

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: CS/CS/HB 386

50th Legislature, 1st Session, 2011

Tracking Number: .186322.1

Short Title: Transparency In Private Attorney Contracts

Sponsor(s): Representative Thomas C. Taylor and Others

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**HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BUSINESS AND INDUSTRY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 386**

Bill Summary:

The provisions of CS/CS/HB 386:

- permit the Attorney General (AG) to enter into contingent fee contracts with private attorneys to recover, through litigation or settlement, money due to the state or any of its components or officers, if such contracts are necessary to perform the duties of the AG;
- limit the amounts of fees awarded to private attorneys under contingency contracts;
- establish that the contract shall include a provision mandating the contract's termination (with no additional payments) if the contractor or any of its partners, associates, or employees is found to have violated Section 2 of the bill by contributing to, or soliciting contributions for:
 - a candidate seeking reelection to the office of the AG;
 - a campaign committee established by such a candidate; or
 - a political committee:
 - established by the AG, an agent of the AG, or in consultation with the AG; or
 - controlled by the Attorney General or an agent of the AG to aid or promote the nomination or election of any candidate to a state office;
- create the "Attorney General Suspense Fund" in the State Treasury to be administered so that:
 - each contract shall provide that all amounts received by a contracting attorney in satisfaction of a claim be transferred to the AG and deposited in the fund;
 - at the direction of the AG, compensation shall be disbursed to the contractor from the fund; and
 - the balance of each deposit shall be distributed to the fund where the loss occurred that was the basis of the claim that the contractor pursued on behalf of the state;

- establish that all contracts shall be subject to *Procurement Code* provisions regarding competitive sealed proposals, except those regarding single source and emergency procurement, and procurement under existing contracts;
- direct the AG to submit an annual report on contingency contracts for the preceding year to the President Pro Tempore of the Senate and the Speaker of the House of Representatives, which shall include:
 - all contingent fee contracts entered into during the previous calendar year;
 - all previously executed contracts that were current during any part of the previous calendar year;
 - the name of the private attorney contractor and the attorney’s law firm;
 - the nature and status of the pertinent legal matter;
 - the name of the parties to the action;
 - the amount of any recovery; and
 - the amount of any contingency fee paid to a contractor; and
- create a new section of the *Campaign Reporting Act* that:
 - prohibits private attorneys who have entered into contingent fee contracts with the AG from contributing to, or soliciting contributions as described above;
 - prohibits candidates for reelection to the office of the AG, or associated political committees, from accepting or soliciting contributions from contracting private attorneys; and
 - defines “attorney.”

Fiscal Impact:

CS/CS/HB 386 does not contain an appropriation.

Fiscal Issues:

- According to the Legislative Finance Committee’s Fiscal Impact Report:
 - the fiscal impact to the state and agencies is limited, as payment under contingency contracts comes from funds received in satisfaction of a state claim; and
 - there is additional potentially positive fiscal impact if losses to the state’s permanent or other funds are recovered that might otherwise not be due to high upfront costs or the lack of internal expertise that might dissuade an agency from filing a lawsuit without recourse to contingency fee contracts.
- The State Investment Office (SIO) notes, in its analysis of SB 404, which was identical to HB 386 as originally introduced, that:
 - contingent fee arrangements with attorneys can be attractive due to a lack of:
 - resources required for large cases;
 - expertise specific to complex types of litigation;
 - budget availability to the agency;
 - support from legislative, executive and public bodies;

- appetite for up-front cost expenditure/risk inherent in any litigation; and
 - distaste for or sticker shock over high hourly lawyer fees;
 - the bill seeks to lessen the state's level of risk and up-front costs associated with litigation in exchange for a smaller share of recovery assets after trial or settlement;
 - the *Fraud Against Taxpayers Act* allows private attorneys to pursue litigation on behalf of the state;
 - those private attorneys can receive up to 30 percent¹ of any moneys recovered by the state in judgment or settlement, a significantly higher amount than the potential fees that are capped under the bill;
 - potential fiscal impact is dependent on the sorts of cases that might arise in the future, and their respective outcomes, variables which make estimates of impact uncertain; and
 - law firms working on a contingent fee basis are typically unwilling to shoulder the entire financial burden of costs associated with litigation prior to settlement or judgment. The bill appears to allow for such fees and costs to be included in contingent fee agreements, should the state negotiate for such terms.
- CS/CS/HB 386 limits contingency fees paid to private attorneys, on a graduated basis, according to the amount of the pertinent award or settlement.

Substantive Issues:

- The Educational Retirement Board (ERB), in its analysis, indicates that:
 - because the AG represents state agencies in non-tort matters, there is an attorney-client relationship between ERB and the AG;
 - ERB has requested that it be granted independent authority to enter into contingency fee contracts, through enactment of SB 269 (*Educational Retirement Board Bank and Attorneys*);
 - granting such independent authority is not inconsistent with the proposed provisions of the bill, and would allow ERB to serve its own fiduciary responsibilities and pursue otherwise meritorious litigation that the AG might not pursue; and
 - passing both this bill and SB 269 would give both ERB and the AG authority to enter into contingency contracts, and thus offer the state a broader range of options to ensure that litigation is appropriately pursued.
- According to the SIO analysis of SB 404, three notable issues are implicated by the bill:
 - Will the state profit more by paying the bills for attorneys on an hourly basis or through a contingent fee arrangement?
 - The AG must be able to justify the use of contingent fee agreements.
 - The bill appears to create a reasonable fee schedule that should allow the state to attract quality firms with appropriate experience and expertise to handle specialized litigation.

¹ as originally introduced; CS/CS/HB 386 now provides for contingent fees of up to 25 percent of the total amount recovered, depending on the amount of the recovery.

- The fee schedule allows the state to avoid paying a risk premium on litigation that ultimately may not result in recoveries for the state.
 - In exchange for lowering the state’s own risk, realistically, it must encourage private contractors by providing sufficient potential benefits.
- Can the Legislature authorize these non-specific but limited payments without violating the Constitution?
- The bill creates a “suspense fund” that, while not allocating a specific dollar amount to be authorized by the Legislature, does create a specific means to address logistical complications associated with pre-authorizing a non-specific, but finite expenditure from a non-reverting fund.
 - There is precedent which would seem to satisfy these constitutional concerns.²
- Are there safeguards in place that will prevent such potentially lucrative arrangements from being abused (i.e. directed to supporters) by the AG and/or other agencies under this authority?
- Section 2 of the bill provides a framework to help prevent “pay to play” situations that might encourage the AG to hire “friendly” law firms over potentially more qualified ones.

Related Bills:

HB 38 *PERA Custodian Bank & Attorney Fees*

*SB 86aa *Investment Council Legal Service Contracts*

CS/SB 269a *Educational Retirement Board Bank & Attorneys*

SB 404 *AG Contingency Fee Contracts* (similar to/conflicts with CS/CS/HB 386)

CS/SB 461 *Transparency in Private Attorney Contracts* (similar to/conflicts with CS/CS/HB 386)

² See, e.g., Section 66-6-22.1 NMSA 1978 (*Motor Vehicle Code*, Motor vehicle suspense fund created) , Section 70-5-10 NMSA 1978 (*LPG and CNG Act*, Revenue; suspense fund), and Section 27-2-29.1 NMSA 1978 (*Public Assistance Act*, Compensation under contingent fee contracts; suspense fund created)