details should be posted on the Internet for public inspection.¹²⁸ Second is value: “[u]nless an extraordinary situation requires assistance from a specific legal expert . . . every

126. See generally Press Release, Am. Tort Reform Assoc., ATRA Proposes ‘Transparency Code’ for State AGs: As Contracting with Private Sector Attorneys Increases, Greater Public Accountability is Needed (Sept. 17, 2007), <http://www.atra.org/newsroom/releases.php?id=8168>; Brooke Jones Bacak, *The Case for Regulation of Private Attorney Retention by the State of Alabama*, 29 J. LEGAL PROF. 179, 188–89 (2004–05); U.S. CHAMBER INST. FOR LEGAL REFORM, STATE ATTORNEY GENERAL CODE OF CONDUCT: RECOMMENDED BEST PRACTICES FOR INITIATING AND CONDUCTING INVESTIGATIONS AND LITIGATION (2007), <http://www.instituteforlegalreform.com/images/stories/documents/pdf/AGCode.pdf>.

127. The code starts with an acknowledgement that “litigation can be sufficiently complex, time consuming and expensive that at certain times, and on certain occasions, it may be necessary for state attorneys general to retain the services of outside legal counsel.” Press Release, *supra* note 126.

128. *Id.*

effort should be made to competitively bid contracts for outside counsel.”¹²⁹ Third, the ATRA calls for oversight: contingency fee contracts should be subject to review by the legislature.¹³⁰ Fourth is a call for reporting: the ATRA would require each private attorney retained by an attorney general to “disclose detailed information on the hours worked, services performed, and fees received from the state, as long as this reporting does not undermine the attorney-client privilege.”¹³¹ Fifth and finally, the ATRA calls for accountability with regard to recovered funds.¹³²

The American Legislative Exchange Council (“ALEC”) has proposed a second means of reform embodied in legislation known as the Private Attorney Retention Sunshine Act.¹³³ The Sunshine legislation requires an open and competitive bidding process prior to the awarding of any state contract for legal services.¹³⁴ If a contract is issued in an amount over \$1 million, the Act calls for at least one legislative public hearing on the contract.¹³⁵ It also requires documentation of all attorneys’ hours, expenses, and fees, while capping the hourly rate of outside counsel at \$1,000.¹³⁶ To date, the legislation has been adopted in seven states: Colorado, Connecticut, Kansas, Minnesota, North Dakota, Texas, and Virginia.¹³⁷

Third, the Institute for Legal Reform (“ILR”), an affiliate of the United States Chamber of Commerce, has joined the call for reform with its own “best practices” recommendation for state attorneys general.¹³⁸ The organization suggests that “taken together, the [best practices] constitute a guide to the conduct of

129. *Id.*

130. *Id.*

131. *Id.*

132. Specifically, the organization suggests that all recovered money in excess of \$250,000 should be deposited in the state treasury for appropriation by the legislature, and an attorney general should never be permitted to enter into a settlement agreement which allows the attorney general to disseminate funds at its discretion. *Id.*

133. Bacak, *supra* note 126, at 188–89.

134. *Id.*

135. *Id.*

136. *Id.*

137. See NAT’L ASSOC. OF MUT. INS. COS., ATTORNEY RETENTION (SUNSHINE ACT) REFORM, <http://www.namic.org/reports/tortReform/AttorneyRetention.asp> (last visited Apr. 1, 2009).

138. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 126. The ILR designed its suggested code of conduct from surveys distributed to state attorneys general to which there was a twenty-eight percent participation rate. *Id.*

attorney general investigations and litigation that will enhance transparency, consistency, predictability and ultimately, fairness.”¹³⁹

First, the ILR advocates for written retention agreements and public disclosure of such agreements on the Internet.¹⁴⁰ Second, the ILR suggests banning contingency fee-based agreements altogether in situations involving the exercise of the state’s sovereign police power.¹⁴¹ Instead, contingency fee agreements should be used by the attorney general only to recover losses by the state in its proprietary capacity, such as debt collection.¹⁴² Third, an open and competitive bidding process should be used for any contract for legal services exceeding \$1 million or any contract in which at least 1,000 hours of attorney time is anticipated.¹⁴³ Fourth, the ILR emphasizes limitations and reporting requirements. In instances where a contingency fee arrangement is appropriate, compensation for outside counsel should be capped at \$1,000 an hour.¹⁴⁴ Further, outside counsel should maintain a thorough record of hours worked, expenses incurred, the total fee, a breakdown of the fee, and all other relevant information.¹⁴⁵ Finally, the ILR maintains that attorneys general must “retain ultimate control and substantive decision-making authority in any matter in which private counsel is retained.”¹⁴⁶

B. THE PREEMINENCE OF THE NEUTRALITY DOCTRINE DEMANDS A SHIFT IN REFORM EFFORTS

A synthesis of the case law and underlying justifications for, and criticism of, contingency fee arrangements is difficult because a legal analysis begins with state constitutions and statutes. As

139. *Id.* at 1. The ILR starts from the premise that a general code of conduct is necessary because state attorneys general are in the unique position of having to balance “the public’s right to know of law enforcement matters, a defendant’s right not to suffer undue prejudice, and the government’s obligation to administer justice.” *Id.*

140. *Id.* at 7.

141. *Id.*

142. *Id.*

143. *Id.* at 8.

144. *Id.*

145. *Id.*

146. *Id.* This requires attorneys general to determine when and whether to file suit, when and whether to abandon a claim, what legal theories to rely on, and what remedies to pursue. *Id.*

each of the fifty states has its own unique constitution and statutory scheme, the analysis that emerges in each state will have its own particular nuances and concerns. The case law, however, indicates that the constitutional doctrine of separation of powers and a standard of neutrality grounded in due process concerns are the two likely means by which an attorney general's use of contingency fee attorneys may be challenged.¹⁴⁷

The value of contingency fee arrangements between state attorneys general and outside counsel cannot be denied, and is highlighted by the Oklahoma case against members of the poultry industry.¹⁴⁸ Without the fee arrangement, the unprecedented pollution of Oklahoma waters would likely continue unabated, and the interests and health of Oklahomans would be left unprotected. Nevertheless, a re-evaluation of the contingency fee process is necessary in light of the legal implications of the arrangements. Because the neutrality standard is likely to prove a more formidable obstacle for state attorneys general than the separation of powers doctrine, its consideration should be at the center of any systemic reforms. Although the Supreme Court of Louisiana found the separation of powers objection persuasive in *Meredith*,¹⁴⁹ there are inherent weaknesses in the argument.

First, numerous courts have heard challenges to contingency fee arrangements based on the separation of powers doctrine, but the Supreme Court of Louisiana is the sole court that found it persuasive enough to overturn a contract.¹⁵⁰ The doctrine has failed to gain any significant traction. Although courts have noted the strength of the argument they have found it ultimately insufficient to warrant the invalidation of an agreement.¹⁵¹

147. See generally *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008); *Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842 (Ct. App. 2008); *Kinder v. Nixon*, No. WD 56802, 2000 WL 684860 (Mo. App. May 30, 2000); *State v. Hagerty*, 580 N.W. 2d 139 (N.D. 1998); *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997).

148. See *supra* Part II.

149. See *supra* Part III.A.

150. Dorf on Law, <http://michaeldorf.org/2007/07/contingent-fees-do-not-violate.html> (July 10, 2007, 09:35 EST).

151. When faced with an argument based on the separation of powers doctrine in an effort to strike down a contingency fee arrangement, the Supreme Court of North Dakota chose to emphasize the history of the attorney general's office and his inherent common law powers to conclude that the attorney general's powers are quite broad. *Hagerty*, 580 N.W. 2d at 139. It explained, "[n]ot every aspect of the powers of a constitutional officer like the Attorney General may be conveniently spelled out by statute. . . . Public officers have implied and incidental powers in addition to their explicit statutory powers." *Id.* at

Second, the separation of powers argument relies on the doctrine as embodied in state constitutions, an arguably less formidable obstacle than the federal principle.¹⁵² Of the United States Constitution's "three most distinctive features — federalism, judicial protection of individual rights and separation of powers — only the last has been held inapplicable to the states."¹⁵³ Although an individual state is, of course, free to choose a governmental structure which incorporates separation of powers, the United States Supreme Court has concluded that the principle does not necessarily apply to the states.¹⁵⁴ Thus, while the separation of powers doctrine is certainly valid within a state, its implications may be weaker than at the federal level.

Third, as Professor Michael Dorf has pointed out, the fact that contingency fee arrangements vest executive power in private parties is a weak objection.¹⁵⁵ Professor Dorf explains that the practice is anything but a novel phenomenon: in a tradition that pre-dates the Founders, private parties known as "relators" have long been able to bring *qui tam* actions on behalf of the government, and the practice continues today.¹⁵⁶ Further, Dorf explains that "private attorney general" actions in which private parties sue in their own name to enforce public obligations are exceeding-

147. Similarly, the Missouri Court of Appeals found that a contract between the attorney general and a private attorney for the purposes of representing the state in tobacco litigation on a contingency fee basis did not violate the separation of powers doctrine of the state constitution. *Kinder*, 2000 WL 684860. The opinion emphasized the plenary nature of the attorney general's powers; "the office of Attorney General is clothed, in addition to the duties expressly defined by statute, with all the powers pertaining thereto under the common law." *Id.* at *10. Further, as illustrated by *Glendening*, *supra* note 61, even in a state where attorneys general lack common law powers, a broad interpretation of constitutional and statutory grants of power may be sufficient to overcome a separation of powers challenge.

152. Michael Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51 (1998).

153. *Id.* at 51.

154. *Id.* at 52.

155. Dorf on Law, *supra* note 150.

156. *Id.*; see, e.g., Kashmiri Makwana, *Simon Says — False Claims Act and the Reliance Defense*, 10 J. HEALTH CARE COMPLIANCE 47 (2008) (explaining that *qui tam* relators have used the False Claims Act extensively against providers and suppliers of health care services and items); Kara Nicole Schmidt, Note, *Privatizing Environmental Enforcement: The Bounty Incentives of the False Claims Act*, 9 GEO. INT'L ENVTL. L. REV. 663, 663-64 (1997) (in examining the use of *qui tam* actions in the enforcement of environmental laws, noting that "modern day 'bounty-hunters' (known as *qui tam* relators) have found that [the False Claims Act] can be used to combat fraud in healthcare and food stamp programs, and to prosecute false certification as a minority business enterprise.").

ly common in contemporary society and sanctioned by law.¹⁵⁷ For Dorf, “[t]here is no constitutional difference between, on the one hand, *qui tam* and private attorney general suits, and on the other hand, private attorney contingent fee cases, at least so far as derogations from executive power are concerned.”¹⁵⁸

Fourth, the separation of powers argument allows a reviewing court significant leeway regarding constitutional and statutory interpretation. As discussed above,¹⁵⁹ in *Meredith*, the Supreme Court of Louisiana reviewed a state statute that stated “[a]ll sums recovered through judgments, settlements, assessment of civil or criminal penalties [and] funds recovered by suit or settlement . . . shall be paid into the state treasury.”¹⁶⁰ The *Meredith* court interpreted the provision to require any monetary recovery from a state environmental suit to be deposited into the state treasury rather than first used to pay outside counsel on a contingency fee basis.¹⁶¹ To the majority, it was “clear and unambiguous.”¹⁶² The “clear and unambiguous” nature of the provision, however, was openly questioned by the dissenting opinion in *Meredith*, in which Chief Justice Calogero argued for a broad understanding of the attorney general’s powers and a different interpretation of the statute at issue.¹⁶³ One year later, Maryland’s highest court tracked Justice Calogero’s reading of the statute and method of interpretation, when it decided to uphold a contingency fee arrangement against a separation of powers challenge.¹⁶⁴ Thus, it seems that the exercise in constitutional and statutory interpretation demanded by a separation of powers challenge leaves each particular court, and even judge, free to apply their own method of interpretation, along with their respective understanding of state attorneys general power. In this sense, a challenge to contingency fee arrangements based on the

157. Dorf on Law, *supra* note 150.

158. *Id.*

159. *See supra* Part III.A.

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

161. *Id.* at 482; *see* LA. REV. STAT. ANN. § 30:2205 (2009).

162. *Meredith*, 700 So. 2d at 482.

163. *Id.* at 485. Judge Calogero felt that “a reasonable interpretation of the sum ‘recovered’ by the client . . . is the amount of the judgment or settlement less the contingency fee.” *Id.*

164. *See Philip Morris, Inc. v. Glendening*, 709 A.2d 1230 (Md. 1998); *see also supra* note 61.

separation of powers doctrine would be dependent on the particular composition of the reviewing court rather than a formal legal principle.

An emphasis on the neutrality doctrine in formulating best practices is not necessary simply because of the inherent weaknesses in the separation of powers criticism. The neutrality principle, grounded in due process concerns, is a formidable obstacle to contingency fee arrangements in itself. Defenders of the agreements have worked to assuage neutrality concerns by promising control and authority over outside counsel. Rather than attempt to precisely measure the nuanced relationship between state attorneys general and private counsel, courts have relied on an examination of the contractual language behind the agreements.¹⁶⁵ The judiciary likely places such emphasis on the language of the agreements because a precise determination of whether and to what extent the attorney general is exercising oversight is likely to be complicated. As pointed out by Judge Komar in *Santa Clara*, it is extremely difficult to compare from the bench the decision-making authority of outside counsel to the authority retained by the attorney general.¹⁶⁶ Thus, attorneys general would be well advised to carefully enter into contracts that make it explicitly clear that the presiding attorney general retains complete control over the litigation at issue. But the mere inclusion of particular words in a retainer agreement is a questionable check on the influence and power of outside counsel. Although the courts of Rhode Island and California have accepted altered language as sufficient proof of a changed relationship,¹⁶⁷ the notion seems highly suspect.

It is easy for the requisite contractual language stating that the attorney general retains control and authority over the litigation to slide into mere abstractions. When Attorney General Edmondson filed suit against members of the poultry industry in Oklahoma, he noted the importance of the industry to the state's

165. See, e.g., *Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842, 853 (Ct. App. 2008), *supra* Part III.B

166. *Santa Clara v. Atl. Richfield Co.*, No. 1-00-cv-788657, slip op. at 2 (Cal. Super. Ct. Apr. 4, 2007), available at http://pdfserver.amlaw.com/ca/april_4_ruling.pdf; see *supra* Part III.B.

167. See *Santa Clara*, 74 Cal. Rptr. 3d at 849; *State v. Lead Indus. Ass'n, Inc.*, 898 A.2d 1234, 1237 (R.I. 2006).

economy and job market and assured the citizens of Oklahoma that he would support a strong, formidable, and compliant poultry industry.¹⁶⁸ Although Judge Frizzell decided otherwise,¹⁶⁹ the clash between this promise and the reality that contingency fee attorneys are motivated by financial incentives rather than intangibles, is not sufficiently overcome by Oklahoma's assurances that Edmondson "actively participates" in the action, is "an attorney of record," and "the Contract makes it abundantly clear that [he] retains complete control over this litigation."¹⁷⁰ Such statements lack concrete value and provide no real evidence that clean water and a stable economy will be given priority over recovering monetary damages.

Similarly, the reform proposals of the ATRA, the ALEC, and the ILR each fail to create a system of reform that sufficiently provides state citizens with the assurance that their interests will be represented in accordance with the neutrality principle. The three reform proposals focus on ensuring outside counsel is not selected because of personal and/or political connections, public disclosure as to the existence and purpose of contingency fee contracts, and billing and recordkeeping strategies designed to ensure outside counsel are paid at a reasonable rate and only for approved services that are actually performed.¹⁷¹ All three proposals lack a mechanism for honoring the demands of the neutrality doctrine within the contingency fee relationship. Only the ILR's best practices proposal takes the neutrality principle into consideration; as discussed above, its final recommendation is that attorneys general "retain ultimate control and substantive decision-making authority in any matter in which private counsel is retained."¹⁷² Given the significant threat to the integrity of the neutrality doctrine, such an abstract suggestion falls far short of an adequate response. Indeed, the government must retain control and authority over any litigation in which private attorneys are involved. The harder question is how. The intention behind this Note is to provide state attorneys general with a novel set of

168. Press Release, Okla. Office of the Att'y Gen., *supra* note 21.

169. See Minute Sheet, *supra* note 20.

170. State of Oklahoma's Response, *supra* note 50, at 15.

171. See generally U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 126; Bacak, *supra* note 126, at 188–89; Press Release, Am. Tort Reform Assoc., *supra* note 126.

172. See U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 126, at 8.

best practices that includes specific methods for retaining and exercising control along with concrete changes to the current system. These best practices are described in Part V below.

V. RE-THINKING REFORM: BEST PRACTICES AS A MEANS OF ENSURING NEUTRALITY

A best practices model for state attorneys general that prioritizes a specific response to the concerns implicit in the neutrality doctrine is essential. In formulating the specific recommendations contained in this Note, the relationship between corporate in-house counsel and private law firms was helpful guidance. At times, corporate law departments make the decision to shift the responsibility for certain legal services to outside providers, effectively outsourcing certain types of legal work. Thus, in some ways, the relationship between the in-house legal departments of corporations and their chosen outside providers is analogous to the relationship between state attorneys general and outside counsel hired to represent the state on a contingency fee basis.

In August of 2004, the Association of Corporate Counsel (“ACC”) created a profile of leading practices for corporate counsel engaged in strategic outsourcing.¹⁷³ Many of the ACC’s leading practices prove instructive when applied to the context of state attorneys general outsourcing work to private attorneys on a contingency fee basis. Similar concerns are a backdrop to both relationships; the establishment and maintenance of control and authority over the underlying litigation is an issue for both in-house corporate counsel and state attorneys general. Thus, a number of the best practices recommendations presented in this Note are inspired by the ACC’s leading practices and were adjusted to meet the needs of the unique relationship between state attorneys general and contingency fee counsel. Others were formulated out of a desire to find innovative ways to meet the demands of the neutrality doctrine while adhering to the reality that contingency fee contracts are often a crucial resource for state attorneys general. Contingency fee arrangements need not be elimi-

173. ASSOC. OF CORPORATE COUNSEL, LEADING PRACTICES IN STRATEGIC OUTSOURCING AND ALTERNATIVE SERVICE MODELS: WHAT COMPANIES ARE DOING (2004), <http://www.acc.com/resource/v5903>.

nated entirely, but rather restructured around a theme of continued government control and authority. Parts V.A–V.H constitute novel best practices recommendations for state attorneys general entering into contingency fee contracts with outside counsel.

A. PRECISE CONTRACTUAL LANGUAGE

Any agreement between a state attorney general and outside counsel must contain an explicit assurance that the requisite standard of neutrality will be maintained by all members of the state attorney general's office and all private counsel throughout the duration of the relationship. Upon judicial review, the lynchpin of a valid contingency fee arrangement may be an unqualified statement that the state attorney general retains complete control and authority over the litigation.¹⁷⁴ It must be readily apparent to the parties to the contract, third parties, and to the broader public that the attorney general maintains absolute control over the litigation from beginning to end.

It cannot be over-emphasized, however, that words are not enough. Although a reviewing court may be appeased by precise contractual language assuring neutrality and control, each state attorney general who chooses to utilize contingency fee contracts must work to align the actions of his office with the contractual language in order to ensure that the standard of neutrality required of government officers remains uncompromised. Specific methods of attaining and maintaining such neutrality are discussed in Parts V.B–V.H below.

B. TRANSPARENCY

Transparency is certainly not a novel concept in the realm of best practices recommendations for state attorneys general. The proposals of the ATRA, the ALEC and the ILR each call for an open and competitive bidding process to award contracts to outside counsel under particular circumstances.¹⁷⁵ The ATRA and

174. *Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842, 848–49 (Ct. App. 2008); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 477 (R.I. 2008); *State v. Lead Indus. Ass'n*, 898 A.2d at 1234, 1237 (R.I. 2006).

175. See generally U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 126; Bacak, *supra* note 126, at 188–89; Press Release, Am. Tort Reform Assoc., *supra* note 126.

the ILR models take transparency a step further by suggesting that contingency fee contracts be posted on the Internet for public inspection.¹⁷⁶ But if state attorneys general are to adequately respond to the concerns prompted by contingency fee agreements, more significant steps must be taken.

The ACC's leading practices reveal that one method of corporate outsourcing utilizes online auctions to receive, filter and select proposals from private law firms.¹⁷⁷ For example, in 2003 the law department at Alcoa, Inc. decided to outsource its intellectual property work.¹⁷⁸ The law department worked with the company's procurement group to set up an online auction which was handled by a company called Free Markets.¹⁷⁹ Before the actual auction, the law department invited all interested law firms to participate in a series of conference calls in which the proposals were discussed and questions were addressed.¹⁸⁰ Applying online auctions to the context of state attorneys general contingency fees will drastically increase transparency, not only with regard to the parameters of an eventual fee agreement, but also with regard to the selection process behind the agreement itself.

An auction may not be an ideal transparency tool in all situations — as General Counsel for Golden West Financial explained, “[i]f you want someone to be a trusted partner, using . . . auctions to award service arrangements can be counter-productive.”¹⁸¹ Golden West Financial opted instead to rely on its own general knowledge of the legal market when it decided to outsource a percentage of its legal work and approached a law firm specializing in intellectual property.¹⁸² Thus, in cases where an attorney general may want to couple with a particular firm because of its acknowledged area of expertise or particular relationship with an attorney at the firm, an auction could interfere. Nevertheless, because accusations of attorneys general selecting outside counsel on the basis of campaign contributions made and favors owed run

176. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 126; Press Release, Am. Tort Reform Assoc., *supra* note 126.

177. ASSOC. OF CORPORATE COUNSEL, *supra* note 173, at 3.

178. *Id.* at 7.

179. *Id.*

180. *Id.* at 7–8.

181. *Id.* at 14.

182. *Id.*

rampant,¹⁸³ an auction has potential to vastly increase the transparency of the contingency fee process. Additionally, an online auction could presumably be designed in a manner that would pre-screen bidders for expertise, experience, and other pertinent qualifications. An online auction could also be open for public observation, further enhancing transparency and connecting the process to the fact that selected counsel will eventually be representing the public interest.

C. A MOVEMENT AWAY FROM CONTINGENCY FEES

It is not necessary, or even practical, to ban the use of contingency fee arrangements by state attorneys general in all cases where the state sovereign police power is used (as is advocated by the ILR best practices).¹⁸⁴ But an effort to move away from such a strong reliance on that particular means of structuring the relationship is preferable if state attorneys general are to successfully respond to neutrality concerns. The ACC's leading practices illustrate a preference for "fixed fee" arrangements over the more traditional method of billing on an hourly basis; "many companies have described a preference for implementing fixed or retainer fee arrangements, and commented on how this type of fee arrangement helps to promote better alignment with in-house law department economics."¹⁸⁵ When the legal department at American Express sent solicitation letters to law firms expressing an interest in entering into working relationships with a small number of firms to handle a significant portion of the corporation's litigation matters, the letter emphasized that it wanted to receive proposals that were structured in non-traditional ways.¹⁸⁶ As American Express' Chief Litigation Counsel explained,

[t]he traditional economics of outside law firms is antithetical to the goals and economics of the in-house law department. Outside firms make their money based on hours

183. See generally Liptak, *supra* note 5; John O'Brien, *Money, Lawyers and Politics: State Farm Case Has it All*, LEGAL NEWSLINE, June 12, 2007, <http://legalnewsline.com/news/196634-money-lawyers-and-politics-state-farm-case-has-it-all>; O'Brien, *supra* note 9.

184. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 126.

185. ASSOC. OF CORPORATE COUNSEL, *supra* note 173, at 4.

186. *Id.* at 9.

billed and hourly rates . . . On the other hand, in-house goals focus on finding ways to control costs in terms of the ultimate bottom line, and to bring predictability and stability to litigation.¹⁸⁷

Unfortunately, an emphasis on fixed fee relationships is likely to prove difficult for attorneys general because their use would likely stretch most government offices well beyond their budget — contingency fee contracts are sometimes favored specifically for the reason that they eliminate up-front costs.

American Express' strategy of non-traditional fee structures may still be successfully transferred to the realm of state attorneys general. One way of "bridging the gap" between the goals of outside counsel and attorneys general in a manner that directly responds to the concerns of the neutrality doctrine would be to broaden the definition of "contingent" to refer to not only monetary damages but also specific policy achievements. Under such a framework, outside counsel would not simply be awarded a percentage of the damages. While a pre-determined percentage of the recovered damages may still be an element of total compensation, outside counsel might also receive compensation for each public policy benchmark achieved through the ensuing litigation. Applying this compensation structure to the Oklahoma case discussed above,¹⁸⁸ the contract would be drawn such that the state would compensate outside counsel based on its ability to bring about not only damages, but also substantial environmental changes, while maintaining the economic stability of the industry. Thus, the contingency fee arrangement would designate a substantially smaller percentage of the damages as compensation for the private attorneys, but additional compensation would be linked to benchmarks such as whether the poultry industry has agreed to a specific, itemized plan to clean up the Illinois River or the creation of a fund, sponsored by members of the poultry industry, to provide for future beautification efforts along the watershed. Such a framework would align the otherwise divergent interests of the attorney general's office and the private firm, moving the arrangement beyond monetary damages to incorpo-

187. *Id.*

188. *See supra* Part II.

rate public policy goals. Although the total compensation awarded to outside counsel might ultimately prove to be the same as the amount awarded under a traditional contingency fee arrangement after the contingency fee and benchmark awards are combined, the concerns of the neutrality doctrine are directly confronted by linking private counsel to public policy goals.

D. TRAINING

According to the ACC's leading practices, many companies place an emphasis on training the firms they enter into outsourcing relationships with on the company's business, culture, client contacts, and approaches.¹⁸⁹ This strategy of conducting and prioritizing training should be extended to the attorney general context as an element of their relationships with private attorneys. While it may be cost-prohibitive in small cases, larger cases with high stakes and large sums of money involved will benefit by incorporating plans for training the private attorneys. Once hired on a contingency fee basis, state attorneys general should require private attorneys who anticipate billing substantial amounts of time to a case in which the firm is representing the state to attend a professional responsibility seminar for government attorneys. Professional responsibility standards and priorities may vary according to the specific field within the legal profession¹⁹⁰ and a "crash course" on the obligations and duties of government attorneys would serve to further bridge the gap between attorneys general and outside counsel, helping the two align strategies, policies, and goals. An incentive to "do the right thing" rather than to recover the largest possible monetary award must be firmly instilled in private counsel.

Training need not be one-sided; members of the state attorney general's office may receive training as well. Certain types of cases and issues will be likely to surface again within the state.

189. ASSOC. OF CORPORATE COUNSEL, *supra* note 173, at 3.

190. Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 829 (2001) (arguing that legal ethics and professional responsibility standards must take into account, and perhaps at times be guided by, specific career choices within the legal field. The ethical implications and obligations of attorneys vary based on whether an individual has decided to practice in a law firm, functions as in-house counsel, represents the government, or is a public interest attorney).

Although a lack of nuanced knowledge or experience in a particular field may initially lead the attorney general to hire outside counsel, assistant attorneys general may receive valuable training, both formal and informal, from private counsel over the course of the underlying litigation. Over time and through continued exposure to particular methods and strategies, it may be possible for the attorney general's office to handle subsequent cases without the need for outside counsel.

E. LOCATION OF OUTSIDE COUNSEL

It is generally assumed that outside counsel will remain geographically distinct from the state attorney general even after the two entities are linked by a contingency fee arrangement. The ACC leading practices indicate that some of the companies it surveyed have chosen to change their geographic relationship to their outside service providers.¹⁹¹ In one case, the service provider chose to open an additional office near company headquarters.¹⁹² In another outsourcing agreement, outside lawyers provided their services from a location physically co-located in company space.¹⁹³ The service provider may even lease workspace from the company when working in company space on a large scale.¹⁹⁴

Although resources are an obvious concern for state attorneys general, for long term cases with substantial discovery it may be desirable to link outside counsel to the attorney general, not only with shared goals and motivations, but also physically. While renting nearby office space is likely too expensive for the limited budgets of attorneys general, private attorneys working on state matters could be required to work from the office of the attorney general, perhaps for a pre-determined number of days a week. The inconvenience would likely be minimal, as associates at private firms are often asked to work outside of the office when conducting due diligence or document review. Even attorneys gener-

191. ASSOC. OF CORPORATE COUNSEL, *supra* note 173, at 4.

192. *Id.*

193. *Id.*

194. *Id.* One company using between sixty and eighty contract lawyers and paralegals had an arrangement with its preferred provider for the contract personnel to work in designated company space that the service provider leases from the company. *Id.*

al with few resources should be able to clear out enough space for a “war room” or convert low-use space into additional offices. Enhancing the physical connection between the two offices would further connect the objectives, strategies, and knowledge of the attorneys involved in the litigation.

F. DIRECT CLIENT CONTACT

Several corporations surveyed by the ACC have established a structure in which clients may contact the outside service provider directly.¹⁹⁵ Transferring such an idea to the context of attorney general contingency fee arrangements, the public should be granted access to outside counsel on the same terms it would had the attorney general been representing the interests of the state himself. Many websites that represent offices of state attorneys general allow citizens to contact their attorney general with comments and concerns.¹⁹⁶ This means of communication could be implemented to allow concerned citizens to contact the private attorneys representing their interests. For example, in the Oklahoma case discussed above,¹⁹⁷ if outside counsel were accessible in some way by the citizens of Oklahoma, it may make it more likely that the private attorneys would better understand, and thereby prioritize, the needs and concerns of the people of Oklahoma (e.g., long term provisions for ensuring clean waters, as opposed to a sole focus on a large damages award).

G. RECORD KEEPING AND POINTS OF CONTACT

Both the ATRA and the ILR methods of reform emphasize reporting requirements for outside counsel engaged in a contingency fee relationship with state attorneys general, suggesting that outside counsel maintain a thorough record of hours, fees, services performed, and expenses incurred.¹⁹⁸ A reporting requirement, however, is insufficient. It is also necessary to designate points of

195. *Id.*

196. *See, e.g.,* Office of the Attorney General of the State of New York, <http://www.oag.state.ny.us/contact.html> (last visited Apr. 1, 2009).

197. *See supra* Part II.

198. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 126; Press Release, Am. Tort Reform Assoc., *supra* note 126.

contact, both within the attorney general's office and at the private firm, whose responsibility it is to manage the relationship and the underlying case. In order to ensure accountability, the point of contact within the attorney general's office must be an integral member of the trial team, responsible for keeping track of all briefs filed by outside counsel and monetary disbursements. The point of contact must also ensure that the legal strategy of outside counsel is not accompanied by unwanted public policy implications or contradictions of current or past attorney general legal interpretations or legal strategy. The point of contact within the private law firm would be an active member of the trial team and should be able to supply this information as it requested or becomes relevant.

Furthermore, one of the ACC's leading practices is the use of "shadow time" and monitoring by the corporations outsourcing work.¹⁹⁹ This requires service providers to maintain and submit time reports in order to shed light on how much time is spent on particular issues and what type of work is prioritized, allowing the company to monitor the overall efficiency of the relationship.²⁰⁰ Management of shadow time reports could be incorporated as an additional responsibility for the respective points of contact within the contingency fee relationship.

H. COMMUNICATION

Finally, it is necessary for a contingency fee relationship to exist alongside a pre-determined communications timetable. The respondents to the ACC's leading practices survey described periodic meetings to discuss outsourced areas on a weekly, monthly, or quarterly basis.²⁰¹ Additional communication devices described by the corporations include identifying outside service providers on company email systems, case management system links, and combined telephone contact lists.²⁰² Such methods of communication could be implemented with relatively low cost in the context of attorney general relationships. Contracts between the attorney general's office and outside counsel should include pre-

199. ASSOC. OF CORPORATE COUNSEL, *supra* note 173, at 4.

200. *Id.*

201. *Id.*

202. *Id.*

determined meetings at regular intervals, along with provisions for linking telephone and email communications, particularly in cases that are expected to be long term.

VI. CONCLUSION

The obstacles facing state attorneys general are formidable. Each must find a way to ensure that the interests of the state and its citizens are represented while juggling limited legal resources and working within specific budget constraints. While entering into contingency fee relationships with outside counsel solves many of the attorneys general's problems with regard to expertise, budget and personnel, it opens the government office to legal criticisms, particularly concerns raised by the neutrality doctrine. Although the actual number of cases where the arrangements have been struck down by reviewing courts may seem negligible, the surrounding controversy and ethical implications of the relationships necessitate an effort to reform the current system.

The proposed methods of reform suggested by the ATRA, the ALEC and the ILR fall short of a comprehensive response to the problems inherent in the current system, particularly with regard to concerns linked to the neutrality doctrine. A more promising means of reform directly responds to the neutrality standard and its notion that attorneys representing government interests act and serve from the perspective of government attorneys rather than private attorneys. Thus, reform must focus on the intricate relationships between the attorneys general and outside counsel, demarcating specific boundaries, standards, and policies that serve as the basis for each contingency fee contract with the ultimate goal of linking the interests and strategies of the public and private attorneys working on each particular case. As articulated in Part V, these best practices must include enhanced transparency, a movement away from the traditional contingency fee structure, training programs, changes in the geographic relationship of the parties, increased contact with state citizens, record keeping standards, and superior communication. The implementation of these best practices in the offices of state attorneys general nationwide may begin the process of reimagining the nature of the relationship between state attorneys general and private counsel. Rather than posing a threat to the integrity of the neutrality doctrine, the dynamics of contingency fee outsourcing may

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be refocused on aligning the interests of all involved attorneys, so as to better serve the interests of each state and its respective citizenry.