



Ohio Legislative Service Commission

Final Analysis

Amber Hardesty

S.B. 38

131st General Assembly
(As Passed by the General Assembly)

Sens. Seitz, Eklund, Jones, Patton, Beagle, Coley, Jordan, LaRose

Reps. Blessing, Butler, Antani, Buchy, Burkley, Conditt, Duffey, Grossman, Hackett, Kraus, LaTourette, Retherford, Romanchuk, Sprague, Terhar, Young

Effective date: August 12, 2015

ACT SUMMARY

- Enacts the Transparency in Private Attorney Contracts Act.
- Prohibits the state from entering into a contingency fee contract with a private attorney unless the Attorney General (AG) or the AG's designee makes a written determination that private representation is cost-effective and in the public interest.
- If a written determination is made, requires the AG or designee to request qualifications from private attorneys to represent the state unless the AG or designee determines that making the request is not feasible.
- Sets forth the maximum allowable percentages that a private attorney can receive under a contingency fee contract with the state based on the amount of any damages actually recovered.
- Generally prohibits the aggregate contingency fee from exceeding \$50 million unless expressly authorized in the contract, and prohibits the AG from entering into a contract authorizing a contingency fee in excess of \$50 million without Controlling Board approval.
- Provides that for specified securities class actions, the \$50 million limit applies only to the state's share of any judgment, settlement, or common fund and does not apply to attorney's fees for representing other members of a class.
- Requires a contract with a private attorney to provide that the private attorney acknowledges that the assistant AG retains complete control over the conduct and course of the case and to include other specified provisions regarding the case.

- Prohibits the state from entering into a contract with a private attorney located outside Ohio unless the AG determines that at least one of specified circumstances applies.
- Requires a copy of the executed contingency fee contract between the state and a private attorney to be posted on the AG's website and to remain posted for the contract's duration, and requires detailed records concerning the private attorney's services to be maintained from the contract's inception until at least three years after the contract's expiration or termination.
- Requires the AG to submit an annual report to the Senate President and the House Speaker describing the use of private attorney contracts in the preceding fiscal year.
- Specifies that the act does not apply to contingency fee contracts or renewals thereof in existence before the act's effective date.
- States that the General Assembly intends that the act's limitations on entering into contingency fee contracts are to be applied only to contracts with a private attorney retained on a contingency fee basis by the state.
- Provides that nothing in the act's provisions is to be construed as expanding the authority of any state agency or agent to enter into contracts if that authority did not previously exist.

CONTENT AND OPERATION

The act prescribes the requirements and procedures for the state to enter into a contract with a private attorney to represent the state in a legal matter. The Revised Code sections enacted by the act are to be known as the Transparency in Private Attorney Contracts Act.¹

Prohibition regarding private attorney contracts; exception

The act prohibits the "state" from entering into a contingency fee contract with a "private attorney" unless the Attorney General (AG) or the AG's designee makes a written determination before, or within a reasonable time after, entering into that contract that private representation is both cost-effective and in the public interest. Any written determination must include findings for each of the following factors: (1) whether there exist sufficient and appropriate legal and financial resources within the AG's office to handle the matter involved, and (2) the nature of the "legal matter" for which private representation is required if divulging that information would not violate

¹ R.C. 9.49.



any ethical responsibility of the AG or privilege held by the state. (See "**Definitions**," for the definitions of the terms in quotation marks.)²

Request for private attorney's qualifications; list of private attorneys

If the above written determination is made, the AG or designee must request qualifications from private attorneys to represent the state, unless the AG or designee determines that requesting qualifications is not feasible under the circumstances and sets forth the basis for this determination in writing.³

Contingency fee contracts

Under the act, the state generally cannot enter into a contingency fee contract with a private attorney that provides for the private attorney to receive an aggregate contingency fee in excess of the total of the following amounts:⁴

- (1) 25% of any damages up to \$10 million;
- (2) 20% of any portion of damages of \$10 million or more but less than \$15 million;
- (3) 15% of any portion of damages of \$15 million or more but less than \$20 million;
- (4) 10% of any portion of damages of \$20 million or more but less than \$25 million;
- (5) 5% of any portion of damages of \$25 million or more.

Except as described below with respect to security class actions, the aggregate contingency fee, exclusive of reasonable costs and expenses, must not exceed \$50 million, regardless of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery, unless the contract expressly authorizes a contingency fee in excess of \$50 million. The act prohibits the AG from entering into a contract authorizing a contingency fee in excess of \$50 million without Controlling Board approval.⁵

² R.C. 9.492(A).

³ R.C. 9.492(B).

⁴ R.C. 9.492(C)(1).

⁵ R.C. 9.492(C)(2).



A contingency fee in a contingency fee contract cannot be based on penalties or civil fines awarded or on any amounts attributable to penalties or civil fines. The amount of a contingency fee paid to a private attorney is the percentage of the amount of damages actually recovered by the state to which the private attorney is entitled.⁶

Contingency fee contract in a securities class action

The act provides that in any contingency fee contract covering a "securities class action" in which the state is appointed as lead plaintiff under specified sections of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or in which any state is a class representative, the maximum allowable aggregate contingency fee of \$50 million applies only with respect to the state's share of any judgment, settlement amount, or common fund. The maximum allowable fee does not apply to the amount of attorney's fees that may be awarded to a private attorney for representing other members of a class certified under the Federal Rules of Civil Procedure or state class action procedures.⁷

Contents of contract with private attorney

The act requires that a contract entered into between the state and a private attorney include all of the following provisions that apply throughout the term of the contract and any extensions of that term:⁸

(1) The private attorney must acknowledge that the assistant AG retains complete control over the course and conduct of the case involved;

(2) An assistant AG with supervisory authority must oversee the litigation of the case;

(3) An assistant AG must retain veto power over any decisions made by the private attorney;

(4) Any opposing party in the case can contact the assistant AG directly without having to confer with the private attorney unless the assistant AG instructs the opposing party otherwise;

(5) An assistant AG with supervisory authority for the case can attend all settlement conferences; and

⁶ R.C. 9.492(C)(3) and (4).

⁷ 15 U.S.C. 77z-1(a)(3)(B)(i), 15 U.S.C. 78u-4(a)(3)(B)(i); R.C. 9.492(D).

⁸ R.C. 9.492(E).



(6) The private attorney must acknowledge that final approval regarding settlement of the case is reserved exclusively to the discretion of the AG.

The above provisions must not be construed to limit the client's authority regarding the course, conduct, or settlement of the case.

Contract with out-of-state private attorney

The act prohibits the state from entering into a contract with a private attorney located outside Ohio unless the AG determines that at least one of the following applies:⁹

(1) There are no private attorneys with an office in Ohio that are willing to accept the legal representation.

(2) All private attorneys with offices in Ohio that possess the necessary experience or capability are conflicted and unable to represent the state or the AG or lack necessary personnel and capacity in the firm to take on the engagement.

(3) The AG cannot engage a private attorney with an office in Ohio under the rules of the Controlling Board regarding waiver of competitive selection.

(4) There are no private attorneys with offices in Ohio that possess the necessary experience, capability, or capacity required by the contemplated engagement.

Posting of contract on website; records

The act requires that a copy of the executed contingency fee contract between the state and a private attorney and any corresponding submission by the AG to the Controlling Board be posted on the AG's website and remain posted on the website for the duration of the contract. A private attorney under a contingency fee contract to provide services to the state must maintain, from the inception of the contract until at least three years after the contract expires or is terminated, detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of the attorney services. The private attorney must maintain detailed contemporaneous time records for the attorneys and paralegals working on the legal matter and promptly provide these records to the AG upon request.¹⁰

⁹ R.C. 9.493.

¹⁰ R.C. 9.494.



Annual report to General Assembly

Under the act, by September 1 of each year, the AG must submit a report to the President of the Senate and the Speaker of the House of Representatives describing the use of contracts with private attorneys in the preceding fiscal year. The report must include the following:¹¹

(1) Identification of all contracts entered into during the fiscal year and all previously executed contracts that remain current during any part of the fiscal year or that have been closed during any part of the fiscal year, and for each contract a description of all of the following:

(a) The name of the private attorney with whom the state has contracted, including the name of the private attorney's law firm if the private attorney is an individual;

(b) The nature of the legal matter that is the subject of the contract if divulging that information would not violate any ethical responsibility of the AG or privilege held by the state;

(c) The state entity the private attorney was engaged to represent or counsel; and

(d) The total legal fees approved by the AG for payment to a private attorney by the state for legal services rendered during the preceding fiscal year.

(2) Copies of any written determinations made during the fiscal year, as described above.

Miscellaneous

The act specifies that its provisions do not apply to contingency fee contracts and renewals thereof that are in existence on the act's effective date.¹²

The act states that the General Assembly intends that any limitations on entering into a contingency fee contract under the act are to be applied only to contracts with a private attorney retained on a contingency fee basis by the state. These limitations must not apply to contingency fee contracts between private parties and contracts not involving the state.¹³

¹¹ R.C. 9.495.

¹² R.C. 9.496.

¹³ R.C. 9.498.



The act provides that its provisions cannot be construed to expand the authority of any state agency or state agent to enter into contracts if that authority did not previously exist.¹⁴

Definitions

The act defines the following terms, for the purpose of the Transparency in Private Attorney Contracts Act:¹⁵

"Legal matter" means any administrative proceeding, case, group of cases, or legal issue for which the state requires legal representation or advice.

"Private attorney" means any attorney in the private practice of law or a law firm, but does not mean an attorney appointed by the AG as special counsel for the purpose of collecting debts certified to the AG for collection under any law or debts that the AG can collect.

"State" means Ohio and any officer, department, board, commission, division, bureau, council, or unit of organization, however designated, of the executive branch of government of Ohio and any of its agents.

"Securities class action" means an action brought as a class action that includes a violation of the Securities Act of 1933, or the Securities Exchange Act of 1934.¹⁶

HISTORY

ACTION	DATE
Introduced	02-09-15
Reported, S. Gov't Oversight & Reform	03-11-15
Passed Senate (22-10)	03-18-15
Reported, H. Gov't Accountability & Oversight	04-29-15
Passed House (61-34)	04-29-15

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¹⁴ R.C. 9.497.

¹⁵ R.C. 9.491.

¹⁶ 15 U.S.C. 77a and 78a.

