THE USE OF CONTINGENCY FEE CONTRACTS BY THE ATTORNEY GENERAL, STATE AGENCIES, BOARDS, AND COMMISSIONS

R.S. 42:262/49:259

WHITE PAPER

INTRODUCTION

This White Paper reviews the authority to use contingency-fee contracts by the Louisiana Attorney General, state agencies, boards, and commissions, excluding public postsecondary educational institutions. This paper also reviews the changes made in regard to the use of contingency-fee contracts for special legal counsel retained by those entities. The provisions this paper do not apply to contingency-fee contracts entered into by local government.

I. BACKGROUND

R.S. 42:262

What are contingency fees?

In an ordinary contingency-fee arrangement, the attorney agrees to represent a client in exchange for a fixed percentage of the recovery won in a successful lawsuit. The contingency-fee agreement does not, however, grant the attorney any right to the underlying cause of action. If the attorney wins the case, the attorney's fee comes out of the money awarded to the client. Generally speaking, if the client loses the case, neither the client nor the attorney will receive any money, but the client will not be required to pay for the attorney's work performed on the case. Whether the litigation is won or lost, the client will likely have to pay court filing fees, costs related to depositions, expert witness fees and similar expenses common to litigation; however, this depends on the language of the contingency-fee agreement.

The Louisiana Supreme Court in *Meredith v. Ieyoub*, 700 So.2d 478, (La. 1997) and *Ieyoub ex rel. State v. W.R. Grace & Co.-Conn.*, 708 So.2d 1227, (La. 1998) held that the Attorney General (and other state agencies) could not utilize contingency-fee contracts unless they were specifically authorized to do so by the Louisiana Legislature. The Supreme Court noted that absent constitutional or legislative authority, the power to authorize the use of contingency-fee contracts rests solely with the Legislature, under its constitutional authority over appropriation of public funds of the State.

II. MANNER IN WHICH STATE AGENCIES ARE AUTHORIZED TO CONTRACT FOR OUTSIDE SPECIAL ATTORNEY OR COUNSEL

R.S. 42:262 provides for the general authority of state boards and commissions to contract for outside special attorney or counsel instead of utilizing the Attorney General (AG) or their regular staff counsel. Approval of the Governor and AG must be obtained in order for a special attorney or counsel to be hired.

Selection of outside special attorney or counsel by state agency, board, or commission is required to be done through the ordinary procurement process established under the Procurement Code, R.S. 39:1551, et seq. related to contracts for professional services.

Contracts for legal representation by an attorney are considered contracts for professional services under R.S. 39:1556(42), and therefore may be awarded without competitive bidding or competitive negotiation (Requests for Proposals) pursuant to R.S. 39:1617. This contract would also be subject to approval by the Office of State Procurement.

The Attorney General (AG) and other state agencies may only use contingency-fee contracts when the Legislature specifically authorizes their use. This legislative authorization may come through statutory enactment or by authorization directly from the Legislature through passage of a concurrent resolution or approval of a contingency-fee contract by the Joint Legislative Committee on the Budget (JLCB) when the Legislature is not in session.

Examples of statutory legislative approval for use of contingency-fee contracts include, but are not limited to, the following:

- R.S. 37:2153, which authorizes the State Licensing Board for Contractors to utilize contingency-fee contracts for outside counsel or collection agencies in order to enforce judgments.;



- R.S. 37:3730*, which authorizes the Louisiana Uniform Construction Code Commission to utilize contingency-fee contracts for outside counsel or collection agencies in order to enforce judgments;

  *Enacted by Act 881 of the 2026 Regular Session (eff. August 1, 2026).

- R.S. 47:1512, which authorizes the Secretary of the Department of Revenue to utilize contingency-fee contracts (limited to 10% of taxes, penalties, and interest due) to assist in the collection of taxes, penalties, and interest due or to represent the Department of Revenue in proceedings;

- R.S. 42:1157.3, which authorizes the Board of Ethics to utilize contingency-fee contracts to hire outside counsel in order to enforce judgments;

- R.S. 17:100.10, which authorizes the Recovery School District to utilize contingency-fee contracts for the purpose of contracting with outside counsel for legal services related to the use of tax credits;

- R.S. 23:1669, which authorizes the Executive Director of the Louisiana Workforce Commission to utilize contingency-fee contracts to hire attorneys to assist with collections of delinquent contributions in regard to Unemployment Compensation; and
- R.S. 46:15, which authorizes the AG to designate counsel to represent state hospitals on a contingency-fee basis in regard to all claims and cases concerning public welfare and assistance programs related to charity hospitals.

III. CHANGES BROUGHT ABOUT BY ACT 796 OF THE 2014 REGULAR SESSION ON SELECTION AND PAYMENT OF OUTSIDE SPECIAL ATTORNEY OR COUNSEL AND THE USE OF CONTINGENCY-FEE CONTRACTS

R.S. 42:262/R.S. 49:259

❑ R.S. 42:262 – Special Attorney or Counsel

R.S. 42:262(A) states that special attorneys or counsel when contracted to represent the AG, any state agency, board, or commission, excluding public postsecondary education institutions, shall not be compensated for their legal representation on a contingency-fee or percentage basis in the absence of express statutory authority. The statute also notes that preference shall be given to private attorneys licensed to practice law in Louisiana and law firms domiciled and licensed in Louisiana. R.S. 42:262 does not apply to any contract for outside legal counsel by a local government entity. R.S. 42:263 would instead apply to contracts by local government entities for outside special attorneys or counsel. R.S. 42:263 requires that local government entities obtain the approval of the AG prior to contracting for any outside special attorney or counsel; approval of the Governor is not required for contracts by local government entities for special attorney or counsel.

R.S. 42:262(B) declares that any recovery or award of attorney fees, including settlement, in litigation involving the AG, or any state agency, board, or commission, excluding any postsecondary education institution, belongs to the State and shall be deposited into the State Treasury into the Department of Justice Legal Support Fund in accordance with R.S. 49:259. **Further, no payment of attorney fees shall be made out of state funds in the absence of express statutory authority, except such payment as may be approved by the JLCB during the interim between Legislative Sessions**.

R.S. 42:262(C) states that special attorneys or counsel, contracted to represent the AG, or any state agency, board, or commission, excluding public postsecondary education institutions, are precluded from demanding anything of economic value from third parties in return for their

legal representation. (This appears to preclude any potential agreement for the opposing party to directly pay the state's special attorney or counsel's fees as part of any settlement agreement.)

The provisions of R.S. 42:262(D) mandate that special attorneys or counsel shall keep accurate records of the hours worked and the expenses incurred in their representation of a public entity. Further, a maximum rate of five hundred dollars per hour is established. Finally, any settlement or final judgment that would result in an award of attorney fees in excess of five hundred dollars per hour will be reduced to an amount equivalent to five hundred dollars per hour, or the maximum rate approved by the Attorney Fee Review Board, whichever is greater.

R.S. 42:62(E) & (G) declare that the provisions of R.S. 42:262 shall not apply to:

- Attorneys or counsel retained pursuant to R.S. 39:1533(B) and R.S. 49:258 for purposes of defending the state, state agencies, and state employees in tort litigation or other matters involving the Self-Insurance Fund, including contracts for legal representation entered into by the Office of Risk Management (ORM) as established in R.S. 39:1533; or

- Legal fees or attorney compensation made in connection with the issuance of bonds, notes, or other issuances of indebtedness, when such legal fees or attorney compensation are approved by the State Bond Commission pursuant to R.S. 39:1405.4.

❑ Approval Process

Finally, R.S. 42:262(F) establishes a list of provisions that apply to the retainer of any special attorney or counsel, excluding contracts by ORM or for certain bond counsel. These newly enacted provisions are as follows:

1. The written approval of the Governor and the written approval of the AG must be obtained through application both as to the attorney or counsel to be retained, and as to the compensation to be paid;

2. The applicant shall include in its application to the Governor and AG all of the following:

    a. A resolution that includes all of the following:

        i. A statement showing a real necessity exists;
        ii. A statement fully providing the reasons for the action;
        iii. A statement of the total compensation to be paid; and
        iv. The statutory authority for the contingency-fee, if the contract contains such a fee.

    b. A copy of the proposed contract described in the resolution.

3. The Governor and the AG shall not ratify or approve any action of a board or commission, not including any public postsecondary education institution, in employing

any special attorney or counsel unless all of the formalities as provided by R.S. 42:262 are complied with, or if:

a. The terms of the resolution do not match the required terms of the contract;
b. The need is not sufficiently shown in the resolution;
c. The fee is unreasonable; or
d. The Governor or AG determines there is a valid reason not to ratify or approve the action.

4. The Governor and the AG shall respond to the application in writing by giving approval or rejection with reasons. The AG and Governor must both agree in order for execution of the contract to proceed.

R.S. 49:259 – Department of Justice Legal Support Fund

R.S. 49:259 establishes and provides for the Department of Justice Legal Support Fund (Fund) as a special fund in the State Treasury. All monies recovered in the legal representation of the State under a contract subject to R.S. 42:262, including any award of attorney's fees, shall be considered property of the State of Louisiana. These monies shall be deposited into the Fund, unless exempted by statute.

III. CONCLUSION

The Legislature, through amendments to R.S. 42:262, has incorporated the Louisiana Supreme Court's decisions in *Ieyoub* and *Meredith* in regard to the authority of the AG, state agencies, boards, and commissions to use contingency-fee contracts for legal services. State agencies, boards, and commissions that wish to hire special attorneys or counsel should consult R.S. 42:262, particularly in regard to the approval process by the Governor and AG. R.S. 42:262 does not apply to any contract for outside legal counsel by a local government entity.

R.S. 49:259 establishes and provides for the Department of Justice Legal Support Fund (Fund) as a special fund in the State Treasury. All monies recovered in the legal representation of the State under a contract subject to R.S. 42:262, including any award of attorney's fees, shall be considered property of the State of Louisiana. These monies shall be deposited into the Fund, unless exempted by statute.

Finally, state entities should ensure that any contracts for legal services are in compliance with the statutory provisions concerning the declaration of state ownership of monies, including the awarding of attorney fees, obtained through judgments, settlements, or through other means.