“Pay to Sue” — Contingency-Fee Arrangements When Representing the State: A Review of Section 25-16-702 of the Arkansas Code

I. INTRODUCTION

On April 11, 2012, a jury in Pulaski County returned a $1.2 billion verdict against Johnson & Johnson’s subsidiary company, Janssen Pharmaceuticals (Janssen).1 The State of Arkansas initiated the suit, alleging that Janssen committed deceptive advertising practices through its marketing of the antipsychotic drug Risperdal.2 The court instituted the $1.2 billion judgment against Janssen for the drug maker’s failure to adequately disclose and detail the potential side effects of the drug.3 A Houston, Texas, law firm, Bailey Perrin Bailey PLLC (BPB),4 represented the State pursuant to section 25-16-702 of the Arkansas Code, which vests the Attorney General with the power to hire outside counsel to represent the State.5 The contract between the State and

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2. See id. at 2.
3. See id. at 2-8.
5. See Motion for Attorneys’ Fees, Costs, and Expenses at 2, State v. Ortho-McNeil-Janssen Pharm., Inc., Case No. CV 07-15345 (Ark. Cir. Ct. June 8, 2012) [hereinafter Motion for Attorneys’ Fees]. Section 25-16-702 of the Arkansas Code provides:

If, in the opinion of the Attorney General, it shall at any time be necessary to employ special counsel to prosecute any suit brought on behalf of the state or to defend a suit brought against any official, board, commission, or agency of the state, the Attorney General, with the approval of the Governor, may employ special counsel. The compensation for the special counsel shall be fixed by the court where
BPB provided for a 15% contingency fee, resulting in the firm seeking legal fees and costs of over $180 million. The trial judge issued an order on January 31, 2013, awarding attorneys’ fees in the amount of $180,851,370 and costs in the amount of $298,799,867. Janssen filed a notice of appeal to the Arkansas Supreme Court, and the trial court granted Janssen’s motion to stay the order awarding attorneys’ fees and costs.

Although BPB’s representation of Arkansas drew a great deal of attention to the Attorney General’s use of outside counsel on a contingency-fee basis, the practice became the nationwide trend during the tobacco litigation of the 1990s. This practice has evolved over time as states have used outside counsel in a variety of settings, including cases against lead-paint manufacturers, against poultry companies accused of polluting public waterways, and in pursuit of claims based on public nuisance. More recently, states have used outside counsel to represent them against pharmaceutical manufacturers.

This comment suggests that, while Arkansas should continue to vest the Attorney General with the power to hire outside counsel on a contingency-fee basis, the Arkansas General Assembly should amend section 25-16-702 by requiring greater transparency and creating a more...
competitive process for selecting firms to represent the State. Part II of this comment provides background on the practice of state attorneys general hiring outside counsel, including its rise in popularity during the tobacco-litigation era of the 1990s and its more recent use in cases against pharmaceutical manufacturers. Further, Part II examines the benefits and drawbacks of allowing states to use contingency-fee arrangements with outside counsel. Part III explores section 25-16-702’s limitations on this practice in Arkansas and recent instances when the State has employed outside counsel. Part IV reviews statutes that other state legislatures have amended recently to restrict the practice. Part V contends that the Arkansas General Assembly should continue to allow the Attorney General to hire outside counsel on a contingency-fee basis but that the State should amend section 25-16-702—as other states have done to their statutes—by creating a more transparent process with competitive bidding. Appendix A of the comment proposes an amendment to section 25-16-702 of the Arkansas Code.

II. BACKGROUND ON CONTINGENCY-FEE ARRANGEMENTS

A. History of Contingency-Fee Arrangements for Outside Counsel

Contingency-fee arrangements for attorneys representing states as outside counsel first garnered national attention during the tobacco litigation of the 1990s. Nationwide, private attorneys collected over $14 billion in fees for representing states in suits against tobacco companies. Historically, states only used outside counsel to collect money for the state or to counsel state employees in need of representation. But states’ use of outside counsel in the tobacco litigation differed from this historical

14. Id.
practice by employing private attorneys to seek monetary damages against private companies for torts allegedly committed against the state’s citizens.16 The states’ use of outside-counsel in the tobacco litigation also differed from historic practices because, in the tobacco cases, the states did not pay the attorneys a government salary or an hourly fee.17 Instead, the fees that the attorneys recovered were solely contingent upon a recovery and the amount of any judgment the counsel achieved.18

In 1994, Mississippi Attorney General Mike Moore brought one of the first tort suits against the tobacco industry waged by any state on behalf of its citizens for harm caused by tobacco products.19 To mount the case, Attorney General Moore employed the assistance of a well-known personal-injury lawyer, Richard “Dickie” Scruggs.20 Moore and Scruggs entered into an agreement under which Scruggs would assist with the case in exchange for the promise that, if the case was successful, the State of Mississippi would petition the court to have the tobacco industry pay Scruggs’s fees.21 Thus, the idea for the “big tobacco” contingency-fee arrangement was born.

Numerous state attorneys general followed in Moore’s footsteps by filing suit against the tobacco industry and employing outside counsel to pursue their cases.22 The agreements with outside counsel differed from one state to another, but most involved some type of a contingency-fee

17. Id. at 430.
18. Id.
22. Id.
arrangement based on a successful recovery. For example, Connecticut, Florida, Maryland, Massachusetts, Minnesota, and South Carolina agreed to 25% contingency-fee arrangements, plus expenses, with the firms representing them. Arizona agreed to pay outside counsel 18% of funds recovered and the reasonable expenses of litigation. Oklahoma and Texas provided for contingency-fee arrangements of 15%. Kansas executed an agreement calling for any settlement agreement or other resolution to determine the fee so long as the fee did not exceed 12.5%. Indiana instituted a sliding scale for a contingency fee, awarding outside counsel 13.5% of the first $30 million recovered and 10% of any amount remaining. And Wisconsin structured a fee around the length of litigation—outside counsel would receive 10% of any recovery obtained within 180 days after the commencement of the suit, 15% of any recovery obtained between 180 and 360 days after commencement of the suit, and 20% of any recovery obtained after 360 days.

The attorneys general defended their use of outside counsel on a contingency-fee basis, arguing that such arrangements were necessary to confront an industry that had escaped liability in the past, not because of the merit of its defenses, but because the industry could drown opponents in litigation costs. While attorneys nationwide collected nearly $14 billion in legal fees for their involvement in these suits, they secured even larger recoveries for the states they represented and the states’ citizens who had been harmed by the tobacco industry.

24. Id. at 3, 7-8, 12.
25. Id. at 2.
26. Id. at 10, 12.
27. Id. at 5.
29. Id.
B. Arguments Supporting Contingency-Fee Arrangements

Several legitimate arguments support an attorney general’s decision to hire outside counsel on a contingency-fee basis. The underlying policy behind allowing contingency-fee arrangements is “that plaintiffs should not be denied access to justice simply because they do not have the financial resources to pay attorneys on an hourly fee.”

Applying this policy argument to contingency-fee arrangements for representing states, proponents argue that engaging outside counsel for financial and litigation support is a well-recognized practice that allows governments to engage in large-scale, complex litigation and achieve justice for the public. These proponents also maintain that, without outside counsel, the government would be unable to survive litigation—because of a lack of resources and expertise—or to even bring the suit in the first place.

Further, proponents note that a government entity should not be precluded from using a contingency-fee arrangement because every state recognizes the practice as appropriate, ethical, and proper.

Permitting an attorney general to retain the services of outside counsel allows a state to pursue claims on behalf of the public where it would otherwise lack the resources to do so on its own. The hiring of outside counsel generally occurs in large tort cases, which often involve wrongdoing that affects the public at large. States would be unable to provide any recourse to the public if they could not employ outside counsel on a contingency-fee basis. Moreover, some note that trying these kinds of cases without outside counsel would be impossible because a state may lack the “personnel resources, expertise, and money” to successfully represent its citizens. Proponents reject the argument that

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33. Id. at 781.
34. Id.
35. Id. at 765, 768.
36. Griffis, supra note 13, at 23.
37. Id.
38. Id.
allowing attorneys general to enter into contingency-fee contracts violates separation of powers by infringing upon the legislature’s role for appropriating state resources. Proponents argue that entering into such contracts is an executive function that falls squarely under the powers of an attorney general. Further, the use of outside counsel is aimed at recovering state money, not spending it, which alleviates the separation-of-powers concerns. Indeed, most contracts are dependent upon, and paid from, affirmative recoveries.

Additionally, supporters of hiring outside counsel insist that opponents’ arguments concerning political patronage are “overblown.” In fact, proponents maintain that most attorneys general sparingly employ outside counsel on a contingency-fee basis and that only a small minority of attorneys general use this practice more broadly. Proponents of the practice further argue that prohibiting the use of contingency-fee arrangements would allow wrongdoers to go unpunished in cases where a large segment of the public is adversely affected. Recently, for example, the Oklahoma Attorney General employed outside counsel to represent the State in a case brought against the poultry industry for its alleged pollution of Oklahoma’s waterways. Arguing for his use of outside counsel, former Oklahoma Attorney General Drew Edmondson maintained that, without a contingency-fee arrangement, the State would not have been able to pursue the case, the pollution of Oklahoma waterways would continue, and no mechanism would exist to protect the interests and health of Oklahomans affected by the pollution.

40. Id. at 596.
41. Id. at 597.
42. Id.
43. See, e.g., Motion for Attorneys’ Fees, supra note 5, at Exhibit A app. B (contract between the State of Arkansas and BPB).
44. Griffis, supra note 13, at 23; see infra notes 63-72 and accompanying text.
45. Godesky, supra note 10, at 588.
46. Griffis, supra note 13, at 23.
47. Godesky, supra note 10, at 612.
48. Id.
Proponents of contingency-fee arrangements argue that the debate over this practice turns on two key issues: “fundamental fairness and access to justice.” Proponents maintain that a defendant’s wealth, power, and political influence should not overcome the ability of a government entity to protect the health, safety, and welfare of the general public. Many of the companies that may be subject to this kind of litigation are large companies with a wealth of resources devoted to defending litigation. These companies use their deep pockets to retain highly skilled defense counsel, even when defending against a state. Contingency-fee arrangements allow states to compete against such defendants by relieving states of the financial burden of paying hourly rates to outside counsel and by allowing states to pay fees only if outside counsel secures a recovery. Because state budgets are increasingly strained, many argue that without contingency-fee arrangements, no one will challenge certain industries even though the industries have exposed the public to harm.

C. Arguments Against Contingency-Fee Arrangements

Some argue states should abolish the practice of state attorneys general hiring outside counsel on a contingency-fee basis. These opponents argue that an attorney general does not represent a traditional client; rather, he or she represents the public. Opponents argue that lawyers working for a contingency fee only seek to maximize their fees instead of advancing the public interest. Opponents maintain that this “profit motive necessarily influences the course of the litigation” and undermines the expectation

49. Kelly & Fitzpatrick, supra note 32, at 765.
50. See id.
51. Wilkins, supra note 16, at 431.
52. Id.
53. Id. at 432.
54. Id. at 433.
55. Griffis, supra note 13, at 23.
56. Wilkins, supra note 16, at 436.
that attorneys “will be guided solely by what is best for the general welfare.”

Contingency-fee contracts financially incentivize lawyers to maximize damages at the expense of equitable remedies or other non-monetary solutions; this incentive potentially creates a conflict between the public interest and the rules and standards governing how public officials should litigate for the general public. Pointing to this financial stake in the outcome, opponents argue that the interests of private attorneys “are inherently divergent and irreconcilable” from the interests of state attorneys. Private attorneys representing a state for a contingency fee are motivated by monetary incentives to maximize recovery. Opponents argue that this financial stake can erode attorneys’ judgment and cause them to become more concerned with their own financial well-being than with their role as a proper advisor to their clients. Attorneys general, on the other hand, can successfully represent their state’s interests without similar considerations of personal financial gain.

Further, opponents argue that contingency-fee arrangements may lead to political cronyism because they permit private attorneys to profit from their relationship with a state’s attorney general. Opponents point to the tobacco litigation of the 1990s for several examples of this political patronage. In Kansas’s suit against big tobacco, the Kansas Attorney General ultimately awarded the contingency-fee contract to the law firm for which she had worked prior to becoming Attorney General. In Texas, the Attorney General received political contributions of at least $150,000 from attorneys he hired to represent the

59. Id. at 595.
60. Id.
61. Axelrad & Perrochet, supra note 57, at 332-33.
63. See Joyce & Hotra, supra note 19, at 407-08.
64. Id. at 408 (noting that the private lawyers who represented four states in the tobacco litigation “earned or stand to earn at least $8.6 billion in fees”).
65. Id.
State for a contingency fee in a suit against tobacco companies.\textsuperscript{66}

Additionally, the \textit{Wall Street Journal} devoted a series of editorials to the more recent practice of states hiring outside counsel on a contingency-fee basis in suits against pharmaceutical manufacturers.\textsuperscript{67} Zeroing in on political cronyism, the editorials focused on former Pennsylvania Governor Ed Rendell’s hiring of outside counsel to pursue a case on behalf of the State.\textsuperscript{68} Pennsylvania, like Arkansas, secured the services of BPB to represent the State in a suit against Janssen Pharmaceuticals for the marketing of the antipsychotic drug Risperdal.\textsuperscript{69} The editorials alleged that the founding partner of the Houston-based firm was negotiating a contingency-fee contract with the Governor’s office at the same time he was making political contributions to Governor Rendell’s re-election campaign.\textsuperscript{70} The \textit{Wall Street Journal} noted that BPB represented several states, including Arkansas, in similar cases against Johnson & Johnson.\textsuperscript{71} Arkansas Attorney General Dustin McDaniel dismissed claims that political contributions motivated his hiring of BPB, stating that the firm “‘has never contributed to [his] campaigns.’”\textsuperscript{72}

Opponents also point to separation-of-powers issues surrounding an attorney general’s hiring of outside counsel for a contingency fee. These opponents argue that the practice appropriates and expends state resources which are roles reserved for the legislature.\textsuperscript{73} They also argue that because due process prohibits a judge from having a financial stake in the outcome, the same rationale should apply to government attorneys.\textsuperscript{74} Further, opponents

\begin{itemize}
  \item \textsuperscript{66} Id.
  \item \textsuperscript{68} \textit{State Lawsuit Racket, supra} note 12.
  \item \textsuperscript{69} \textit{Pay to Sue on the Docket, supra} note 67.
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} Id.
  \item \textsuperscript{72} \textit{Pay-to-Sue Business, supra} note 67.
  \item \textsuperscript{73} See Godesky, \textit{supra} note 10, at 595.
  \item \textsuperscript{74} Id. at 594.
\end{itemize}
advocate for extending to state governments a federal executive order prohibiting federal contingency-fee arrangements.\footnote{75. Hearing Explores States' Hiring of Outside Private Counsel, TRIAL, Apr. 2012, at 48. The executive order, signed by President George W. Bush and extended by President Barack Obama, prohibits federal agencies from using outside counsel on a contingency-fee basis. Exec. Order No. 13,433, 72 Fed. Reg. 28,441 (May 18, 2007); Hearing Explores States' Hiring of Outside Private Counsel, supra.}

III. THE PRACTICE OF HIRING OUTSIDE COUNSEL IN ARKANSAS

A. Section 25-16-702 of the Arkansas Code

Section 25-16-702 of the Arkansas Code, enacted in 1933, provides the Attorney General power to employ outside counsel:

If, in the opinion of the Attorney General, it shall at any time be necessary to employ special counsel to prosecute any suit brought on behalf of the state or to defend a suit brought against any official, board, commission, or agency of the state, the Attorney General, with the approval of the Governor, may employ special counsel. The compensation for the special counsel shall be fixed by the court where the litigation is pending, with the written approval of the Governor and the Attorney General. The Attorney General shall not enter into any contract for the employment of outside legal counsel without first seeking prior review by the Legislative Council.\footnote{76. ARK. CODE ANN. § 25-16-702(b)(2) (Repl. 2002).}

Notably, this statute requires the Attorney General to seek approval from the Governor and calls for a review from the Legislative Council before the Attorney General finalizes any contract with outside counsel.\footnote{77. ARK. CODE ANN. § 25-16-702(b)(2).} The statute also requires the court to fix the compensation for outside counsel under a contingency-fee contract,\footnote{78. ARK. CODE ANN. § 25-16-702(b)(2).} providing an additional avenue for review and protection from abuse.
B. Previous Uses of Outside Counsel in Arkansas

1. Bailey Perrin Bailey

The Arkansas Attorney General hired outside counsel in three recent cases, all of which involved claims against pharmaceutical manufacturers for deceptive-advertising practices.79 In all three cases, BPB represented the State.80 The Houston-based law firm has extensive experience representing states as outside counsel, particularly in cases against pharmaceutical manufacturers.81 BPB has represented thousands of plaintiffs in litigation against pharmaceutical manufacturers concerning a wide variety of drugs, including Prozac, Lexapro, Seroquel, and Zoloft.82 The firm also has extensive experience in representing state attorneys general in cases seeking to recover damages from drug manufacturers for unlawful marketing practices and other violations.83 BPB represents its clients on a contingency-fee basis, arguing that it allows individuals to obtain legal representation without paying any money up front and that it provides the firm with the opportunity to demonstrate its commitment to clients by sharing in the risks of litigation.84

Attorney General McDaniel received approval from both the Governor and Legislative Council before entering into any contracts with BPB.85 While appearing before the Legislative Council, McDaniel highlighted the need to bring in outside counsel to pursue pharmaceutical claims, stating: “This particular matter is so large that frankly the

79. Motion for Attorneys’ Fees, supra note 5, at 2; see sources cited infra note 106.
80. Motion for Attorneys’ Fees, supra note 5, at 2; see sources cited infra note 106.
81. Id. at 3.
AG’s office could not handle it internally.” 86 He further explained BPB’s qualifications to handle the suit, noting the firm’s involvement in similar litigation elsewhere, including Alaska, Louisiana, Mississippi, New Mexico, Pennsylvania, and South Carolina. 87 Attorney General McDaniel noted that he considered the services of four other law firms before selecting BPB. 88 Ultimately, he selected BPB because of the firm’s experience representing other states on the same issue. 89 McDaniel stressed to the Legislative Council that the 15% award sought by BPB was “extraordinarily reasonable for the quality of work [the State is] going to get,” and he emphasized that his office, not the law firm, would retain final say on any major decisions concerning the litigation. 90

a. Risperdal Litigation

On September 21, 2007, Attorney General McDaniel and BPB executed a contract by which the law firm agreed to represent the State in its suit against Janssen over the company’s marketing of the drug Risperdal. 91 The contract established a 15% contingency-fee arrangement. 92 If BPB obtained a recovery for the State, the Attorney General agreed to request the court to award attorneys’ fees of 15% pursuant to section 25-16-702 of the Arkansas Code. 93 The contract stipulated that BPB would not be entitled to any compensation or reimbursement if it were unable to secure any recovery. 94 The contract also vested the Attorney General with the power to settle the litigation for non-monetary relief. 95 The Attorney General would then make

86. Seth Blomeley, State Set to Sue 3 Drug Makers, ARK. DEMOCRAT-GAZETTE, Sept. 22, 2007, at 1B.
87. Id.
88. Id. These firms included The Miller Firm LLC from Orange, Virginia; Allen L. Rothenberg P.C. of Yeardley, Pennsylvania; Schiffrin Barroway Topaz & Kessler from Radnor, Pennsylvania; and Heninger Garrison Davis LLC of Birmingham, Alabama. Id.
89. Id.
90. Blomeley, supra note 86, at 1B, 91.
91. Motion for Attorneys’ Fees, supra note 5, at Exhibit A.
92. Id. at Exhibit A app. B.
93. Id.
94. Id.
95. Id.
reasonable efforts to recover an award of attorneys’ fees and costs, but he was not obligated to make the settlement contingent upon such an award. The contract additionally called for BPB to seek approval from the Attorney General’s Office before incurring any expenses in an amount greater than $5000.

On May 9, 2012, after a jury trial, the court entered a verdict in the amount of $1,205,792,500 against Janssen for Medicaid fraud and violations of the Arkansas Deceptive Trade Practices Act for its labeling and marketing of the drug. A month later, on June 8, 2012, Attorney General McDaniel filed a motion for attorneys’ fees and expenses pursuant to section 25-16-702. Through this motion, McDaniel sought authority to pay $180,868,875 in attorneys’ fees, calculated on 15% of the total recovery, and an additional $357,679 to pay BPB’s expenses. Judge Timothy D. Fox issued an order on January 31, 2013, awarding BPB attorneys’ fees in the amount of $180,851,370 and costs in the amount of $298,799.86. Judge Fox reduced the award by $17,500 because BPB failed to keep contemporaneous time records. The court calculated this deduction by determining how much time and expense Janssen incurred because of BPB’s failure to keep time records. The court granted a motion to stay the attorneys’ fees and costs on February 19, 2013. On March 1, 2013, Janssen filed a notice of appeal with the Arkansas Supreme Court.
b. AstraZeneca and Zyprexa Settlements

Attorney General McDaniel employed BPB in two other cases where Arkansas sought recovery against pharmaceutical manufacturers for claims relating to the marketing of antipsychotic medications. McDaniel hired BPB to represent the State in a suit against AstraZeneca for claims of deceptive-advertising practices through the marketing of the antipsychotic drug Seroquel. The State reached a settlement with AstraZeneca, and as a part of the settlement agreement, BPB received attorneys’ fees of $787,631. BPB also represented the State in its suit against Eli Lilly for the marketing of the drug Zyprexa. The parties reached a settlement agreement by which Eli Lilly agreed to pay the State $18.5 million. As a part of this settlement, Eli Lilly agreed to pay BPB $2.7 million, representing the 15% contingency fee due to BPB under its contract with the State.

Attorney General McDaniel, speaking on the topic of selecting outside counsel, particularly in reference to the pharmaceutical cases, stated: “I recognize there’s some discomfort with hiring outside counsel to take a contingent fee on state cases.” . . . “It’s very unusual. I’ve not done it before, and I don’t intend to do it again. But in this case, I think it was absolutely the right decision.”

2. Other Uses of Outside Counsel

While the three instances in which BPB represented the State on a contingency-fee basis are the most notable uses of outside counsel during Attorney General McDaniel’s tenure; he also approved using outside counsel in other cases, albeit not for a contingency fee. Between

107. Park, supra note 106, at 3B.
109. Krupa, supra note 106, at 9A.
110. Id. at 1A.
111. Id. at 9A.
112. Id.
113. Findings of Fact, supra note 85, at 3-9.
May 2007 and November 2011, McDaniel approved the use of outside counsel for the University of Arkansas Medical Services twelve times, citing the lack of expertise and specialized knowledge of the Attorney General’s Office with respect to highly specialized regulatory-compliance and medical-reimbursement issues. 114 Eight different firms were involved in these twelve contracts, and notably, none of the eight were Arkansas-based firms. 115 Between April 2008 and June 2012, Attorney General McDaniel approved ten contracts to Arkansas-based firms. 116 These cases involved the Arkansas Department of Health, the Arkansas Teacher Retirement System, the Arkansas Student Loan Authority, Arkansas Tech University, the University of Central Arkansas, and Northwest Arkansas Community College. 117 In all of these contracts, the Attorney General’s Office cited a lack of specialized expertise and necessary resources to provide representation as the reason for procuring outside counsel. 118

Unlike Attorney General McDaniel, previous Arkansas Attorneys General have employed outside counsel rather sparingly. In 1998, during the tobacco-litigation era, Attorney General Winston Bryant originally secured the services of a California-based law firm for a contingency fee to help pursue the State’s claims against tobacco manufacturers. 119 But Attorney General Bryant never used the services of the firm, and the State ultimately settled the litigation as part of a multi-state agreement. 120 Additionally, in 2002, Attorney General Mark Pryor employed the Texas-based law firm Dies & Hile LLP to represent the State in a case involving asbestos claims. 121 The contingency-fee contract in the case called for the firm to receive 27% of the net amount recovered by the State. 122

114. Id. at 3-7.
115. Id.
116. Id. at 5-9.
117. Id.
118. Findings of Fact, supra note 85, at 5-8.
119. Blomeley, supra note 86, at 91.
120. Id.
121. Id.
122. Findings of Fact, supra note 85, at 9.
IV. RESPONSES OF OTHER STATES

Since the tobacco-litigation era, a debate has waged over whether to reform the practice of states using outside counsel on a contingency-fee basis. Two advocacy groups, the American Legislative Exchange Council (ALEC) and the Institute for Legal Reform (ILR), have recommended reforms they believe will result in a more transparent and fairly applied process. ALEC proposed legislation, known as the Private Attorney Retention Sunshine Act, calling for an open and competitive bidding process prior to awarding any state contract for legal services. The proposed legislation also calls for at least one public legislative hearing on any contract awarding legal fees that may exceed $1 million; documentation of all attorneys’ hours, expenses, and fees; and a cap on the hourly rate. Likewise, the ILR called for open and competitive bidding for contracts exceeding $1 million or where the state anticipates more than 1000 hours of attorney work time, and for the state to publish all written agreements on the Internet. The ILR further recommended that states maintain records for hours worked, expenses, and fees, and set a $1000 hourly cap on compensation for outside counsel. Finally, the ILR recommended that attorneys general retain ultimate control and substantive decision-making authority over the litigation.

124. The Institute for Legal Reform is an advocacy group formed in 1998 by the United States Chamber of Commerce with the stated goal of representing the nation’s business community by focusing on what is analogous to tort reform. About ILR, INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/about (last visited Oct. 17, 2013).
127. Id. §§ 4-6.
128. Godesky, supra note 10, at 611.
129. Id.
130. Id.
Several states, including Mississippi, Arizona, Indiana, Virginia, North Dakota, Minnesota, and Colorado, amended their statutes to restrict their attorneys general’s hiring of outside counsel for contingency fees. The statutes vary in their comprehensiveness, with some states adopting the majority of ALEC or the ILR’s recommendations and other states adopting more singular provisions.

A. Mississippi

Mississippi recently amended its statute governing the power of the Attorney General to hire outside counsel. The amendment requires the Attorney General to make a written determination that a contingency-fee arrangement is both cost-effective and in the best interest of the public before entering into a contingency-fee contract with outside counsel. The written determination must include a consideration of the following factors:

1. whether there exist sufficient and appropriate legal and financial resources within the Attorney General’s Office to handle the matter;
2. the time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly;
3. the geographic area where the attorney services are to be provided; and
4. the amount of experience desired for the particular kind of attorney services to be provided and the nature of the outside attorney’s experience with similar issues or cases.

The amended Mississippi statute also imposes an absolute cap on contingency fees and uses a sliding scale to calculate the fees based on the amount recovered. The State may not enter into a contingency-fee contract that allows an

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131. See, e.g., ARIZ. REV. STAT. ANN. § 41-4803 (West 2013) (effective Mar. 29, 2012); COLO. REV. STAT. § 13-17-304 (West 2013); IND. CODE ANN. § 4-6-3-2.5 (West 2013) (effective July 1, 2011); MINN. STAT. ANN. § 8.065 (West 2013); MISS. CODE ANN. § 7-5-8 (West 2013) (effective July 1, 2012); N.D. CENT. CODE ANN. § 54-12-08.1 (West 2013); VA. CODE ANN. § 2.2-510.1 (West 2013).
132. MISS. CODE ANN. § 7-5-8.
133. MISS. CODE ANN. § 7-5-8(1).
134. MISS. CODE ANN. § 7-5-8(1)(a)-(d).
135. MISS. CODE ANN. § 7-5-8(2)(a)-(b).
attorney to receive fees exceeding: 25% of any recovery less than $10 million; 20% of any recovery over $10 million but not more than $15 million; 15% of any recovery over $15 million but less than $20 million; 10% of any recovery greater than $20 million but less than $25 million; and 5% of any recovery over $25 million. The statute places an absolute cap of $50 million on any fees to be collected. These limits have exceptions, including instances in which the State makes a written determination explaining why a greater fee is necessary and when the Outside Counsel Oversight Commission approves the terms of a contingency-fee contract exceeding the limits. This Commission is composed of the Governor, Lieutenant Governor, and Secretary of State, and their actions require majority approval.

Mississippi requires the State to post any contingency-fee contract on the Attorney General’s website within five business days after its execution and requires the contract to remain posted for its duration. An exception exists, however, for instances in which the publication will adversely affect the interests of the State. If the State determines that adverse effects will occur, it will post the contract within five days of the earliest occurrence of one of the following: (1) the filing of the lawsuit for which the State executed the contract; (2) an entry of appearance for any pending matter for which the State executed the contract; or (3) the time when the private attorney engages in any substantive action on behalf of the State relevant to the subject matter of the contract.

The State must post any payment of contingency fees on the Attorney General’s website within fifteen days of making the payment. The statute also requires attorneys hired on a contingency-fee basis to maintain time and expense records and to submit them upon conclusion of the...
The attorneys must record the time in increments of no greater than one-tenth of an hour. Additionally, the attorney must submit the records to the Attorney General promptly upon request and maintain the records for at least four years after the contract is terminated or expires.

B. Arizona

Arizona also recently amended its statute governing the Attorney General’s power to hire outside counsel, providing for more restrictions on the Attorney General’s use of contingency-fee contracts. The statute imposes several requirements the State must meet throughout the contract period:

1. Government attorney retains ultimate control over the course and conduct of the case;
2. Government attorney with supervisory authority is personally involved in overseeing the litigation;
3. Government attorney with supervisory authority retains veto power over any decision made by the private attorney;
4. Any defendant’s attorney that is the subject of the litigation may contact the lead government attorney without directly having to confer with the private attorney;
5. Government attorney with supervisory authority for the case must attend all settlement conferences. For the purposes of this paragraph, “attends” includes attendance by phone, teleconferencing or similar electronic devices; and
6. Decisions regarding the settlement of the case may not be delegated to this state’s private attorney.

The Attorney General must develop a standard addendum for contingency-fee contracts describing in detail the expectations for private attorneys and the State. All contingency-fee contracts must contain this addendum.

The statute also requires the Arizona Attorney General to post copies of any contingency-fee arrangements on the Attorney General’s website within five business days of executing the contract, which must remain posted for the duration of the contract. An exception exists when the Attorney General determines that posting the contract may damage the reputation of any business or person. The provision requires the Attorney General to post on the website any payment of contingency fees within fifteen days of the payment and leave the information posted for a year.

Further, the Arizona statute contains a provision placing duties upon the private attorney. The attorney must maintain detailed, current billing records that include documentation of all expenses. The attorney must retain records upon entering into the contract until four years after the contract has expired or is terminated. The private attorney must maintain these time records contemporaneously in increments of no greater than one-tenth of an hour, and for all attorneys and paralegals who are involved in the matter. Upon the request of the Attorney General, the private attorney must promptly submit these records for review.

The statute imposes a structured percentage for fees, allowing the private attorney to collect based on the specific amount recovered. The standards impose a sliding-fee scale identical to Mississippi’s statute and provide limits on the percentage recoverable based on the overall amount awarded. The Arizona statute has an absolute cap of $50 million on contingency fees, except for reasonable costs and

151. ARIZ. REV. STAT. ANN. § 41-4803(E).
152. ARIZ. REV. STAT. ANN. § 41-4803(E).
153. ARIZ. REV. STAT. ANN. § 41-4803(E).
154. ARIZ. REV. STAT. ANN. § 41-4803(F).
155. ARIZ. REV. STAT. ANN. § 41-4803(F).
156. ARIZ. REV. STAT. ANN. § 41-4803(F).
157. ARIZ. REV. STAT. ANN. § 41-4803(F).
158. ARIZ. REV. STAT. ANN. § 41-4803(F).
159. ARIZ. REV. STAT. ANN. § 41-4803(A).
160. Compare ARIZ. REV. STAT. ANN. § 41-4803(A) (applying a sliding-scale limitation on attorneys’ fees), with MISS. CODE ANN. § 7-5-8(2)(a) (West 2013) (using a sliding-scale approach to calculate fees based on amount recovered).
expenses.\textsuperscript{161} This cap is cumulative and applies regardless of the number of lawsuits filed or the number of private attorneys or firms retained.\textsuperscript{162}

C. Indiana

Indiana is another state with recently enacted legislation reforming the Attorney General’s process for employing outside counsel on a contingency-fee basis.\textsuperscript{163} The newly enacted statute, like that of Mississippi, requires a written determination that a contingency-fee arrangement is both cost-effective and in the best interest of the public.\textsuperscript{164} To demonstrate the need for retention, the written determination must consider factors similar to Mississippi’s statute, including:

\begin{quote}
(1) \textit{whether the agency has sufficient and appropriate legal and financial resources to handle the matter}; (2) \textit{the time and labor required to conduct the litigation}; (3) \textit{the novelty, complexity, and difficulty of the questions involved in the litigation}; (4) \textit{the expertise and experience required to perform the attorney services properly}; and (5) \textit{the geographic area where the attorney services are to be provided}.\textsuperscript{165}
\end{quote}

Additionally, the Indiana statute provides possible competitive involvement for attorneys seeking retention.\textsuperscript{166} Once the State makes its written determination, the Attorney General must request proposals from private attorneys seeking to provide services on a contingency-fee

\textsuperscript{161} ARIZ. REV. STAT. ANN. § 41-4803(B).
\textsuperscript{162} ARIZ. REV. STAT. ANN. § 41-4803(B).
\textsuperscript{163} \textit{See} IND. CODE ANN. § 4-6-3-2.5 (West 2013) (effective July 1, 2011).
\textsuperscript{164} \textit{Compare} IND. CODE ANN. § 4-6-3-2.5(b) (“An agency may not enter into a contingency fee contract with a private attorney unless the agency makes a written determination before entering into the contract that contingency fee representation is cost effective and in the public interest.”), with MISS. CODE ANN. § 7-5-8(1) (“Before entering into a contingency fee contract with outside counsel, the state, an arm or agency of the state, or a statewide elected officer acting in his official capacity must first make a written determination that contingency fee representation is both cost-effective and in the public interest.”).
\textsuperscript{165} \textit{Compare} IND. CODE ANN. § 4-6-3-2.5(c) (requiring State to consider five factors in its written determination that contingency-fee arrangement is appropriate), with MISS. CODE ANN. § 7-5-8(1) (requiring State’s written determination to include “specific findings” for four similar factors).
\textsuperscript{166} \textit{See} IND. CODE ANN. § 4-6-3-2.5(d).
basis unless the State determines, in writing, that requesting proposals would not be feasible under the circumstances. The Indiana Inspector General must also make a written determination “that entering into the contract would not violate the code of ethics or violate any statute or agency rule concerning conflict of interest.” The Inspector General must submit this writing after the State makes its determination that outside counsel is necessary but before the State actually enters into a contract.

Any contingency-fee agreement must appear on the Attorney General’s website within five business days of the contract’s execution and must remain posted for the duration of the contract. Similar to the Mississippi statute, Indiana’s statute requires the State to post on the Attorney General’s website any contingency fees within fifteen days of the payment. Further, the Indiana statute requires the private attorney to maintain time records and submit them to the Attorney General upon request. Private attorneys must keep time records contemporaneously and in increments of one-tenth of an hour. Records must exist for all attorneys and paralegals working on the matter.

Like Arizona and Mississippi’s statutes, the Indiana statute establishes a sliding-fee scale based on specific amounts recovered. This scale mirrors the Mississippi provision, placing the same parameters on the percentage that an attorney may recover based on the overall amount awarded by the court. The Indiana statute additionally

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167. IND. CODE ANN. § 4-6-3-2.5(d).
168. IND. CODE ANN. § 4-6-3-2.5(e).
169. IND. CODE ANN. § 4-6-3-2.5(e).
170. IND. CODE ANN. § 4-6-3-2.5(h).
171. Compare IND. CODE ANN. § 4-6-3-2.5(h) (requiring the State to post any contingency-fee payment on the Attorney General’s website “not later than fifteen (15) days after the payment”), with MISS. CODE ANN. § 7-5-8(5)(c) (West 2013) (imposing 15-day requirement for posting contingency-fee payments on website).
172. IND. CODE ANN. § 4-6-3-2.5(f).
173. IND. CODE ANN. § 4-6-3-2.5(f).
174. IND. CODE ANN. § 4-6-3-2.5(f).
175. Compare IND. CODE ANN. § 4-6-3-2.5(g), with ARIZ. REV. STAT. ANN. § 41-4803(A) (West 2013), and MISS CODE ANN. § 7-5-8(2)(a).
176. Compare IND. CODE ANN. § 4-6-3-2.5(g), with MISS. CODE ANN. § 7-5-8(2)(a).
places a $50 million cap on contingency fees with exclusions for reasonable costs and expenses.  

D. Other States with Less Comprehensive Measures

Other states have enacted statutes limiting the use of outside counsel for contingency fees, but these statutes are not as comprehensive or specific as the Mississippi, Arizona, and Indiana statutes. For instance, in North Dakota, the statute governing contingency-fee arrangements prohibits the Attorney General from using outside counsel for a contingency fee without approval from the Emergency Commission in civil cases where the amount in controversy exceeds $150,000. In Minnesota, the Attorney General must submit to the Legislative Advisory Commission any proposed contingency-fee contract for legal services if the fees and expenses are reasonably expected to exceed $1 million. Before entering into a contingency-fee contract, the Minnesota Attorney General must also allow twenty days to receive a recommendation from the Commission.

In Virginia, when contingency fees and expenses are reasonably anticipated to exceed $100,000, the State cannot enter a contingency-fee contract for legal services without a competitive-negotiation process. The State will award the contract to the attorney or firm that makes the most competitive offer. This determination considers: (1) the costs of the services; (2) the qualifications of the attorney or firm seeking to win the contract; (3) the attorney or firm’s experience with similar legal matters; (4) the legal expertise of the attorney or firm; and (5) other relevant factors identified by the Attorney General.

177. IND. CODE ANN. § 4-6-3-2.5(g).
178. See, e.g., COLO. REV. STAT. ANN. § 13-17-304 (West 2013); MINN. STAT. ANN. § 8.065 (West 2013); N.D. CENT. CODE ANN. § 54-12-08.1 (West 2013); VA. CODE ANN. § 2.2-510.1 (West 2013).
179. N.D. CENT. CODE ANN. § 54-12-08.1.
180. MINN. STAT. ANN. § 8.065.
181. MINN. STAT. ANN. § 8.065.
182. VA. CODE ANN. § 2.2-510.1.
183. VA. CODE ANN. § 2.2-510.1.
184. VA. CODE ANN. § 2.2-510.1.
Colorado takes a unique approach to limiting contingency-fee arrangements between the State and private attorneys.\textsuperscript{185} The Colorado statute requires the private attorney representing the State to maintain, on a monthly basis, contemporaneous records that document the hours of legal services provided, the nature of the services, and any costs incurred during the monthly recording period.\textsuperscript{186} The private attorney must provide these records to the overseeing governmental entity each month and upon resolution of the matter.\textsuperscript{187} The attorney must also specify an alternative hourly rate, not in excess of $1000 per hour, at which the state should compensate the attorney if the attorney’s statement indicates an average hourly rate over $1000.\textsuperscript{188} The attorney’s average hourly rate for the services is determined by dividing the contingency fee by the number of legal-services hours.\textsuperscript{189}

V. RECOMMENDATIONS

The practice of attorneys general hiring outside counsel for contingency fees engenders both a great deal of support and opposition. Detractors argue this practice promotes political cronyism, creates neutrality issues, and incentivizes attorneys representing a state to maximize personal profit at the expense of the public interest.\textsuperscript{190} Proponents of the practice argue that it allows attorneys general to seek recovery for their state’s citizens in cases that the state would not otherwise pursue.\textsuperscript{191} When a state properly decides to retain outside counsel, the practice provides the public with practical and economic advantages. But because the fees can be enormous—as demonstrated in the Risperdal litigation—transparency and fairness in the selection process are necessary to maintain public confidence and to avoid cronyism. Such a selection process will allow an attorney general to mount an equally

\begin{footnotesize}
\footnotesuperscript{185} COLO. REV. STAT. ANN. § 13-17-304 (West 2013).
\footnotesuperscript{186} COLO. REV. STAT. ANN. § 13-17-304(1)(a)(I).
\footnotesuperscript{187} COLO. REV. STAT. ANN. § 13-17-304(1)(a)(I)–(II).
\footnotesuperscript{188} COLO. REV. STAT. ANN. § 13-17-304(1)(a)(III).
\footnotesuperscript{189} COLO. REV. STAT. ANN. § 13-17-304(1)(b).
\footnotesuperscript{190} Griffis, supra note 13, at 22-23.
\footnotesuperscript{191} Id. at 23.
\end{footnotesize}
competitive case against the typical defendant in these cases—a large corporate entity with access to a highly skilled legal defense with specialized experience.\textsuperscript{192} Before considering whether Arkansas should amend section 25-16-702 of the Arkansas Code, one should determine whether the State should allow hiring outside counsel on a contingency-fee basis at all.

A. Arkansas Should Continue Allowing the Use of Outside Counsel on a Contingency-Fee Basis

Although valid concerns with this practice exist, Arkansas should continue granting the Attorney General the discretionary power to hire outside counsel for a contingency fee. Giving the Attorney General this power serves an important function by allowing the State to pursue otherwise impractical claims.\textsuperscript{193} In the three recent instances where Attorney General McDaniel employed outside counsel for a contingency fee, he secured recoveries of substantial sums for the citizens of Arkansas who otherwise may have received no recovery.\textsuperscript{194} Although BPB, the firm that represented the State in these cases, collected large amounts in attorneys’ fees, the firm secured a recovery for the State and its citizens against companies that caused harm to Arkansas citizens.\textsuperscript{195} Moreover, the State paid the firm’s fees only from the recoveries the firm achieved.

Additionally, the cases in which Attorney General McDaniel employed BPB as outside counsel involved subject matters outside the expertise of the Attorney General and his staff.\textsuperscript{196} The State also faced stiff opposition from major legal-defense teams representing pharmaceutical manufacturers with nearly unlimited funds to defend the claims. BPB is involved in a number of suits nationwide against pharmaceutical manufacturers for claims of deceptive-advertising practices and is well-versed

\begin{footnotes}
192. Id. at 23-24.
193. Id.
194. Motion for Attorneys’ Fees, supra note 5, at Exhibit A; Krupa, supra note 106, at 9A; Park, supra note 106.
195. See supra notes 1-4, 106-10 and accompanying text.
196. Blomeley, supra note 86.
\end{footnotes}
in the subject matter of these lawsuits. Hiring BPB as outside counsel enabled the State to mount the same caliber of case as the defense and to put the State in the best position to recover for its citizens.

Further, although the use of outside counsel on a contingency-fee basis can create cause for concern, this practice has not been as prevalent in Arkansas as in other states. Attorney General McDaniel has remarked on his discomfort with hiring outside counsel against pharmaceutical manufacturers, stating that the practice was unusual and that he did not intend to employ outside counsel for a contingency fee again. The three cases where McDaniel used outside counsel on a contingency-fee basis are not sufficient to imply that the practice is a pervasive problem in Arkansas. Although BPB litigated Risperdal cases on behalf of several other states, and some criticize the firm’s political connections with officials that have hired the firm, McDaniel himself stated that BPB “‘has never contributed to [his] campaigns.’” The firm has been linked financially to political figures in other states, but no such tie appears to exist with Attorney General McDaniel.

The recent Risperdal case highlights this issue in Arkansas and provides a great platform for instituting greater transparency in the hiring process. The case does not reveal a pattern of abuse or indicate that the process in Arkansas needs drastic changes. Room exists, however, to improve section 25-16-702 by implementing a process with greater transparency that allows the State to continue to realize the benefits of using outside counsel on a contingency-fee basis.

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197. Id. at 9B.

198. Krupa, supra note 106, at 9A.

199. Pay-to-Sue Business, supra note 67.

200. See id.

201. See id.
B. Arkansas Should Reform Section 25-16-702 of the Arkansas Code

Although section 25-16-702 appears to grant the Attorney General broad power to hire outside counsel, the statute is not devoid of any restrictions. Subsection 25-16-702(b)(2) requires approval from the Governor and a review by the Legislative Council before the Attorney General may enter into a contract for contingency-fee representation. This subsection also requires courts to fix the attorneys’ fees. Although the statute imposes some restrictions, amending section 25-16-702 could alleviate much of the debate over the fairness and equity of the practice.

The Arkansas General Assembly should consider the approach other states have taken in amending their statutes and creating better-regulated practices for hiring outside counsel. The approaches differ significantly in their comprehensiveness. Some states have implemented whole-scale measures that place restrictions on numerous aspects of the practice and require attorneys general to comply with a multi-step process before they can execute a contingency-fee arrangement with outside counsel. Other states have instituted very specific regulations on certain aspects of the practice. Arkansas would benefit the most from adopting singular provisions making very specific reforms to section 25-16-702. Because Arkansas does not have a pattern of abuse, a wide-reaching measure restricting the Attorney General’s power as the State’s principal lawyer is unnecessary. But a more modest amendment to the current statute could strengthen it through instituting narrow limitations on the practice.

207. See infra Appendix (proposed amendment to section 25-16-702 of the Arkansas Code).
In particular, the General Assembly should consider a provision that requires the Attorney General to post any contingency-fee contract, as well as any payment made under the contract, on the Attorney General’s website. States that have adopted provisions requiring the publication of a contingency-fee contract call for the posting to occur within five days of the contract’s execution. Although such disclosure provides the public with readily available access to the contract, it does not eliminate entirely the concern that political patronage may have played a role in awarding the contract. Thus, Arkansas would be better served by requiring publication of a proposed contingency-fee contract for thirty days before the Attorney General executes it. A thirty-day period allows sufficient time for public examination, but it would not be so long as to delay unduly the ability of the Attorney General to conduct business.

Such a period—during which the public could review a proposed contract and make objections before the contract’s execution—would protect the public interest more than simply allowing the Attorney General to post the contract once the parties have signed it. Requiring the publication of an already-executed contract would have little practical effect. Posting already-executed contracts would not deter the State from entering into contracts with undesirable firms because after-the-fact backlash would be too late to affect the Attorney General’s action. Allowing the public to object before the contract’s execution provides a much greater check on the process, forcing the Attorney General to face any concerns or criticisms head-on, instead of allowing him to hide behind a defense of an already-executed contract that the State is unwilling to breach.

Additionally, drawing from the Arizona, Indiana, and Mississippi models, once the State and private attorneys execute the contract, the State should post it on the Attorney General’s website for the duration of the contract,

including any extension. Further, Arkansas should require the Attorney General to post any contingency-fee payment on the Attorney General’s website within fifteen days of delivering the payment. These records should remain posted for a full calendar year. These publication requirements would ensure the public has access to all vital parts of any contract the Attorney General executes on a contingency-fee basis.

Adopting such a provision would create transparency when the Attorney General employs outside counsel to represent the State for a contingency fee. This amendment would provide all Arkansans with access to the information, alleviating the concerns of political cronyism and providing a check on the process.

In addition to requiring publication of the contingency-fee contract, the Arkansas General Assembly should adopt a provision requiring an open-bidding process when the Attorney General seeks outside counsel to represent the State for a contingency fee reasonably expected to exceed $1 million. Arkansas should consider a provision governing an open-bidding process like Virginia’s statute. Virginia’s provision requires an open and competitive bidding process in accordance with the Public Procurement Act before awarding any contingency-fee contract, listing a number of factors for deciding which proposal is the most competitive. Arkansas should implement a provision in accordance with Arkansas Procurement Law and should enumerate factors for choosing the most competitive proposal. These factors should include: (1) the cost of the services; (2) the qualifications of the attorney or firm submitting the proposal; (3) the experience of the attorney

214. The Arkansas Procurement Law governs the competitive-bidding process by which the State may award contracts for services. See Ark. Code Ann. §§ 19-11-201 to -266 (Repl. 2007).
or firm with similar legal matters; (4) legal expertise generally; (5) location of the firm, with possible preference given to Arkansas-based law firms; and (6) such other relevant factors as may be identified by the Attorney General.215

Allowing interested firms to submit proposals and then evaluating them with these factors would help ensure the State pays proper attention to the qualifications and expertise of those who represent the State and would help prevent the Attorney General from unilaterally selecting a law firm without evaluating other viable options. In addition, a competitive process could yield a more competitive fee structure. Further, the amendment should give preference for Arkansas-based attorneys or law firms. A perception may exist that out-of-state law firms swoop in from all over the country to take enormously profitable cases away from well-qualified Arkansas attorneys. Instituting a preference for local law firms and attorneys could help curtail this practice.

The statute must also give the Attorney General the ability to identify and consider other relevant factors.216 Although the aforementioned factors may restrict the Attorney General’s power to hire a firm unilaterally, the Attorney General is in the best position to evaluate and determine the needs of the State for its representation. The Attorney General may identify factors crucial to specific litigation that the statute would otherwise overlook. These reforms should not strip the Attorney General of ultimate power in selecting a firm or attorney to represent the State for a contingency fee; they should create a more open, transparent, and competitive process. Because the Attorney General is in the best position to evaluate the needs of the State, any new statutory provision should heed the Attorney General’s advice and give the Attorney General discretion to apply the factors.

Requiring the competitive-bidding process only for cases where one may reasonably expect the legal fees to exceed $1 million ensures a rigorous review for the biggest

215. See VA. CODE ANN. § 2.2-510.1 (outlining similar considerations).
216. See, e.g., VA. CODE ANN. § 2.2-510.1.
cases the State tries with outside counsel, but it doesn’t unnecessarily hinder the ability of the Attorney General to carry out the duties of the office. This limitation would provide a competitive process without impeding the Attorney General’s course of business.

One of the greatest concerns in retaining outside counsel on a contingency-fee basis is that an official may use it as a mechanism for political favors. Amending the statute to require an open-bidding process would provide any interested firm with the opportunity to compete for the contingency-fee contract and would prevent the Attorney General from improperly selecting a firm based on political ties. An open and competitive bidding process would help ensure that political ties do not play a large role in the selection of representation and would help the State secure the services of the firm most capable of producing favorable results.

Because section 25-16-702 provides some protections, Arkansas does not need to implement the drastic reforms enacted in other states. In particular, Arkansas does not need provisions placing an absolute cap on fees or requiring detailed accountings of the time, expenses, and fees of all attorneys involved in the case. Notably, section 25-16-702 requires the court to fix the compensation for special counsel. This requirement vests the trial court judge with the power to make decisions regarding fees paid to outside counsel working under a contingency-fee arrangement. The trial court judge is in the best position to make determinations on what constitutes a reasonable fee, and this power should remain with the judge. Legislators should not take this power from the judge’s purview. Trial judges exercising their discretion provide a check on the process similar to an absolute cap. Additionally, attorneys wishing to receive a favorable ruling from the judge on their motion for attorneys’ fees are likely to keep detailed

218. See *ARIZ. REV. STAT. ANN.* § 41-4803 (West 2013); *IND. CODE ANN.* § 4-6-3-2.5 (West 2013); *MISS. CODE ANN.* § 7-5-8 (West 2013).
Thus, incorporating a provision requiring detailed recordkeeping would not achieve a marked difference from the results of the current protections.

While judges should set fees and any new statute should not impose an absolute cap, the Arkansas General Assembly should adopt a provision restricting contingency-fee awards that exceed a certain threshold. When a contingency-fee award exceeds $50 million, a law firm should be entitled to the agreed-upon percentage up to $50 million. However, the law firm should only be entitled to 5% of an award exceeding $50 million. Reducing the fee to this percentage ensures law firms do not profit unnecessarily from large jury verdicts and recognizes that, when fees could exceed $50 million, the statute should not deter law firms from taking large cases because of an arbitrary cap on fees.

VI. CONCLUSION

The Attorney General’s use of outside counsel on a contingency-fee basis is a heavily scrutinized practice, particularly in light of the large verdict in the Janssen, Risperdal litigation. BPB, representing the State of Arkansas as outside counsel, secured a $1.2 billion verdict for the State. Consequently, the State awarded the firm hundreds of millions of dollars in legal fees. This case has spotlighted the practice in Arkansas and has provided the opportunity to evaluate section 25-16-702 of the Arkansas Code. Although many argue that the State should eradicate the use of outside counsel by the Attorney General on a contingency-fee basis, the practice provides the Attorney General with important resources in pursuing cases on behalf of the State. Although the practice is beneficial to the State and its citizens, section 25-16-702 needs slight reform. Instituting more transparency when the Attorney General employs the statute and creating an

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220. See, e.g., Findings of Fact, supra note 85, at 18. The trial court judge reduced the amount of attorneys’ fees for BPB’s failure to keep contemporaneous time records. Id.

221. Judgment, supra note 1, at 8.
open-bidding process would alleviate the concerns that come with this kind of arrangement and would allow the State to continue realizing many of the benefits of the practice.

KATHERINE E. MCDONALD
§ 25-16-702. Duties.

(a) The Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. Whenever any officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.

(b)(1) All office work and advice for state officials, departments, institutions, and agencies shall be given by the Attorney General and his or her assistants, and no special counsel shall be employed or additional expense paid for those services.

(2) If, in the opinion of the Attorney General, it shall at any time be necessary to employ special counsel to prosecute any suit brought on behalf of the state or to defend a suit brought against any official, board, commission, or agency of the state, the Attorney General, with the approval of the Governor, may employ special counsel. The compensation for the special counsel shall be fixed by the court where the litigation is pending, with the written approval of the Governor and the Attorney General. The Attorney General shall not enter into any contract for the employment of outside legal counsel without first seeking prior review by the Legislative Council.

(A) The Attorney General shall post copies of any proposed contingency-fee contract on the Attorney General’s website for public inspection for a period of not less than thirty (30) days before the contract is executed. Upon execution, the contract shall remain posted on the website for the duration of the contingency-fee contract, including any extensions or amendments of the contract. The attorney general shall post any payment of contingency fees on the attorney general’s website within fifteen (15) days after the payment of the contingency fees to the private attorney, which shall remain posted on the website for at least three hundred sixty-five (365) days thereafter.
(B) The Attorney General shall not enter into a contingency-fee contract for legal services where fees are reasonably expected to exceed one million dollars ($1,000,000) until an open and competitive negotiation process has been undertaken in accordance with the provisions of the Public Procurement Act (§ 19-11-101 et seq.). The contract may be awarded to the attorney or firm that submits the most competitive proposal to provide such services considering the cost of the services, the qualifications of the attorney or firm to provide the services, the experience of the attorney or firm with similar legal matters, legal expertise generally, location of the attorney or firm, with preference given to Arkansas-based firms, and such other relevant factors as may be identified by the Attorney General. The selection of the firm may be made by the Attorney General in light of these factors.

(C) The contractually agreed upon percentage may be awarded for any recovery up to fifty million dollars ($50,000,000). After the award exceeds fifty million dollars ($50,000,000), a firm may not collect more than five percent (5%) of the remaining amount that exceeds fifty million dollars ($50,000,000).

(c) If any official, department, institution, or agency of the state needs the service of an attorney and the Attorney General fails to render the service when requested in writing, then, upon the establishment of that fact, the Governor may appoint counsel to look after the matter or may authorize the employment of counsel by the officer, department, agency, or institution needing the services of an attorney.

(d) Any person violating the provisions of this section shall be subject to indictment and upon conviction fined in any sum not less than two hundred dollars ($200) nor more than two thousand dollars ($2,000) and, upon proper proceedings, removed from office.
(e) The Attorney General shall have authority to initiate civil lawsuits under all state and federal environmental protection statutes.