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INHERENT CONFLICT: A CASE AGAINST THE USE OF CONTINGENCY FEES BY SPECIAL ASSISTANTS IN QUASI-GOVERNMENTAL PROSECUTORIAL ROLES

Question: If on election day you were asked to chose [sic] between a political candidate who promised to work for a reasonable salary, and another candidate who wanted to be paid 25% of the government's revenues, an amount which could reach billions of dollars, which candidate would you vote for? ¹

INTRODUCTION

The response to this question appears to be obvious. Why would anyone choose to elect a government official whose compensation would be based upon a percentage of the government’s revenues? Unfortunately, for many citizens this scenario is a reality. Although an elected official is not personally collecting a percentage of the government’s revenue, government officers, acting on behalf of the State Attorneys General, are charging the taxpayers a percentage of their courtroom winnings. Across the fifty states, the offices of the Attorneys General have been hiring private attorneys on contingency fee contracts in order to act as temporary employees of the government.² Although it was never intended, the states have placed the power of the Attorneys General into the hands of private attorneys, who are motivated to prosecute on behalf of the state because they have a pecuniary interest in every lawsuit that is filed.³ Unfortunately, the principles inherent within the offices of the Attorneys General are incompatible with such a scenario.⁴

Unlike private attorneys, the Attorneys General are not attorneys in the normal sense of the term.⁵ In contrast to any other attorney in

². See infra notes 220-236 and accompanying text.
³. See infra notes 237-260 and accompanying text.
⁴. See infra notes 266-298 and accompanying text.
⁵. “Attorney at law” is defined as a “[p]erson admitted to the practice of law in his respective state and authorized to perform both civil and criminal legal functions for clients.” BLACK'S LAW DICTIONARY 128 (6th ed. 1990). “Attorney General” is defined as the “chief law officer of the state.” Id. at 129. See also, In re Estate of Stern, 608 N.E.2d 534, 536 (Ill. App. Ct. 1992) (stating that the Attorney General is the sole officer authorized to represent the People of Illinois in any litigation in which the People of the State are the real party in interest); Miller v. State, 33 Ill. Ct. Cl. 144, 146 (1980) (citing to Fergus v. Russell, holding that the Attorney Gen-
private practice, the Attorneys General are instilled with a higher public duty and obligation. For example, on the first day of his administration, the Attorney General of the State of Illinois is required to stand before the Governor of Illinois, raise his right hand, and state, “I do solemnly swear, that I will support the Constitution of the United States and the Constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of [A]ttorney [G]eneral, according to the best of my ability.” Reciting the oath of office on the day of inauguration is the formal procedure that binds the Attorney General to the people of the state. Through the process of a popular election, the people entrust the Attorney General to represent the citizens and interests of the State of Illinois. “The Attorney General is the chief legal officer of the State; that is, he or she is ‘the law officer of the people, as represented in the State government, and its only legal representative in the courts.’”

In each state, Attorneys General are given unique and broad powers that no other state officials possess. In fact, the office “occupies
the middle of a well-traveled intersection of law, politics, and public policy, delicately, sometimes even perilously, poised between the tensions of scholarship and activism; professional responsibility and public duty; political conflict and the search for legal certainty. In the maze of Attorney General activities, it is difficult to ascertain the official duties of the office. "The job description for the office of Attorney General continues to evolve, since much government decision making calls on the state Attorney General to help resolve numerous cutting-edge legal and policy decisions that affect the lives of state citizens."

The awesome duties of the State Attorneys General can at times exhaust the resources of the office. Therefore, most states provide the office with the power to temporarily expand its resources by seeking assistance outside of the regular government channels. This power includes the ability to appoint special counsel, generally known as Special Assistant Attorneys General (Special Assistant), which allows the office to undertake efforts that would normally be beyond its capacity. A Special Assistant is nothing more than a private attorney selected to act with the powers of the Attorney General's office for the duration of a case or a specific time period. Throughout history, the Attorneys General have utilized this power of appointment to help expand the reach of its office.

Private attorneys acting as Special Assistants are entitled to compensation for their time and effort. Traditionally, the compensation for the services of a Special Assistant was based on an amount compa-
rable to the salary of full time Assistant Attorneys General, or a comparable "reasonable" hourly amount. However, this traditional form of compensation has recently been replaced by the increasing use of contingency fee contracts between the offices of the Attorneys General and the private attorneys hired as Special Assistants. Rather than using the role of the Special Assistant to act as an impartial advocate for the people of the state, private attorneys have returned to their roots by taking on cases with a personal financial stake in the outcome.

The decision of the State Attorneys General to commence litigation against consumer product manufacturers is a weighty task and requires a significant dedication of both human and economic resources. Within the past few years, Special Assistants, working on the basis of contingency fee contracts, have participated in state sponsored suits against consumer product manufacturers such as the tobacco industry, manufacturers of guns, lead paint, asbestos, and HMOs. Such dedication of resources has proven to be beyond the capacity of many State Attorneys General. However, this situation presents a problem when the role of the Attorney General is being played by private attorneys who pursue cases, not as neutral advocates attempting to litigate the best possible outcome for the state, but rather as partial parties motivated by the prospect of large settlements.

Part II of this Comment will examine the evolution of the offices of the State Attorneys General from its common law roots in England to discover the extent and scope of power that was retained by the of-

20. See infra notes 211-212 and accompanying text.
21. See infra notes 237-260 and accompanying text.
22. See infra notes 237-260 and accompanying text.
23. See infra note 367 and accompanying text.
24. See infra notes 237-260 and accompanying text.
25. See Suro, infra note 386.
27. See infra notes 251, 343 and accompanying text.
28. See Hanna, infra note 387.
29. See infra note 381 and accompanying text.
30. See infra notes 295-298 and accompanying text. The author recognizes that the argument could be made that any attorney representing a client under a contingency fee, regardless if that client is a private individual or a state government, is motivated by the prospect of money rather than the welfare of his client. However, the purpose of this Comment is not to attack the use of contingency fee contracts; the author concedes that contingency fees in the private sector serve an important purpose to the American legal system. See infra notes 299-303 and accompanying text. The use of contingency fee contracts in the context of government actions, however, is a very different issue. See infra notes 266-268 and accompanying text.
Since the power of the Attorney General to appoint Special Assistants is questionable, it is necessary to explore the historical beginnings of the office of the Attorney General. Part II will also narrow the analysis of the State Attorneys General to the boundaries of the sovereign state of Illinois in order to examine how the power to appoint Special Assistants evolved within one jurisdiction. Although each office of the State Attorneys General evolved from common law, state constitutions and state statutes have modified the specific powers available to each office. Accordingly, reference will be made to other State Attorneys General in order to compare and contrast the offices. Additionally, Part II will answer the important question of whether the Illinois State Attorney General possesses authority to appoint and compensate Special Assistants through the use of contingency fee contracts.

Part III will examine the role that Special Assistants have played in recent state sponsored suits against the tobacco industry. This Part will illustrate that the method for choosing Special Assistants for the billion-dollar tobacco litigation was not an objective and neutral selection process, but rather a tainted political process corrupted by influence, patronage, and money. Furthermore, Part III will pose the question of whether the use of Special Assistants and contingency fee contracts is proper in state sponsored litigation. Part IV will argue that the use of contingency fee contracts conflicts with the goals of the office of the State Attorneys General. Based on the idea that the Attorneys General are the representatives of the people, allowing an employee of the office to receive a great windfall as a result of his duty to the state, is in conflict with the purpose of the office. Part IV will also examine how other jurisdictions, opposed to the use of con-

31. See infra notes 42-68 and accompanying text.
32. See infra notes 206-218 and accompanying text.
33. See infra notes 142-154 and accompanying text.
34. See infra notes 188-205 and accompanying text. In Minnesota, Michael Ciresi, the special assistant appointed to handle the tobacco litigation, was entitled to net over $1.5 billion on behalf of his firm. See infra note 203. He has reportedly nullified his contingency fee contract with the state of Minnesota and will now receive an undisclosed amount directly from the tobacco industry. See id. Furthermore, in Texas, Florida, and Mississippi, the Special Assistants will receive over $8.2 billion, about a quarter of the entire settlement amount, for their efforts on the cases. See id. The Special Assistants in Florida are set to receive an amount that if calculated hourly comes to $7,716 per hour if every lawyer billed 24 hours a day, every day, during the 42 months they managed the case. See infra note 220.
35. See infra notes 230-260 and accompanying text.
36. See infra notes 238-257 and accompanying text.
37. See infra notes 238-257 and accompanying text.
38. See infra notes 281-315 and accompanying text.
39. See infra notes 281-298 and accompanying text.
tingency fee contracts in the government context, have attempted to constrain the power of their State Attorneys General. In conclusion, Part V will explore industries across America that have now become the target of plaintiff's lawyers acting under the guise of Special Assistants and the future of Attorney General sponsored contingency fee contracts.

II. BACKGROUND

A. Common Law Evolution of the Attorney General

Similar to the many elements of law in the United States, the office of the Attorney General emerged from the evolution of English common law. Distinct from English law, however, the American system has two levels of Attorneys General, the United States Attorney General and fifty State Attorneys General. Unlike the United States Attorney General, which was created expressly by statute, the State Attorneys General are the direct descendents of the English Attorney General; however, their powers and duties do not extend beyond the sovereignty of their respective states.

The Attorney General in each state shares a common point of origin with England and the original American colonies. However,

40. See infra notes 338-352 and accompanying text.
41. See infra notes 384-391 and accompanying text.
42. See STATE ATTORNEYS GENERAL, supra note 10, at 3-14; NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, REPORT ON THE OFFICE OF THE ATTORNEY GENERAL 11 (1971) [hereinafter OFFICE OF ATTORNEY GENERAL].
43. The focus of this Comment is the State Attorneys General of the fifty states, not the United States Attorney General. The United States Attorney General is mentioned merely to recognize that both offices have a similar origin in English common law. However, only the State Attorneys General are the direct descendents of the English Attorney General. See infra notes 92-102. When England established colonies in North America, each colony soon developed an Attorney General to act in similar fashion to the English Attorney General. See infra notes 92-102. The United States Attorney General was not created until after the successful resolution of the American War for Independence and subsequent adoption of the United States Constitution. See STATE ATTORNEYS GENERAL, supra note 10, at 10. The United States Attorney General was expressly created by the Judiciary Act of 1789, and was therefore a product of the newly independent United States. See id. Although the United States Attorney General possesses the same name as it did in England, the duties of the office are controlled by congressional enactments and not the evolution of the common law. See id. The office of the United States Attorney General has no control over the state Attorneys General and vice versa. See id. at 11. See generally Luther A. Huston, HISTORY OF THE OFFICE OF THE ATTORNEY GENERAL, in ROLES OF THE ATTORNEY GENERAL 1-34 (1968) (describing the history and powers of the United States Attorney General).
44. See STATE ATTORNEYS GENERAL, supra note 10, at 10.
45. See infra notes 92-95 and accompanying text.
46. See infra notes 148-150 and accompanying text.
47. As is further explained below, the State Attorneys General are the direct descendents of the Attorney General in England. The office was not a unique idea created in the United States,
since each state is a sovereign power, each possesses the authority to create its own state laws. As a result, some states have modified the office of the Attorney General by either adding to or subtracting from the authority granted under the common law.48 Further, some states have even chosen to deny the office of the Attorney General all of its common law powers and to restrict it to state statutes.49

Today, the offices of the State Attorneys General gain their authority from a combination of state constitutions, statutory enactments, and the common law.50 While most states agree that the Attorney General's primary duty is to act as an attorney for all citizens of the state, other states believe that the Attorney General's duty is to the state government.51 Therefore, the power of the Attorney General in one state can be very different from that of another state. Regardless of the modifications that each state may have made to the office, most Attorneys General have retained their common law powers.52 Implicit within these powers is the Attorney General's authority to appoint Special Assistants.53 This authority was created in England and handed down to the states through the common law.54

1. The Creation of the Attorney General in England

The term “Attorney General” was not used until late in England’s history.55 During the Middle Ages, many of the duties now assumed by the Attorney General were performed by attorneys, serjeants, and solicitors of the King.56 These officers were temporary representatives of the King and were used for limited purposes.57 “Prior to the 13th Century, the King appointed [S]pecial [A]ttorneys to prosecute criminal cases. These counsels had limited authority and were em-

48. Id. at 12.
49. See infra note 148 and accompanying text.
50. See infra note 148 and accompanying text.
51. See infra notes 115-118 and accompanying text. In England, the Attorney General was the representative of the sovereign King. See Common Law Powers, supra note 47, at 7; see also infra note 71 and accompanying text. However, when the United States established a republican system rather than a monarchy, the authority of the Attorney General shifted from the King to the People of the sovereign state. See infra notes 109-114 and accompanying text.
52. See infra notes 120-154 and accompanying text.
53. See infra notes 120-154 and accompanying text.
54. See infra notes 120-154 and accompanying text.
56. See id.
57. See id.
powered to represent the Crown in a specified court for a specified period of time."58 Historical records from England show that the courts used the term *attornatus regis*59 when making reference to an attorney who appeared on behalf of the King.60 Although the King made use of various persons to represent his interests, the system lacked a central figure of authority:61

Although the Sovereign [was] in theory the fountain of justice and supreme, the Year Books (official records) are replete with cases in which the King was concerned as a litigant in his own courts and, presumably abided by the decisions reached by the royal justices. For the King to appear in person as a plaintiff or defendant in such suit was inconceivable. The right of any person to come forward in court and to sue on behalf of the King in any matter affecting the King’s interests was repeatedly recognised [sic] by the courts . . . . As a method of protecting the King’s rights, however, this unlimited right of audience could only be regarded, at best, as somewhat unreliable.62

The King’s unreliable system of temporary representatives eventually gave way to a more centralized office. The King’s first permanent representative appeared in 1254 when Lawrence del Brok, referred to as the *sequitur pro rege*,63 appeared in court on behalf of the Crown.64 In many subsequent cases, Lawrence del Brok retained the same title and is often recognized as the first person designated by the King to act as a permanent attorney on the King’s Bench.65 Although 1254 is the first recorded date of Lawrence del Brok’s appearance, other studies have suggested that del Brok acted on behalf of the King as early as 1247.66

Although the King had designated a permanent *sequitur pro rege*, numerous temporary *attornati regis* appeared throughout England during the late Thirteenth Century. However, these representatives were generally granted limited powers with respect to the specific

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62. Id.
63. *Sequitur pro rege* translated from Latin means “to follow, come after, or accompany on behalf of or for the king.” *See Cassell’s New Latin Dictionary*, supra note 59, at 549.
64. *See Bellott, supra* note 60, at 406.
65. Id.
66. *See Edwards, supra* note 61, at 15 (citing later studies of Professor Sayles).
courts and the matters over which they had authority. As time passed, these numerous attorneys and solicitors were consolidated into one office. Historians differ as to when the first Attorney General was appointed, some believe that John Herbert was appointed to the position in 1461. Nonetheless, others claim that William Husse became the first Attorney General of England in 1472. Although most historians support the latter finding, it has been commented that:

The fixing of dates is often an idle pursuit where the progress of historical development is concerned. This is particularly true of English History. There is no need, therefore to pronounce with certainty that so-and-so was the first Attorney General, or that the office was instituted in such a year, even if this were possible. Historically, the office has no statutory basis. The Attorney General and the Solicitor-General are the products of royal need. These offices emanate from the magnitude of the royal business in the Courts. For this the King, like everyone else must have representatives to match the proctor in the ecclesiastical courts. Little by little the Law Officers are drawn into the great constitutional struggles of Tudor and Stuart times, and when these are at last ended, the Law Officers emerge, firmly attached to the King’s Cabinet Council, whose development has made possible our modern Parliamentary system.

As the office of the Attorney General evolved, the powers of the King’s attorneys and solicitors were slowly absorbed by the Attorney General, until only the Attorney General existed as the representative of the sovereign King. Regardless of the exact date, it is clear that by the end of the Fifteenth Century the King had created an Attorney General with the power to appoint deputies to act on the King’s behalf in any court of record.

2. **Powers of the English Attorney General**

Although the original duties of the Attorney General were rather broad, the actual power of the position was limited. Since the Attorney General began merely as the “King’s Attorney,” he was respon-

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67. The appointment of these attorneys did not create a broad authority to represent the King; rather, the appointed attorneys were assigned to a specific court in England, typically a region that was too difficult or burdensome to require travel by the sequitur pro rege, and for a specific purpose, such as the collection of taxes. See COMMON LAW POWERS, supra note 47, at 8. As the attorneys with limited power completed their assignments, they were replaced by a single attorney who possessed much broader powers. Id.
68. See EDWARDS, supra note 61, at 26.
69. See Bellott, supra note 60, at 410-11.
70. George W. Keeton, The Office of Attorney General, 58 JURID. REV. 107, 217 (1946).
71. See COMMON LAW POWERS, supra note 47, at 7.
72. See id.
73. STATE ATTORNEYS GENERAL, supra note 10, at 4.
sible for any and all duties that the King would direct. Therefore, all authority belonged to the King, and the Attorney General had little authority of his own.\textsuperscript{74} The actual duties of the first King’s Attorney included:

initiating actions to recover rents and lands, proceeding against those who pronounced a sentence of excommunication against a royal servant, guarding the King’s right to present to churches, investigating homicides to hear and determine what pertained to the Crown, and, on one occasion, engaging in a special mission to discover the marriages, wards, reliefs, and other royal rights which had been conceded or alienated within a particular township since the time of King John’s coronation.\textsuperscript{75}

History has shown that the duties of the early Attorney General were fairly broad. He was authorized to “protect state property, employees, and exercises of official discretion; to prosecute serious criminal cases; and to commence special investigations.”\textsuperscript{76} However, these powers could only be exercised through the authority of the King “at the direction of state executive authority.”\textsuperscript{77}

In 1461, the Attorney General accumulated additional powers that began to grant the office more autonomy. “In that year, the Crown authorized the King’s Attorney to appoint subordinates to carry out the attorney’s responsibilities; [and] appointed a King’s Attorney to a life tenure position.”\textsuperscript{78} Although the Attorney General’s life tenure and ability to appoint additional attorneys increased the power of the office, its position continued to be closely connected and controlled by the King.\textsuperscript{79}

During the reign of King Henry III, the duties of the Attorney General further expanded as it began to assume political duties beyond its typical role in the King’s courts. In the early 1500s, the King utilized the Attorney General as a liaison between the House of Lords and the House of Commons.\textsuperscript{80} “The Attorney General, who served the Lords, in effect as an assistant, ‘[carried] bills and messages from the Lords to the Commons, and [drafted] or [amended] government bills before and during their passage through Parliament.’”\textsuperscript{81}

\textsuperscript{74} See id.
\textsuperscript{75} EDWARDS, supra note 61, at 16.
\textsuperscript{76} STATE ATTORNEYS GENERAL, supra note 10, at 4.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 5. This granting of power by the King is now recognized as the birthplace of modern American Attorneys General’s power to appoint Special Assistants. See id.
\textsuperscript{79} See id.
\textsuperscript{80} See EDWARDS, supra note 61, at 34.
\textsuperscript{81} STATE ATTORNEYS GENERAL, supra note 10, at 5 (quoting EDWARDS, THE LAW OFFICERS OF THE CROWN 34 (1964)). This novel use of the Attorney General was significant because the
The nature of the Attorney General’s service to the House of Lords was altered when, in 1670, Sir Heneage Finch was appointed Attorney General. Aside from being appointed as the new Attorney General, Sir Heneage Finch was also an elected member of the House of Commons. Finch was permitted to retain his seat in the House of Commons as well as perform the duties of the Attorney General. Therefore, the Attorney General “played an active role in presenting Commons’ cases to the Lords . . . . Thus, by the early 1700s, the Attorney General’s role had evolved from an assistant to the Lords to an advocate of Commons as an elected Member of Commons.”

By the Sixteenth Century, the Attorney General had become not only the chief representative of the King and all his courts, but also the most important person in the legal department of the state. During the late Sixteenth and early Seventeenth Centuries, the office of the Attorney General began to assume political overtones. As the constitutional differences between the King and Parliament grew, the King required an office of lawyers “who were conversant with the political problems of the day.” As English law developed, the office of the Attorney General “emerged as the legal advisor for the government, not just as the single servant of the King.” The Attorney Gen-

82. See STATE ATTORNEYS GENERAL, supra note 10, at 5.
83. See id.
84. See id.
85. Id.
87. Many of the constitutional difficulties between King George III and Parliament developed around the imminent revolution in the American colonies. See COMMON LAW POWERS supra note 47, at 10. During this time, the King attempted to fill the courts and government offices with attorneys loyal to the English common law, the system of law that recognized judge-made law as the rule of law in England. Id at 9. Parliament, on the other hand, sought practitioners educated in the Roman civil law, who believed the rule of law was that which was codified in legislative enactments. Id.
88. COMMON LAW POWERS, supra note 47, at 9. When the King began his use of the Attorney General, the office needed only to be filled by someone who could execute simple matters in an English court, such as the collection of taxes. Id. However, due to the emerging political debate between the King and Parliament, the King now required a staff of attorneys who would not only represent the King in court, but also advise and counsel him on the important political and legal issues of the time. Since the King was only one man, in a battle of works and ideas with the many members of Parliament, the King found it wise to surround himself with many of his educated loyalists in an attempt to even the odds. Id.
89. Id. at 10.
eral "appeared on behalf of the Crown in the courts, gave legal advice to all the departments of the government and appeared for them in courts whenever they wished . . . [h]e became an adviser to the government as a whole; the Attorney General for the Crown."\textsuperscript{90}

Although the Attorney General began as a mere attorney for the King, it expanded into an intricate political and governmental office. The Attorney General became involved in the important matters of the state and began to establish authority away from the Crown. "The Attorney General thereby, over time, became less the King’s lawyer’ and more a public official responsible for justice. This trend in [E]ighteenth [C]entury England continued to develop in the American colonies."\textsuperscript{91}

3. The Attorney General in Colonial America

The early English colonists brought the office of the Attorney General with them when they traveled to the New World. Although historical records show that Attorneys General were present in America, the records are unclear about whether they were given power through a royal decree or by parliament.\textsuperscript{92} The colonists generally accepted that the Attorneys General were delegates of the Attorney General in England and that they generally possessed the same common law powers, except as modified by colonial statutes.\textsuperscript{93}

It is evident that Attorneys General were present soon after the colonists settled in the New World, however, "[t]he first recorded appointment of an Attorney General in the New World was that of

\textsuperscript{90} Id.

\textsuperscript{91} STATE ATTORNEYS GENERAL, supra note 10, at 6.

\textsuperscript{92} Historians are unclear as to how the office of the Attorney General was transferred to the New World. See COMMON LAW POWERS, supra note 47, at 10. The emergence of Attorneys General in the New World may have been nothing more than a mere recognition by the colonists that English law, and therefore all elements of English law, including the Attorney General, continued to be the controlling rules in the New World. Id. However, the colonists also recognized that the English Attorney General was too distant from any of the events in the New World to have any true understanding or ability to assist with the potential legal difficulties of the colonies. Id. Therefore, each colony took it upon itself to select a local Attorney General who would address the issues within that colony under the same rule of English laws and principles. Id.

\textsuperscript{93} See generally OLIVER W. HAMMONDS, THE ATTORNEY GENERAL IN THE AMERICAN COLONIES, ANGLO-AMERICAN LEGAL HISTORY, Series V.1, no.3 (1939) (discussing the first Attorneys General in the colonies). Since the colonists had been living with an Attorney General in England, they had no reason to contest or question the continued use of the office in the New World. The New World was intended to be an English colony, ruled under English law; therefore, the colonists had no reason to believe that the duties and responsibilities of the office were to be any different than its counterpart in England. Id.
Richard Lee in Virginia in 1643,\footnote{STATE ATTORNEYS GENERAL, supra note 10, at 6.} and the first printed record of an American Attorney General appeared in a Maryland criminal statute in 1658.\footnote{COMMON LAW POWERS, supra note 47, at 10.} Although the office was present in the New World, the exact powers and duties of the office are unclear. Historians have recognized that the office of the Attorney General in the New World was severely disadvantaged due to the limited resources and poorly specified duties of the office.\footnote{See STATE ATTORNEYS GENERAL, supra note 10, at 6.} Since the actual duties of the office were described in the complex rulings of the common law, and because most of "those versed in the common law were far away in England,"\footnote{Id.} the office of the Attorney General in the New World began to take on a "wide variety of duties [that] allowed [the] office to develop differently from colony to colony."\footnote{Id.}

In the year 1660, the Lord Proprietor of Maryland issued a commission which stated that the colonial Attorney General should act "in all Causes as well as Criminnal and Civill to sue poursue prosecute and Implead and in our name on Suits against us Commenced to answere..."\footnote{Id. at 6-7.}
as fully and amply as an Attorney General many doe." Although most colonies received similar commissions, the duties of the Attorney General continued to develop uniquely within each colony.

Pennsylvania provides an example of a colony that developed the office of the Attorney General based on its own individual needs and ideals. Due to the diversity of the early population in the Pennsylvania colony, the office of the Attorney General embodied many different elements of law. The office was created through the "statutory laws of Sweden and the Netherlands, Roman law, Delaware Indian law, colonial and proprietary laws, the laws of the Duke of York, the egalitarian principles of the Quakers, and traditional English common law." While the colonial Pennsylvania Attorney General acknowledged that it was a representative of the state, the office "opposed the governor on numerous occasions on behalf of the citizens of the colony." This opposition marked an early shift in focus as "the office of the Attorney General in colonial Pennsylvania became not only the advocate of the royal or executive interest, as it had been in England, but also the legal defender of the public interest and the rights of individual citizens."

4. From Colony to Statehood: The State Attorneys General in the United States

When the American colonies asserted their independence from England, the offices of the Attorneys General were permanently severed from the common law of England and went on to begin a second generation of common law evolution under the American system. As a


100. STATE ATTORNEYS GENERAL, supra note 10, at 8. New York was another example of a colony with influences other than English law. New York was first settled as New Amsterdam by the Dutch and did not come under English control until 1674; thereafter, the colony still contained elements of Dutch society and culture. Id. at 6-8.

101. Id. at 8.

102. Id.

103. Although American common law is now severed from that of England, it is interesting to examine the duties of the Attorney General as it exists in present day England. The modern Attorney General in England continues to serve the King; however, the office has become much more of a guardian of the public interest, and is generally involved in all matters of public interest. See Attorney General ex rel. McWhirter v. Independent Broadcasting Authority, 1 Q.B. 629 (Law Reports) (1973), Attorney-General v. Times Newspaper Ltd., 3 All E.R. 54 (1973). In The Law Officers of the Crown, Professor Edwards commented:

First, there is the Attorney General's position as the Crown's principal agent for enforcing public legal rights . . . . Generally referred to as relator actions, proceedings are brought in the name of the Attorney General with the object, for example, of obtaining a declaration or an injunction (1) in cases of public nuisance, (2) with a view to restraining a corporation from exceeding the legal powers conferred upon it by statute,
result of the American Revolution, the offices of the Attorneys General were free to evolve independently of the Attorney General in England. Each office utilized its newfound independence to develop its role as an important part of American jurisprudence.

The presence of seven delegates at the Constitutional Convention in Philadelphia in 1787, whom had already been or would soon serve as Attorneys General in their respective state or colony, marked the beginning of the Attorney General’s importance in the new United States. Many states created the office of the Attorney General through their constitutions in one form or another. “Thirty-four of the fifty, either continued or created the office of the Attorney General with their first constitutions. Eight other states established the office by law at the time of statehood.” Today, each of the fifty United States has created an office of the Attorney General.

5. Source of Attorney General’s Power in America

Even though the English Attorney General derived his power from the King, the United States established a representative democracy. Thus, there is a debate among state courts as to where the office of the American Attorney General derived its power. For example, cases in American courts have generally “held that the Attorney General’s common law powers derive from his role as representative of the people, not of state government.” In Commonwealth v. Paxton, a

where the excess of power tends to injure the public, or (3) to prevent the repeated commission of a statutory offense by any person. These aspects of the Attorney-General’s role as protector of public rights are of great antiquity. Quite distinct is the modern participation by successive holders of the office of Attorney General who have deemed it their duty . . . . to represent the public interest before public tribunals.

Edwards, supra note 61, at 286.

104. Those delegates who served in the office of the Attorney General were: William Paterson of New Jersey; John Rutledge of South Carolina; Gunning Bedford, Jr., and George Read, both of Delaware; Jarod Ingersoll of Pennsylvania; Luther Martin of Maryland; and Edmund Randolph of Virginia. See State Attorneys General, supra note 10, at 11-12. Considering that current and former Attorneys General assisted in the drafting and passage of the United States Constitution, the office of the Attorneys General served a role in state government that was far beyond the mere collection of taxes or prosecution of simple crimes. With their presence at the Constitutional Convention, the Attorneys General of the United States started a program of public advocacy that continues today. Id.

105. State Attorneys General, supra note 10, at 11-12

106. Aside from the fifty states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands each have an office of the Attorney General, or at least provide for a chief legal officer. See id. at 8.

107. See supra notes 64-74 and accompanying text.


109. 516 S.W.2d 865 (Ky. 1974).
Kentucky court found that the office of the Attorney General gains its power from the people and reasoned that:

It is true that at common law the duty of the Attorney General was to represent the King, he being the embodiment of the state. But under the democratic form of government now prevailing the people are the king, so the Attorney General's duties are to that sovereign rather than to the machinery of government.

A similar question arose in the California case, *D'Amico v. Board of Medical Examiners*. In *D'Amico*, the plaintiffs claimed that the Attorney General's representation of a licensing board conflicted with his duty to represent the public interest. The California court agreed and held that the Attorney General's duty to represent the people was paramount where it conflicted with the representation of a state agency or officer.

The notion that the Attorney General represents the people first and the state second is not a uniform idea throughout the fifty states. For example, "Arizona is one of the few jurisdictions to deny the Attorney General authority to act in the public interest . . . "$ In *Arizona State Land Development v. McFate*, the Arizona Supreme Court held that the Attorney General's duty is to represent the state as its chief legal advisor and "the initiation of litigation by the [A]ttorney [G]eneral in furtherance of interests of the public generally, as distinguished from policies or practices of a particular department, is not a concomitant function of this role." The court further explained that "the [A]ttorney [G]eneral in Arizona is thus greatly restricted in his ability to institute actions which he may deem to be in the public interest . . . . The decision to oppose the official determination of a state agency would, then, rest only in the Governor." Aside from Arizona, most states have directed the office of the Attorney General to serve the people of the state.

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110. See *id.* at 868 (holding that the Attorney General's primary obligation is to the state as a body politic rather than any particular state agency or officer).
111. *Id.* at 867 (citations omitted).
112. 520 P.2d 10, 20 (Cal. 1974) (finding that the Attorney General is charged with representing the interests of the people in any matter of public concern).
113. See *id.* at 19.
114. *Id.* at 20.
117. *Id.* at 915.
118. *Id.* at 915. See Howard N. Singer, Note, *State Officers—Attorney General-Right to Institute Action Against a State Agency*, 2 *Ariz. L. Rev.* 293, 295 (1960) (discussing how law enforcement is impeded when the Attorney General's power is restricted).
119. See *COMMON LAW POWERS*, supra note 47, at 15.
6. **Powers of the Attorney General in America**

The various offices of the State Attorneys General derive their power from several sources, including English common law, American common law, state constitutions, and state legislative actions. As a result of the variety of sources, it is difficult to create a list of the possible powers that an Attorney General might possess. Powers arising from state constitutions or legislative enactments are fairly easy to discover because of the express language indicating a presence or absence of authority. Nonetheless, the common law represents a concept with which American courts continue to struggle.

Many courts have attempted to grasp, albeit unsuccessfully, the breadth of the common law. Some have defined the common law as “the common jurisprudence of the people of the United States . . . [which was] brought with them as colonists from England, and established here so far as it was adapted to our institutions and circumstances.” Other courts have concluded that the common law is “a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy.” Yet, others classify it as “not a static but a dynamic and growing thing . . . [with rules] arising from application of reason to the changing condition of society.” While all courts have a general understanding of the concept of common law, none have pinpointed an exact meaning of the term.

As a result of the confusion regarding the meaning of “common law,” the exact duties of the office of the Attorney General in America remain unclear. Although the English common law was the source of the office’s power, no clear guide existed as to the extent of the office’s duties. The duties of the American Attorney General were so vague that it left each office struggling to define its position. In fact,

> [t]he colonial archives reveal that [the Attorney General] was engaged in activities ranging from preparing indictments on charges of murder, theft, mutiny, sedition and piracy, to appearing before the grand jury, and to acting against individuals for disturbing a minister in a divine service. He worked closely with the courts and made recommendations to the Council, even suggesting the creation of new courts and appointing attorneys for the county courts.

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120. See *supra* notes 96-100 and accompanying text.
123. Barnes Coal Corp. v. Retail Coal Merchants Ass’n, 128 F.2d 645, 648 (C.C.A. Va. 1942).
124. *Id.*
For example, in 1701 the Attorney General of Massachusetts commented that, "I never Could know what was my duty, - What I Should doe, . . . All other officers know their power duty & dues by the law, but Relating to the King's Attorney the law is Silent."  

In 1708, South Carolina attempted to resolve the problem by defining the duties of its Attorney General. The colony specified that the duties of the office were:

[T]o Act, Plead, Implead, Sue, and Prosecute all and every Person & Persons whatsoever, for all Debts, Fines, Americaments, Forfeitures, Escheats Claims and Demands whatsoever which now is or may or Shall be Due in Arrears to Us upon any Account whatsoever whither Rents, Revenues or otherwise hownsoever, And to Prosecute all Matters Crimnall as well as Civill Giving and hereby Granting unto You full Power and Authority and the Premises therein to Deal Doe Execute and Performe in as large and Ample manner to all Intents and Purposes as to be Said officer of Attorney Generall doth in any way Appertaine & bellong . . . .

Similarly, Virginia had difficulty in defining the role of the Attorney General. "Generally, the duties of the Attorney General were to prosecute criminal actions, handle bonds and disputed land claims, and to represent the Commonwealth. However, in Virginia, he also seemed to exercise a substantial degree of control and supervision over the collection of public monies." The Attorney General in Virginia even assisted the House of Burgesses in the drafting of legislation and was given a seat in the House even though he was not a member.

The differences between the Attorney General's duties in each of the colonies is representative of the fact that there was no one strict definition of the position. "The office was far from stable, as the Crown or legislatures kept changing it . . . ." Even today, there is a lack of a uniform definition and description of the duties of the Attorney General.

Discovering the powers and duties of the Attorney General in the United States is an onerous task since it requires an analysis of not only the English common law, but also the common law of every state.

Although many courts in the United States have agreed that the Attorney General of the contemporary American state is endowed

125. HAMMONDS, supra note 93, at 6-7.
126. See id. at 17.
127. Id.
128. COMMON LAW POWERS, supra note 47, at 11.
129. See HAMMONDS, supra note 93, at 6-7.
130. See id.
131. COMMON LAW POWERS, supra note 47, at 11.
with the common law powers of his English forbearer . . . the application from one jurisdiction to another of this seemingly simple principle has produced an astonishing array of mutations which make it altogether impossible to reach any sweeping generalization on the matter.\textsuperscript{132}

The first American ruling on the common law powers of the Attorney General was in Massachusetts in 1850. In \textit{Parker v. May},\textsuperscript{133} the Supreme Judicial Court of Massachusetts held that the Attorney General may exercise powers that originated from the English Attorney General.\textsuperscript{134} However, the New York case of \textit{People v. Miner}\textsuperscript{135} is the case most often cited for a basic list of the common law powers of the Attorney General.\textsuperscript{136} The court in \textit{Miner} held that:

The [A]ttorney [G]eneral had the power, and it was his duty: 1st. To prosecute all actions, necessary for the protection and defense of the properties and revenues of the crown. 2nd. By information, to bring certain classes of persons accused of crimes and misdemeanors to trial. 3rd. By \textit{scire facias},\textsuperscript{137} to revoke and annul grants made by the crown improperly, or when forfeited by the grantee thereof. 4th. By information, to recover money or other chattels, or damages for wrongs committed on the land, or other possessions of the crown. 5th. By writ of \textit{quo warranto},\textsuperscript{138} to determine the right of him who claims or usurps any office, franchise or liberty, and to vacate the charter, or annul the existence of a corporation, for violations of its charter, or for omitting to exercise its corporate powers. 6th. By writ of \textit{mandamus},\textsuperscript{139} to compel the admission of an officer duly chosen to his office, and to compel his restoration when ille-

\begin{footnotes}
\item[133] Parker v. May, 5 Cush. 336 (Mass. 1850).
\item[134] See id. at 336.
\item[135] 2 Lans. 396, 398 (N.Y. 1868).
\item[136] Id. (holding in the case was that the Attorney General could not interfere with the town commissioner's power to issue bonds even if the commissioner failed to adhere to the required preliminary steps). The judge in the case commented, "I am utterly opposed to the adoption of a rule that will permit a State officer to intermeddle in the affairs of every corporation in the State. It can only lead to abuse . . . ." \textit{Id}.
\item[137] \textit{Scire facias} is defined as a "judicial writ, founded upon some matter of record, such as a judgment or recognizance, requiring the person against whom it is brought to show cause why the party bringing it should not have advantage of such record, or why the record should not be anulled and vacated." \textit{See} BL\textit{ACK'S LAW DICTIONARY} 1346 (6th ed. 1990). The name is used to designate both the writ and the proceeding. \textit{See id}.
\item[138] \textit{Quo warranto} is defined as a "writ in the nature of a writ of right for the king, against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim, in order to determine the right . . . . A common law writ designed to test whether a person exercising power is legally entitled to do so." \textit{BLACK'S LAW DICTIONARY} 1256 (6th ed. 1990).
\item[139] \textit{Mandamus} translated literally means "we command." \textit{See} BL\textit{ACK'S LAW DICTIONARY} 961 (6th ed. 1990). This is a writ which issued from a court of superior jurisdiction, directed to a private or municipal corporation, or an inferior court. It commanded the performance of a par-
\end{footnotes}
gally ousted. 7th. By information to chancery, to enforce trusts, and to prevent public nuisances, and the abuse of trust powers. 8th. By proceedings in rem to recover property to which the crown may be entitled, by forfeiture for treason, and property, for which there is no other legal owner, such as wrecks, treasure trove. 9th. And in certain cases, by information in chancery, for the protection of the rights of lunatics, and others, who are under the protection of the crown.

The Miner court recognized that “this enumeration, probably does not embrace all the powers of the [A]ttorneys [G]eneral at common law.”

Each state of the Union developed its own common law with respect to the office of the Attorney General. In the case of Mundy v. McDonald, the Michigan Supreme Court held “that the office of Attorney General is ancient in its origin and history, and it is generally held by the states of the Union that the Attorney General has a wide range of powers at common law. These are in addition to his statutory powers.” Although each state has the power to alter the power of the office through legislative enactment, most states have held that the statutory powers given to the office are in addition to the common law powers.

The office of Attorney General has existed from an early period, both in England and this country, and is vested by common law with a great variety of duties in the administration of government. The duties are so numerous and various that it has not been the policy of the legislature of the states of this country to attempt specifically to enumerate them; and where the question has come up for consideration, it is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the powers pertaining thereto under the common law.

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140. In rem is a technical term used to designate proceedings or actions instituted “against the thing,” as opposed to personal actions, which are said to be in personam. See Black's Law Dictionary 793 (6th ed. 1990).

141. Miner, 2 Lans. at 396.

142. Id.

143. 185 N.W. 877 (Mich. 1921).

144. Id. at 880.

145. Each state of the Union has a seminal case that controls the common law powers and statutory construction of the office of the Attorney General. The best listing of these cases was published by the National Association of Attorneys General in 1975. See Common Law Powers, supra note 47, at 57-66 (citing cases from each of the fifty states involving the common law powers of the Attorneys General).

146. 6 C.J. 809, § 12 (1916).
In recognizing that the power of the Attorneys General arises from the combination of both the common law and relevant statutory law, most jurisdictions follow the rationale from *People v. Miner*:

As the powers of the [A]ttorney-[G]eneral, were not conferred by statute, a grant by statute of the same or other powers, would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly, or by reasonable intent, forbade the exercise of powers thus expressly conferred.  

Therefore, unless a state statute expressly excludes the common law powers of the office of the Attorney General, all such powers are deemed to be inherent within the office. Today there appears to be only seven states that deny the Attorney General its common law powers, all other states have either not addressed the issue directly or have expressly held that the common law power continues to coexist with statutory power.

While the general rule is that a state statute can remove the common law powers of the Attorney General, some states have held that the legislature does not have the authority to abolish the common law powers of the office. For example, in Massachusetts, the office of Attorney General was abolished by the state legislature in 1843 as a result of an effort to place all of the Attorney General's powers in local district attorneys. However, in 1849, displeased with the results of its attempt to localize control, the legislature restored the office, but, in doing so, it severely restricted the power and the authority of the office. In *Parker v. May*, the Massachusetts Supreme Court held that although the abolition and subsequent reinstatement of the office broke the continuous flow of the common law, the legislature's action did not terminate the Attorney General's common law powers, even though the new office was restricted by state statute.

Similarly in 1938, the Pennsylvania legislature codified the power of the Attorney General to conduct grand jury investigations. However, one year later, the statute was repealed. In *Appeal of Margi*

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149. *See id.*
150. *See infra* notes 166-180 and accompanying text.
152. *See id.*
154. *See id.*
156. *See id.*
The Supreme Court of Pennsylvania recognized the continued existence of the Attorney General’s common law power to conduct grand jury investigations, without acknowledging the fact that the statute authorizing such power was clearly repealed by the state legislature. The majority reviewed the history of the Attorney General and concluded that the office was “clothed with the powers and attributes which enveloped Attorneys General at common law, including the right . . . to appear before the grand jury.” In dissent, Judge Jones argued that since the statute giving the Attorney General its grand jury power was repealed, the office no longer possessed the authority that the statute codified. Despite this argument, the majority held that the power to conduct grand jury investigations was not rooted in the statute, but rather was an inherent power of the Attorney General based in the common law and continued to exist independent of the now repealed statute.

The above cases from Pennsylvania and Massachusetts demonstrate the strength of the common law within American jurisprudence. Since the common law forms the basis of our modern legal system, it is an inherent part of every Attorney General. As was previously discussed, each state maintains its individual authority over the common law powers of the Attorneys General. Some states possess the ability to modify the common law powers of the State Attorney General through legislative enactment. However, most states have followed the principle stated in Miner that unless a state legislature expressly terminates the common law powers of the Attorney General, it can be assumed that such powers are part of the office. This is the general rule that controls most jurisdictions in the United States. However, the State of Illinois does not subscribe to this general rule. Illinois has expressly held that the common law power of the Attorney General cannot be limited by state statute.

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158. See id. at 466.
159. Id.
160. See id. at 474-75 (Jones, J., dissenting).
161. See id. at 466. This case clearly illustrates that the legislature cannot remove a power of the Attorney General by codifying the authority in a statute, and later repealing that same statute. Since the power to conduct a grand jury investigation was recognized at common law, such authority cannot be revoked without a statute which clearly prohibits the Attorney General from exercising such a power.
162. See supra notes 145-147 and accompanying text.
163. See supra notes 145-147 and accompanying text.
164. See supra notes 145-147 and accompanying text.
165. See supra notes 145-147 and accompanying text.
166. See infra notes 169-178 and accompanying text.
sult, the Attorney General of Illinois has perhaps the broadest power of all the Attorneys General within the United States.167

B. The Attorney General in Illinois

In Illinois, the office of the Attorney General was created by the state constitution that states: "The executive department shall consist of a[n] . . . Attorney General, who shall . . . perform such duties as may be prescribed by law."168 This constitutional provision created the office, and decreed that the state legislature shall have the power to create the duties of the office. However, Illinois is unique because its case law has previously held that not only does the office possess all of its common law powers, but the common law powers of the office cannot be limited.169

In 1887, the Illinois Supreme Court gave the first indication of the Attorney General's broad powers in Hunt v. Chicago Horse & Dummy Ry. Company.170 In Hunt, the court held that "the duties of such an office are so numerous and varied that it has not been the policy of legislatures to attempt the difficult task of enumerating them."171 The Illinois Supreme Court simply stated that the Attorney General has all the authority of the common law.172 In 1941, the Supreme Court of Illinois decided People v. Finnegan,173 which permanently incorporated all common law duties and powers into the office of the Attorney General. This decision made the common law an inherent part of the office that could never be removed.174 In Finnegan, the Illinois Supreme Court specifically held:

[I]n this State the constitution, by creating the office of Attorney General under its well-known common law designation and providing that he shall perform such duties as may be prescribed by the law, ingrafted upon the office all the powers and duties of an Attorney General as known at the common law and gave the General Assembly power to confer additional powers and impose additional duties upon him. The legislature cannot, however, strip him of any of his common law powers and duties as the legal representative of the State.175

167. See infra notes 169-178 and accompanying text.
168. ILL. CONST. OF 1870, art. V, §1.
169. See infra note 175 and accompanying text.
170. 13 N.E. 176, 181 (Ill. 1887).
171. See id. at 180 (holding that the Attorney General has the authority to challenge the Chicago City Council decision to allow the construction of a railroad on city streets).
172. See id.
173. 38 N.E.2d 715, 716 (Ill. 1941) (holding that the Illinois legislature has no authority to remove the common law powers of the office of the Attorney General).
174. See id.
175. Id.
The idea that the Attorney General's common law powers cannot be limited has been well supported by Illinois case law. In People v. Covelli, the Illinois Supreme Court stated that [i]t is thus apparent that on those occasions when the Illinois courts have had an opportunity to examine into the matter of the rights and prerogatives of the Attorney General of the state, they have quite generally determined that such officer, in addition to those powers and duties conferred by statute, enjoys all the inherent powers and duties of the Attorney General of England under the common law, and that under no circumstances could those powers be denied him.

Illinois is the only state to expressly hold that the state legislature cannot remove any of the common law powers of the Attorney General's office. Due to the wide range of duties and powers available at common law, the Illinois courts have never tried to enumerate all of the duties of the office. The publication of such a list by the Illinois

176. 112 N.E.2d 156 (Ill. 1953).
177. Id. at 160.
178. See COMMON LAW POWERS, supra note 47, at 12.
179. See Hunt, 13 N.E. at 176 (adopting the reasoning of Hunt v. Chicago & Dummy Ry. Co., 20 Ill. App. 282 (1886)). The Illinois courts have refrained from creating a list enumerating the powers and duties of the Attorney General because the list would encompass centuries of English law, early American law, as well as almost two hundred years of state law. In addition, it has never been the courts' responsibility to draft lists which enumerate the powers and authorities of a government office. Such a role traditionally belongs to the legislature. Even if such a list were created, it could never encompass the ever-evolving nature of the common law which creates the majority of the Attorney General's powers. Despite these limitations, the Illinois Legislature has provided a list of the Attorney General's duties to be used as a guide. As is evident from the broad and permissive language, this list is not intended to serve as an exclusive or all encompassing enumeration of duties. The Illinois statute states:

The duties of the attorney general shall be — First — To appear for and represent the people of the state before the Supreme Court in all cases in which the state or the people of the state are interested. Notwithstanding this provision, the Office of Public Counsel shall be authorized to represent the interests of the people of the state in all proceedings pertinent to utility regulation, including cases before the Supreme Court, where any such case is properly brought by the Office pursuant to its statutory duties and powers. Second—To institute and prosecute all actions and proceedings in favor of or for the use of the state, which may be necessary in the execution of the duties of any state officer. Third—To defend all actions and proceedings against any state officer, in his official capacity, in any of the courts of this state or the United States. Fourth—To consult with and advise the several state's attorneys in matters relating to the duties of their office; and when, in his judgment, the interest of the people of the state requires it, he shall attend the trial of any party accused of crime, and assist in the prosecution. When the attorney general has requested in writing that a state's attorney initiate court proceedings to enforce any provisions of The Election Code or to initiate a criminal prosecution with respect to a violation of The Election Code, and when the state's attorney has declined in writing to initiate those proceedings or prosecutions or when the state's attorney has neither initiated the proceedings or prosecutions nor responded in writing to the attorney general within 60 days of the receipt of the request, the attorney general may, concurrently with or independently of the state's attorney, initiate
courts would most likely be a futile act because the common law continues to change as time passes.\textsuperscript{180}

Although the common law duties of the Attorney General’s office have never been enumerated, Illinois courts have held that the “[A]ttorney [G]eneral, by virtue of the common law and statutory powers of his office, is the legal representative of the state and may institute proceedings in behalf of the state in any case where it has a substantial interest.”\textsuperscript{181} Most of the Illinois Attorney General’s cases involve representing state agencies or officers in actions around the state,\textsuperscript{182} pursuing consumer protection actions to safeguard citizens from fraudulent business practices,\textsuperscript{183} and protecting the public against threats to health and safety.\textsuperscript{184} In contrast to the duty to the state government, directly inherited from English common law, the duties of the Attorneys General in the United States have been broad-

\begin{itemize}
  \item Fifth—To investigate alleged violations of the statutes which the Attorney General has a duty to enforce and to conduct other investigations in connection with assisting in the prosecution of a criminal offense at the request of a State’s Attorney.
  \item Sixth—To consult with and advise the governor and other state officers, and give, when requested, written opinions upon all legal or constitutional questions relating to the duties of such officers respectively.
  \item Seventh—To prepare, when necessary, proper drafts for contracts and other writings relating to subjects in which the state is interested.
  \item Eighth—To give written opinions, when requested by either branch of the general assembly, or any committee thereof, upon constitutional or legal questions.
  \item Ninth—To enforce the proper application of funds appropriated to the public institutions of the state, prosecute breaches of trust in the administration of such funds, and, when necessary, prosecute corporations for failure or refusal to make the reports required by law.
  \item Tenth—To keep, a register of all cases prosecuted or defended by him, in behalf of the state or its officers, and of all proceedings had in relation thereto, and to deliver the same to his successor in office.
  \item Eleventh—To keep on file in his office a copy of the official opinions issued by the attorney general and deliver same to his successor.
  \item Twelfth—To pay into the state treasury all moneys received by him for the use of the state.
  \item Thirteenth—To attend to and perform any other duty which may, from time to time, be required of him by law.
  \item Fourteenth—to attend, present evidence to and prosecute indictments returned by each Statewide Grand Jury.
\end{itemize}


180. See State Attorneys General, supra note 10 at vii.

181. People v. Continental Beneficial Assoc., 204 Ill. App. 501, 503 (1917) (allowing the Attorney General to freeze assets of insolvent foreign corporation within the state of Illinois for payment to consumer creditors who were injured by defendant corporation).

182. See Board of Trustees of Univ. of Illinois v. Barrett, 46 N.E.2d 951, 958 (Ill. 1943) (representing members of the board of trustees from the University of Illinois).


ened to include a specific duty to the people. "In addition to representing [the] state and its agencies, [the] Attorney General is responsible for representing broader interests of the state,"\textsuperscript{185} which is representative of the larger goal and purpose of the office.\textsuperscript{186}

The Attorney General's office has traditionally prosecuted consumer protection cases, not for the profitability or likelihood of settlement, but for the overall public good that would result from such an action.\textsuperscript{187} The Attorney General of the State of Illinois acts as a constant advocate for the people and is not motivated by money, profitability, or career advancement, but rather by an overwhelming duty to protect the officers, agencies, and people of Illinois. In an effort to further this purpose, the Attorney General of Illinois often makes use of its broad authority to appoint outside counsel to assist with the numerous actions that the office is responsible for overseeing.

\textbf{1. Power to Appoint Special Attorneys in Illinois}

In Illinois, it is impossible to pinpoint with precision when and where the Attorney General was granted the authority to appoint Special Assistants. Illinois case law has continually held that such authority is implicit in the office and has been retained since the common law of England.\textsuperscript{188} There is no statute in Illinois that expressly authorizes such appointment,\textsuperscript{189} nor is there any early decision in Illi-

\textsuperscript{185} People v. E & E Hauling, Inc., 607 N.E.2d 165, 170 (Ill. 1992) (finding that the Attorney General had authority to represent the state against contractors in fraud and breach of contract action for illegal dumping of construction material).

\textsuperscript{186} The term "broader interests" was first used in \textit{E.P.A. v. Pollution Control Board}, 372 N.E.2d 50, 53 (Ill. 1977). The term "broader interests" means that the Attorney General's primary concern is always the "State and the public interest." \textit{Id.} No matter what the case or controversy may be, the Attorney General's highest duty is to the state and its public. Therefore, all actions taken by the office should be guided by the "broader interests" of the office. \textit{Id.}

\textsuperscript{187} Jeremiah W. Nixon, the Attorney General of Missouri, states in his mission statement that "[a]s the state's chief law enforcement officer, I am committed to protesting the safety and welfare of all Missourians. The AG's Office aggressively prosecutes those who break criminal, environmental and consumer protection laws and defends the state against legal actions." \textit{See Missouri Attorney General's Office Homepage, at http://www.ago.state.mo.us/html} (visited Jan. 19, 2000). Bill Lockyer, Attorney General of California, states in his welcome statement that his office "works to ensure the safety of the people of California . . . [and is] dedicated to enforcing the law and putting sex offenders, murderers and drug dealers behind bars." \textit{See California Attorney General's Office Homepage, at http://www.caag.state.ca.us/welcome.htm} (visited Jan. 19, 2000).

\textsuperscript{188} Saxby v. Sonnenman, 149 N.E. 526, 529 (Ill. 1925).

\textsuperscript{189} It may be more relevant to consider that there is no statute that denies the Attorney General the power to appoint Special Assistants. Since such a power is not expressly forbidden by the state constitution, such authority must reside within the common law. The only statute which reflects the common law power or appointment is the section of the Illinois the Attorney General Act which provides for the appointment of a substitute attorney. The Act states that:
nois case law that notably spotlights the source of this power. The Illinois courts have simply relied on the common law as the sole source of authority.\textsuperscript{190} Since the Illinois courts have held that the Illinois Attorney General possesses all of the powers known to the office at common law and that authority cannot be limited by the legislature,\textsuperscript{191} the authority to appoint Special Assistants remains an inherent power of the office.

Despite a lack of express authorization, Illinois courts have routinely upheld the broad power of the Attorney General to appoint Special Assistants to assist in the wide area of enforcement that the Attorney General is required to cover.\textsuperscript{192} The first recorded use of

\begin{quote}
Whenever the attorney general is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the attorney general would have had if present and attending to the same.
\end{quote}

15 ILL. COM. STAT. ANN. 205/6 (West 1991).

\textsuperscript{190} Although it is a distinctly different office with its own history, the office of the State’s Attorney can be examined to compare its power of appointment of Special Assistants with the similar power held by the Attorney General. Unlike the office of the Attorney General, which has no express statute, the appointment of a Special Assistant State’s Attorney is provided for in 55 ILL. COM. STAT. 5/3-9008 (West 1991). In \textit{People v. Hickman}, the court held that the purpose of the statutory provision for the appointment of Special Assistant States Attorney is to prevent any influence upon the discharge of the duties of the State’s Attorney by reason of personal interest. 128 N.E. 484, 487 (Ill. 1920). \textit{See also} EPA v. Pollution Board, 372 N.E.2d 50, 52 (Ill. 1977) (holding that the a special States Attorney could only be appointed to eliminate a conflict of interest where the States Attorney is an interested party as a private individual, or an actual party to the litigation); People v. Morley, 678 N.E.2d 1235, 1238 (Ill. 1997) (holding that there was no conflict requiring appointment of a Special Assistant States Attorney where the defendant was charged with attempted murder of an employee of the State’s Attorneys office); Suburban Cook County Regional Office of Education v. Cook County Board, 667 N.E.2d 1064, 1074 (Ill. 1996) (finding that a court can properly appoint a Special States Attorney when the states attorney has refused to represent a public officer who requires representation).

\textsuperscript{191} \textit{See supra} notes 175-180 and accompanying text.

\textsuperscript{192} \textit{See infra} note 198 and accompanying text. The National Association of Attorneys General has recognized that “[n]early all jurisdictions employ special counsel to supplement the services of the Attorney General Staff.” \textit{National Association of Attorneys General, Committee on the Office of the Attorney General} 296 (1971). However, it also has recommended that “the use of special or part-time counsel be restricted to unusual circumstances, as it tends to be an inefficient method of providing legal services.” \textit{Id.} Although the use of Special Assistants has been challenged in courts across the country, the authority of the respective Attorneys General has been continually upheld. The Mississippi Supreme Court has upheld the power of the Attorney General to hire special counsel whenever he or she felt it was necessary. State v. Mayes, 28 Miss. 706 (1855). The Louisiana Supreme Court has also upheld the authority of its Attorney General to employ special counsel to either assist or perform criminal prosecutions alone. State v. Anderson, 29 La. Ann. 774 (1877); State v. Russell, 26 La. Ann. 68 (1874). The Ohio Supreme Court has held that the Attorney General possessed complete authority to appoint Special Assistants, determine the duration of employment, decide which
the authority in Illinois was a simple commercial action in 1923. In Punch v. Aetna Life Insurance Company, Robert N. Holt appeared as a Special Assistant on behalf of Attorney General Edward J. Brundage. In Punch, the Appellate Court of Illinois granted the defendant an injunction to restrain the State Superintendent of Insurance from threatening the revocation of the defendant's license. The opinion of the case had nothing to do with, nor did it even discuss, the propriety of the Special Assistant's appointment. As a result, it can be justifiably concluded that the court recognized the inherent power of the Attorney General to make such an appointment.

It was not until 1925 that the Illinois Supreme Court officially recognized the appointment power of the office as one of the powers retained by the common law. In Saxby v. Sonnemann, the court held that "it is, of course, easily seen that in a great state such as this the multiplicity of duties of the Attorney General forbid personal attention to all of them. He must, and does, have power to appoint the necessary deputies or assistants to aid in carrying out those duties." Although the court did not expressly state that the Attorney General had the ultimate authority to hire private counsel, deputize them as Special Assistants, and enter into contingency fee contracts, the Saxby decision has become the most frequently cited case as an expression of the common law source of the Attorney General's appointment power. Following the Saxby decision, Illinois courts began to ex-

193. See Punch v. Aetna Life Ins. Co., 230 Ill. App. 656 (1923) (denying a motion for dissolution of a temporary injunction against the State Superintendent of Insurance). This is the first time court records reflect that a Special Assistant Attorney General appeared in court on behalf of the Attorney General. It is important to note that the author's search of Illinois court records was performed via the WestLaw computer database, which at the time of inquiry only cataloged Illinois Supreme Court cases to 1819, and Illinois Appellate Court cases to 1877. Any search for information regarding the appearance of Special Assistants prior to those dates was beyond the capabilities of the author. An additional difficulty in investigation is that Special Assistants may not always have been given the title "Special Assistants." Although this modern title has been utilized for some time, the same position may have been referenced by a different title prior to 1923, the date of the above case. Efforts to discover such a variance have been unsuccessful as of the publication date of this Comment.

194. 230 Ill. App. 656 (1923).

195. See id.

196. Id.

197. If the court had some objection or problem with the members of the Illinois bar that were appearing before it on that day, there would be some indication or acknowledgement. As a result, we can conclude that the court inherently recognized the Attorney General's power to appoint Special Assistants.

198. 149 N.E. 526, 529 (Ill. 1925).

199. The Attorney General's power to appoint Special Assistants is only one of the possible ways that Illinois Courts have recognized that a Special Assistant can be created.
INHERENT CONFLICT

pressly hold that "the Attorney General has the inherent power to appoint Special Assistants." Today, the appointment power of the Attorney General in Illinois is no longer questioned. The common law roots of the authority have been firmly established and the Attorney General continues to make appointments as needed.

In Illinois, Special Assistants are utilized to undertake a variety of efforts. For example, the Attorney General will often look to outside counsel when a conflict occurs that would prevent the office from representing an officer of the state. In other situations, the Attorney General may require special expertise, may be too busy to pursue an action, or simply not have the human or financial resources

also recognized the power of the legislature to create a Special Assistant expressly by statute. In People v. Illinois State Toll Highway Commission, the Illinois Supreme Court upheld a provision of the Highway Commission Act that entitled the commission to appoint Special Assistants to aid in the many legal issues that would arise during the existence of the Highway Commission. 120 N.E.2d 35, 46 (Ill. 1954). Illinois courts have also recognized the power of a Special Assistant to be created through a court appointment. The Illinois statute expressly states that, "[w]henever the attorney general is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court . . . may appoint some competent attorney to prosecute or defend such cause or proceeding. 15 I.L.L. COMP. STAT. 205/6 (1998). In Tully v. Edgar, the Illinois Appellate court appointed a Special Assistant Attorney General to represent trustees of the University of Illinois who had been fired as a result of a statute passed by the state legislature. 676 N.E.2d 1361, 1367 (Ill. App. Ct. 1997). The court ordered the Attorney General to create a Special Assistant to represent the claims of the trustees. See id. This created a precarious situation because the Attorney General was also required to represent the opposite end of the litigation in favor of the state and argue to uphold the legislative action. See id. The Attorney General challenged the court's action on the basis of a conflict of interest. See id. The court held that "to the extent that the Attorney General has a conflict in the representation of an elected official which the attorney general is unable or unwilling to resolve, the circuit court has the authority to remove that conflict through the appointment of a special attorney." Id.

201. The National Association of Attorneys General has reported that while nearly every jurisdiction uses Special Assistants, only sixteen use the power of appointment frequently. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL 298 (1971).

[T]he type [of] cases where special counsel are employed fall into several classifications. Nearly all the jurisdictions which report frequent employment of special counsel use them in title and condemnation cases. Collection cases are also mentioned frequently, as are public utility rate cases. Some offices use special counsel in antitrust cases, particularly those in out-of-state courts. A number of Attorneys General report that private attorneys are hired when special expertise is needed or when a case of special importance or notoriety is involved. Outside counsel may be hired where conflicts between two agencies exist and the Attorney General declines to represent both sides. Washington and West Virginia are among states which say that special counsel is employed in such cases.

Id.

202. See Board of Trustees of Univ. of Illinois, 46 N.E.2d at 967 (finding that the Attorney General was not the sole representative of Trustees and limiting the Attorney General's involvement).
that the case would require.\textsuperscript{203} Regardless of why the Special Assistant is needed, during the time period he serves, the appointed attorney is vested with the full authority and power of the office of the Attorney General.\textsuperscript{204} As a result, the appointed attorneys vested with the title “Special Assistants” have an implicit duty to represent the people of the State of Illinois “as the [A]ttorney [G]eneral would have had if [he was] present and attending the same.”\textsuperscript{205} While it is a privilege to act on behalf of the people of the State of Illinois as a Special Assistant, the appointed attorney does not accept the position on a \textit{pro bono} basis, and is therefore entitled to be compensated for his or her time and effort. The issue then becomes how the Special Assistants should be compensated and how that compensation should be determined.

2. \textit{Compensation of the Special Attorney General}

Similar to the power of the Attorney General to appoint Special Assistants, the power to compensate Special Assistants has no express source or beginning. Illinois courts have recognized that if the Attorney General can appoint Special Assistants, there must be a corresponding power to compensate them for their efforts.\textsuperscript{206}

Until recently, the compensation of Special Assistants, was never an issue because they did not oversee groundbreaking cases or handle front-page litigation. Historically, most Special Assistants have acted on behalf of the Attorney General to collect money owed to the state or to counsel state employees requiring representation.\textsuperscript{207} Most of the Special Assistant’s appointments proceeded without difficulty.\textsuperscript{208} For

\textsuperscript{203} See Daniel J. Capra, \textit{The Tobacco Litigation and Attorneys’ Fees}, 67 \textit{Fordham L. Rev.} 2827, 2856 (1999) (comments of Bob Montgomery) (discussing the state legislatures disapproving of the millions of dollars required to go after the tobacco industry, needed by the states to recruit Special Assistants).

\textsuperscript{204} See supra note 17 and accompanying text.


\textsuperscript{206} See infra notes 207-210 and accompanying text.

\textsuperscript{207} See \textit{Tully}, 676 N.E.2d at 1367 (holding that a court could eliminate a conflict of interest by appointing a Special Assistant to represent a university trustee against the state and ensure that the appointed attorney would receive compensation for services); Morton v. Hartigan, 495 N.E.2d 1159, 1160 (Ill. App. Ct. 1986) (terminating a Special Assistant when he breached a loyalty to the office he was assigned to represent); Potter v. The State of Illinois, 36 Ill. Ct. Cl. 26, 35 (1983) (awarding claimants amount owed for legal fees and expenses while serving as Special Assistant in the place of the Attorney General and as representation for the director of the State of Illinois Department of General Services); \textit{Sears}, 24 Ill. Ct. Cl. at 459 (1964) (denying a claim for legal fees owed to claimant for representation of the Auditor of Public Accounts and the Director of Financial Institutions).

\textsuperscript{208} See supra note 207.
example, the appointment was made, the appointed attorneys pro-
vided their services, and they were justly compensated.209

Although Illinois courts have repeatedly recognized the Attorney
General's authority to appoint Special Assistants and to set a reasona-
ble rate of compensation, the actual definition of reasonable compen-
sation has been subject to interpretation by Illinois courts.210 For
example, in Potter v. State of Illinois, the Illinois Court of Claims held
that a private attorney acting as a Special Assistant was “entitled to
reasonable compensation from the State for the services provided.”211
Further, in Gould v. State of Illinois, the Illinois Court of Claims did
not inquire as to the reasonableness of the compensation, but rather
approved the fees owed to the Special Assistant based on the recom-
mendation of the Attorney General.212 Despite the fact that the defi-
nition of “reasonable compensation” was not expressly stated, the
system worked fairly efficiently. The office of the Attorney General
appointed Special Assistants as required, and provided reasonable
compensation for their services.213

Within the past decade, however, the form of compensation for
Special Assistants has been altered. Rather than using the traditional
compensation methods, the Attorney General began to enter into
contingency fee contracts with Special Assistants. Although contin-

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209. See supra note 207.
210. See supra note 207. The National Association of Attorneys General has stated that a
major problem in the use of special counsel is setting compensation. States follow dif-
ferent patterns in determining compensation. The Attorney General and the special
attorney agree on a fee in Alabama, Florida, Mississippi, Minnesota, Oregon, the Vir-
gin Islands, and Washington. Michigan, Puerto Rico, Wisconsin, and Wyoming specify
that the fee is set by contract. Colorado, Connecticut, Idaho, Louisiana, Nevada, and
New Mexico pay on an hourly basis. Arizona pays some special counsel by the hour
and others a monthly salary. In Massachusetts and Vermont, an hourly rate is paid in
some cases and a percentage fee in others. Ohio pays one-third of the amount col-
clected in claims cases, and standard fees in others. West Virginia and Colorado specify
that fees are set according to the bar association minimum. New Jersey pays in accor-
dance with a predetermined fee schedule. New York reports that compensation is de-
termined flexibly, as indicated by the situation involved.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF THE AT-
TORNEY GENERAL 297 (1971).
211. Potter, 36 Ill. Ct. Cl. at 33 (emphasis added).
212. Gould, 6 Ill. Ct. Cl. 87 (1928).
213. Illinois is not the only state that has difficulty interpreting the definition of “reasonable.”
Three factors that courts use when asking if fees are reasonable are: “(1) the novelty and diffi-
culty of the issues as they are presented when the lawsuit is brought; (2) the extent to which
other work is preempted by the fact that the lawyers take in the case involved; and (3) for
contingent fees, the chance of success.” See Capra, supra note 204, at 2839 (comments of Bar-
bara Gillers).
Contingency fees are widely used by attorneys in private practice, the use of these contracts by government agencies is a novel application. However, within the past few years, the State Attorneys General have begun to utilize contingency fees as a form of compensation for the use of Special Assistants. This specific form of compensation has yet to be challenged in an Illinois court, thus it is assumed that the Attorney General’s authority to enter into such contracts is a mere extension of the power to set reasonable compensation.

Actions involving Special Assistants are normally uneventful, and they generally go unnoticed by the general public. If not for the recent tobacco litigation, the use of contingency fee contracts in the offices of the Attorneys General may never have been questioned. On its face, there appears to be nothing wrong with the use of contingency fee contracts. Objectively, contingency fee contracts are merely another form of compensation that the Attorney General has chosen to utilize. However, the recent tobacco litigation altered the scenario by placing billion-dollar settlements and million-dollar attorney fees in the headlines of every major American newspaper.

III. SPECIAL ATTORNEYS GENERAL AND TOBACCO LITIGATION

In recent years, the tobacco industry has been characterized by health organizations and consumer action groups as evil incarnate.
In the modern age of health awareness, the tobacco producers have been on the defensive about the risks their product poses to the public and what the industry may or may not know about the potential addictive nature of their product. Since individual plaintiffs, injured by the effects of tobacco, had limited success with their private suits against the tobacco industry, the Attorneys General of the United States decided to lend some support to the fight. Although the battle against tobacco began in a few select states, the war soon waged in every state. When the smoke cleared, the tobacco industry agreed to settle with the states for an astronomical amount of money, the likes of which has never before been seen in a product liability action.

A. A Review of the Tobacco Litigation

The fight against the tobacco industry was not easily won. The offices of the Attorneys General across America gained submission from the tobacco industry only after banding together in a concerted effort against tobacco. The Attorneys General recognized that they could not handle this fight on their own; therefore, a majority of the states involved in the tobacco litigation sought the aid and support of outside counsel. Through the appointment of Special Assistants, the offices of the Attorneys General deputized private attorneys to conduct the litigation on behalf of the state. As expected, this service did not come free of charge, and as a result, most of the states

with the Devil, 336 NEW ENG. J. OF MED. 304 (1997) (stating that the tobacco companies have come to personify the devil).

221. The fight against the tobacco companies has occurred in three waves. See Annas, supra note 220, at 304. The first wave (1954-1973) began when medical research first linked tobacco to cancer. Id. The second wave (1983-1992) is marked by individual plaintiffs challenging the tobacco industry with little or limited success. Id. Despite much medical research, there was still no medical proof that the tobacco caused cancer. Id. The third wave (1994-present) was a success due in large part to state-sponsored lawsuits against the industry. See id. Additional elements that contributed to the success of the third wave was the discovery of secret industry documents indicating that the industry had knowledge of the addictive potential of nicotine, and medical proof that the tar ingredient benzopyrene causes cancer. Id.

222. See Capra, supra note 204, at 2828.
223. See infra note 237 and accompanying text.
224. In order to objectively evaluate the role of the Special Assistants in the tobacco litigation, two assumptions must be made. First, one must accept that challenging the tobacco industry was an appropriate course of action for the office of the Attorney General. If this proposition cannot be accepted, then it will be impossible to view the underlying issues of this Comment. Second, one must also assume that the State Attorneys General could not have conducted the litigation themselves and therefore required the use of Special Assistants.

225. See McCarron, infra note 256.
226. Four states did not employ Special Assistants for the tobacco cases. See infra note 329.
227. See infra notes 239-260 and accompanying text.
entered into contingency fee contracts with the Special Assistants.\textsuperscript{228} The problem with these contingency fee contracts stems from the fact that the Special Assistants selected to participate in the tobacco cases were not chosen objectively, but rather on the basis of their personal, political, or financial ties to each respective Attorney General.\textsuperscript{229}

In November of 1998, the tobacco industry settled with forty-six of the fifty states for $206 billion,\textsuperscript{230} an amount which will be gradually awarded over the next five years.\textsuperscript{231} The actual amount awarded to each state may increase due to the fact that each individual state has the option to waive the terms of the settlement and pursue the tobacco industry under its own initiative.\textsuperscript{232} The four remaining states of Mississippi, Texas, Florida, and Minnesota, each settled individually with the tobacco industry,\textsuperscript{233} prior to the multi-state agreement, for $40 billion.\textsuperscript{234}

Illinois was one of the states involved in the multi-state settlement and has agreed to take its portion of the $206 billion award. Illinois is scheduled to receive more than $9 billion from the forty-six state settlement,\textsuperscript{235} over the next twenty-five years, through annual payments of $350 million.\textsuperscript{236} Proponents of the state’s efforts to hold the tobacco industry accountable for the effects of tobacco on the public have failed to recognize that the real victors in this battle were not the states, or even the consumers, but rather the Special Assistants.

\textbf{B. Lawyers: The Real Winners}

Out of the smoke of the tobacco litigation, a select group of attorneys emerged to lead the fifty United States in the battle against the tobacco giants. No matter what their true motives may have been, these attorneys realized a larger windfall from the tobacco litigation

\textsuperscript{228} See infra notes 239-260 and accompanying text.

\textsuperscript{229} See infra notes 239-260 and accompanying text.

\textsuperscript{230} See Capra, supra note 203, at 2828 (comments of Daniel Capra) (discussing the state’s settlement).


\textsuperscript{232} Id.


\textsuperscript{234} Id. See also Capra, supra note 203, at 2827-28 (comments of Daniel Capra) (discussing the order of tobacco litigation and settlements in various states).


\textsuperscript{236} Id.
than any other litigation conducted to date. These new billionaire attorneys were selected to lead the crusade against big tobacco, not necessarily because of their skill or prowess in the field, but because of their close social and political ties with the Attorney General of their state.

Attorneys appointed by the former Texas Attorney General, for example, received more than three billion dollars for their efforts in the litigation. When calculated over the time spent on the project, the Special Assistants in Texas were paid over $92,000 per hour. In addition to the shocking amount of compensation that the Special Assistants received, it was not mere coincidence that the five Texas firms that handled the tobacco litigation donated nearly $150,000 in contributions to the Texas Attorney General's Office. As a result, the new Texas Attorney General, John Cornyn, has begun an investigation into rumors that the former Attorney General Dan Morales solicited one million dollars from each of the lawyers he hired to pursue the tobacco litigation. Cornyn claims that Morales required the five attorneys who eventually represented the State of Texas to pay such an amount in order to work the case. In addition, the Federal Bureau of Investigation (FBI) began an inquiry into the disputed fee agreement between Morales and private attorney Marc Murr.

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238. See infra notes 241-255 and accompanying text. The author acknowledges that the criticism of Special Assistants is in no way a novel concept. Attorneys General across the country have been hiring Special Assistants based on subjective criteria without protest for years. When the Attorney General's office had extra work to be performed, it looked to friends and colleagues of the office for such appointments. Only now, in the wake of the tobacco litigation, is the system of appointment being criticized. Although it may be hypocritical, the fact that Special Assistants were appointed by less than objective means was of no concern prior to the multi-billion-dollar settlements of the tobacco cases. The system of appointment proceeded as it always had, and no one cared. However, the tobacco litigation changed everything because attorneys' fees were amounting to billions of dollars, rather than merely hundreds or thousands of dollars. To argue that the system of appointment was never attacked before, and therefore should not be attacked today, is unconvincing. The mere fact that the system was never questioned is an insufficient justification for approving the process today.

239. See Van Voris, supra note 237.

240. Id.


243. Id.

Morales and Murr worked together at a Houston law firm in the 1980s, and under the contingency fee agreement, Murr was entitled to receive $520 million.\textsuperscript{245} Cornyn has alleged that Murr's fees were "procured by fraud."\textsuperscript{246} Cornyn has suggested that the fee agreement between Morales and Murr was "fake," and although it was purported to be executed before the beginning of the litigation in 1996, it was not actually created until 1998, after a settlement in the case.\textsuperscript{247} One day after Cornyn filed a suit alleging that the contract was fraudulent, Murr withdrew his claim for $260 million from the State of Texas.\textsuperscript{248}

Similarly, the Attorney General of Mississippi, Mike Moore, chose his number one campaign contributor, Richard Scruggs, to lead Mississippi's litigation against the tobacco industry.\textsuperscript{249} The tobacco litigation was not the first time Scruggs had been chosen to represent the state of Mississippi. His first experience with a government sponsored contingency fee was in 1992 with his victory over the asbestos industry on behalf of the State of Mississippi.\textsuperscript{250} The asbestos contingency fee contract was awarded to Scruggs only one year after he donated $20,000 to Moore's re-election campaign. The contingency fee contract eventually allowed Scruggs to collect $2.5 million.\textsuperscript{251} Following

\begin{itemize}
\item \textsuperscript{245} Clay Robison, R.G. Ratcliffe, \textit{Texas Attorney General Accuses Predecessor of Fraud}; \textit{Hous. Chron.}, May 6, 1999, at A1. Under the contingency fee contract, Murr was entitled to three percent of the state settlement. \textit{Id.} Under the terms of the agreement, the three percent fee would equal $520 million. \textit{Id.} However, after a state arbitration panel reviewed the fee award it was reduced to $260 million. Murr reportedly worked 2,000 hours, therefore his fee is equal to $130,000 per hour. Robison, \textit{supra} note 244. The state arbitration panel which reviewed the reward is also being investigated due to allegations that the three judge panel was hand-picked by Morales and Murr. \textit{Id.}
\item \textsuperscript{246} Robison, \textit{supra} note 245.
\item \textsuperscript{247} \textit{Id.} Cornyn claims that Murr was working for Morales in a very limited capacity. He questions whether Murr is deserving of any fee as a result of the settlement. \textit{Id.} Additionally, Cornyn claims that the three percent fee agreement between Morales and Murr was not created until 1998. \textit{Id.} During that year, Morales allegedly created a "fake" contract and post-dated it to the year 1996. \textit{Id.} Morales has responded to these allegations by claiming that Cornyn is attempting to discredit him in the event that Morales should decide to run for Governor. \textit{Id.} Morales, a Democrat, contends that the fee agreements were not post-dated and were legally executed. Cornyn, a Republican, claims the former Attorney General committed fraud and that he will continue to investigate. \textit{Id.}
\item \textsuperscript{249} See Levy, \textit{supra} note 241, at 641.
\item \textsuperscript{250} \textit{Id.} Scruggs was hired by the State of Mississippi on the basis of a contingency fee for the purposes of suing the manufacturers of asbestos. The use of contingency fees in the asbestos cases marks the beginning of the contingency fees' influence in government sponsored suits. States such as Mississippi witnessed how well the agreement worked in state sponsored suits, as well as the large reward that was generated for both the state and the attorneys. When confronted with the enormous task of suing the tobacco industry, the state opted for the same agreement which had previously generated a successful result. \textit{Id.}
\item \textsuperscript{251} See Lochhead, \textit{supra} note 241, at 21.
\end{itemize}
the suit, Scruggs continued to be a generous donor to Moore's political campaigns, and as a result, was awarded the role as lead counsel in Mississippi's suit against the tobacco industry. After a successful bout with the tobacco companies, Scruggs secured a settlement of $4.2 billion for the State of Mississippi. Based on Scruggs' contingency fee contract with the State of Mississippi, he is entitled to receive $339.8 million as compensation for his efforts on the case.

In addition to political contributions, personal and political ties have appeared as factors in the appointment of Special Assistants. In Illinois, Attorney General Jim Ryan began the litigation against the tobacco industry by employing out-of-state firms. However, as talk of settlement grew near, Ryan brought aboard Freeborn & Peters, "the law firm of his good Republican buddy, former U.S. Attorney Fred Foreman." As a result, the firm of Freeborn & Peters is scheduled to collect over $273 million from the state settlement. Chicago Mayor Richard Daley has characterized the three percent contingency fee taken by Freeborn & Peters as "outrageous."

252. Philip Terzian, *Greed, Not Altruism, is Driving Lawyer Famed for Tobacco Suits*, *Columbus Dispatch*, January 19, 2000, at 9A. The financial donations are evidence that Scruggs was a loyal contributor to his favorite Democratic government official. Although such political contributions are perfectly legal, this relationship between Scruggs and Moore has been the major source of criticism for anyone wishing to allege impropriety or misconduct. Unlike the situation in Texas described above, the allegations of misconduct have never gone beyond mere comments and critiques in the newspapers.

253. Id. Mississippi was one of the first states to file suit against, and settle with, the tobacco industry. As a result, many of the other states used the settlement amounts and fee awards from the State of Mississippi as the standard. Most other states demanded settlements that were accordingly in line with this early settlement. Id.

254. Jack Elliott, *Mississippi Law Firms Get $1.4 Billion in Tobacco Victory*, *The Commercial Appeal*, July 30, 1999, at B2. Scruggs maintains that the fees collected in the tobacco settlements were justified due to the risk that the attorneys took in each case. Although Scruggs has categorized his efforts as a form of altruism, he has also used his earnings to fund the purchase of a private jet, a 120-foot yacht, a forty-foot sailboat, two vacation homes, as well as a pledge to donate $30 million to charity. Adam Bryant, *Who's Afraid of Dickie Scruggs?*, *Newsweek*, December 6, 1999, at 46.


256. McCarron, *supra* note 255. Ryan and Foreman first became friends while serving as suburban states' attorneys. Willaim Hatfield, *Ryan Challenged on Tobacco Case*, *Chi. Sun-Times*, May 20, 2000, at 10. Despite this close relationship, Ryan continually maintains that his selection of firms to represent the State of Illinois was proper and not the result of misconduct. Id. Similar to the situation in Mississippi, the allegations of the Attorney General using a friendship to grant a lucrative state contract exist only as allegations. There has never been any formal investigation or inquiry into these charges, nor is there any indication that one is needed.


258. See id.
Unfortunately, more than one law firm has its hand in the Illinois money pot. The Cook County State’s Attorney Richard Devine and County Board President John Stroger, both of whom are strong Democratic party members, requested that the law firm of Corboy & Demetrio, a loyal contributor and fundraiser for the Democratic party, file suit against the tobacco industry on behalf of Cook County.\textsuperscript{259} The county will receive a portion of the settlement, but only after Corboy & Demetrio receives its five percent contingency fee valued at approximately $125 million.\textsuperscript{260}

Based on the historical information presented thus far, the contingency fees collected by the various Special Assistants across the country are in fact legal and authorized by the common law.\textsuperscript{261} Recalling that the power to appoint Special Assistants was inherited by the Attorney General from the common law in England,\textsuperscript{262} any state recognizing the common law powers of the Attorneys General also accepts the authority of the office to appoint Special Assistants. In Illinois, as well as many other states, the Attorney General has also been vested with the corresponding authority to provide compensation for Special Assistants.\textsuperscript{263} Since that authority is attached to the common law, the Attorney General has complete authority to enter into a contingency fee contract or any other type of compensation deemed necessary.\textsuperscript{264} Although the sheer dollar amount of the contingency fee may seem to indicate a sense of inequality, the common law has established that this type of agreement is within the powers of the Attorneys General.\textsuperscript{265}

IV. Analysis

A. The Inherent Conflict

The concept of allowing a Special Assistant to profit from a contingency fee contract is as absurd as allowing the Attorney General himself to receive a payoff for each fraudulent business he successfully challenges or each criminal conviction obtained.\textsuperscript{266} In essence, both ideas are one in the same. Each scenario enables a state employee to

\textsuperscript{259} See id.
\textsuperscript{260} See id.
\textsuperscript{261} See generally Part I.
\textsuperscript{262} See supra notes 188-200 and accompanying text.
\textsuperscript{263} See supra notes 206-217 and accompanying text.
\textsuperscript{264} See supra notes 206-217 and accompanying text.
\textsuperscript{265} This statement is only true for those states that continue to grant the office of the Attorney General its common law powers. See supra notes 143-167.
\textsuperscript{266} See Capra, supra note 204, at 2832 (comments of Professor Brickman).
profit from his position of power in the government. Furthermore, there exists an intrinsic reason why the Attorney General does not and should not receive a personal financial gain from every successful case;\textsuperscript{267} "[w]e do not allow judges or prosecutors to take a percentage of the award because we know how that will impact on their behavior."\textsuperscript{268}

Therefore when a private attorney, acting as a Special Assistant to the office of the Attorney General, accepts a case on a contingency fee contract, a violation occurs. The violation is not within the common or statutory law of a state, but rather it is a violation of the inherent principles upon which the offices of the American Attorneys General were founded.\textsuperscript{269} When a Special Assistant collects on a contingency fee contract, he has betrayed the system that has been created to protect the citizens of the state.\textsuperscript{270} Through the use of contingency fee contracts, the Special Assistant is incapable of performing his duty as an impartial state officer.\textsuperscript{271} The specific financial interest that the Special Assistant has taken in the litigation presents an inherent conflict between the goals of the state and the personal goals of the appointed attorney.\textsuperscript{272}

The courts have not established a detailed criteria for determining the proper compensation for a Special Assistant. Thus, the ultimate question that arises is whether the billion-dollar fees collected across the country comply with the "reasonable"\textsuperscript{273} requirement set forth by courts. The critics of contingency fee contracts used by the Attorneys General fear that as a result of this compensation, the office will become a mere shell that bends at the will of the Special Assistants.\textsuperscript{274}

\textsuperscript{267} Id.

\textsuperscript{268} Id.

\textsuperscript{269} The purpose of this Comment is to address the propriety of contingency fees in the context of government actions, not in the legal system in general. Contingency fees in private practice have typically served a dual purpose. First, contingency fees enable clients who would otherwise be unable to hire an attorney to have their day in court. A client can retain the services of an attorney and pay for the services rendered after a successful judgement or settlement is reached. Second, contingency fees encourage attorneys to take cases that appear to be promising in the hopes that their fees will be covered after a successful outcome. The use of contingency fees in the context of government fails to meet either of the above purposes. The state is not offering a contingency fee to an indigent client that is unable to pay a reasonable rate for legal services. Nor is the state an attorney that requires the prospect of reward if ultimately successful. Both of these ideas conflict with the "broader interests" of the Attorney General, to represent the state and the public interest. See E.P.A. v. Pollution Control Board, 372 N.E.2d 50 (Ill. 1977).

\textsuperscript{270} See infra notes 283-298 and accompanying text.

\textsuperscript{271} See infra notes 283-298 and accompanying text.

\textsuperscript{272} See infra notes 283-298 and accompanying text.

\textsuperscript{273} See infra notes 304-312.

\textsuperscript{274} See infra notes 320-328.
The concern is that the Special Assistants may use the prosecutorial power of the office to seek out and destroy any industry from which they can make a profit. 275

Special Assistants have appeared in almost all fifty states, nonetheless there are a few states that have achieved success in tobacco litigation while managing the litigation with only attorneys inside the office of the Attorney General. 276 This proves that Special Assistants are not always needed, yet only a few states subscribe to this philosophy. 277 In the wake of the billion-dollar fees paid to Special Assistants, many states have begun to challenge the authority of the Attorneys General to enter into contingency fee contracts with varied success. 278 Based on individual state law, the future of state sponsored contingency fee contracts is bleak in some jurisdictions, and still going strong in others. 279

Those who continue to support the actions of the Special Assistants argue that the appointed attorneys are entitled to their fees, regardless of the dollar amount, because of the large amount of risk that they assumed on behalf of the state. 280 Despite the risk that may have been taken, the Special Assistants have intrinsically altered the focus of the office of the Attorney General.

I. Betrayal of the Office

There exists an inherent conflict of interest with the use of contingency fee contracts to compensate Special Assistants. 281 It has already been established that the office of the Attorney General has

275. See infra notes 320-328.
276. The States of California, Colorado, New Hampshire, and Missouri have each managed the litigation through the use of in-house counsel of the Attorney General. The specifics of these situations are further discussed below. See infra notes 329-337.
277. See infra notes 329-337.
278. After the public and government officials realized the size of the fees that Special Assistants were now entitled to recover, many states began to file lawsuits to prevent the payment of such amounts. Although most states eventually forced the Special Assistants into state sponsored mediation, successfully reducing the net amount of the fee awards, the Special Assistants were still adequately compensated for their efforts. Although this re-negotiation of the contingency fee agreements returned large sums of money to the states, one must recognize that such a protest by the states after the awards amounts have been determined is an ad hoc approach to invalidating a contract. Traditionally, parties are unable to agree on the terms of a contract and subsequently alter those terms after realizing what effect the agreed upon terms have created. See infra notes 338-365.
279. Similar to how the Attorneys General in each state has evolved into a unique office, the rule regarding the use of contingency fee contracts must also be reviewed individually by each state. See infra notes 338-365.
280. See infra notes 367-383.
281. See e.g., Capra, supra note 204, at 2832 (suggesting that the recent tobacco settlements undermine the fundamental structure of our republican form of government).
common law roots in the protection of the King and the sovereign state of England, and historical roots in the protection of the American citizens. The slogan of the Illinois Attorney General, “for children, for families, for Illinois,” is representative of this inherent civil duty.

The office of the Attorney General has never placed financial compensation on its list of priorities. In fact, the duties associated with the office are the exact opposite. Unfortunately, the State Attorneys General are undergoing an unintended and unfortunate transformation because the offices are succumbing to the very instruments of political corruption, favoritism, greed, and abuse that the offices typically work against. Since the use of contingency fee contracts intrinsically alters the underlying purpose of the office, the use of such fees must be rejected.

In any action by the State Attorneys General, the client is either the people of the state or the sovereign state itself. Thus, when the Attorney General appoints a private attorney as a Special Assistant, that attorney is temporarily transformed into an official representative of the state. The focus of a Special Assistant’s efforts shifts from one individual client to the broader interests of every citizen within that state, and the fiduciary duty that exists between an attorney and the client is “doubly so when they are representing the people of a state.”

Although the appointment is only temporary, there should be a seamless incorporation of the Special Assistant into the office of the Attorney General. When a Special Assistant is bestowed with all the power and authority of the Attorney General, he has a correspond-

282. See generally Part I.
284. The list of priorities of the Attorney General is a hypothetical list which includes all of the ideas which serve the broader purpose of the office as described above. If the broader purpose of the office is to serve the state and the public, then increased financial compensation of its officers cannot co-exist with the broader purpose of the Attorney General. See supra notes 182-184.
285. See supra notes 182-184.
286. See supra notes 182-184.
287. See supra notes 182-184.
288. See 15 ILL. COMP. STAT. ANN. 205/6 (West 1996) (showing that Illinois grants a Special Assistant the same power and authority as the Attorney General himself).
289. See Capra, supra note 204, at 2842 (comments by Professor Brickman) (stating that an attorney takes on an additional fiduciary responsibility, above that of a duty to an individual client, when he represents the state).
290. Id. at 2830.
291. See 15 ILL. COMP. STAT. ANN. 205/6 (West 1996).
ing duty to represent the state as would the Attorney General himself, or any other officer within the Attorney General's office. 292 It is generally considered to be the duty of the Attorney General to pursue worthy cases for the benefit of the greater good. 293 These motives were intended to guide the office, regardless of the possible financial gain that could be achieved. 294

Conceding that the industries being pursued by the Special Assistants are in fact causing an injury to the consumer, the fact that these appointed attorneys have a significant pecuniary interest in the outcome of the litigation must not be overlooked. 295 These interests jade the perceptions of the Special Assistant and prevent them from performing their temporary duty as an advocate of the state and an officer of the Attorney General. 296

Those members of the plaintiffs' bar [who serve as Special Assistants] are now hopelessly conflicted, serving as government contractors with financial incentives proportionate to their hoped-for conquest. The sword of the state is brandished by private counsel with a direct pecuniary interest in the litigation. On the one hand, they are driven by the contemplation of a huge payoff; on the other hand, they fill a quasi-prosecutorial role in which their overriding objective is supposedly to seek justice. How could such lawyers possibly evaluate with impartiality the prospect of a settlement, say, or the tradeoff between injunctive and monetary relief? 297

The offices of the State Attorneys General have been "invested with enormous power of the state [and possess] a solemn public trust. It is [the State Attorneys General's] moral imperative to make governing decision[s] solely on the basis of the public interest, rather than out of concern for personal gain." 298 In allowing appointed attorneys to op-

292. See id.
293. A poll conducted by Public Opinion Strategies on behalf of the tobacco companies in 1996 asked residents of Texas what "should be the top priority of [the] Attorney General?" See Public Opinion Strategies Push Poll (visited Jan. 28, 2000), at http://www.mojones.com/mother_jones/MJ96/push_poll.html. The responses in the order of most to least popular were as follows: fighting crime, fighting against government corruption, leading efforts to stop drugs and drug trafficking, stopping frivolous lawsuits filed in Texas, collecting child support payments, protecting consumers against business fraud, and suing tobacco companies on behalf of smokers. See id.
294. See supra notes 182-184.
295. See supra notes 241-260 and accompanying text.
296. Representative Chris Cox of California stated that to give a Special Assistant a financial stake in the outcome of the case "creates an inherent conflict of interest with the lawyer's role as an officer of the court." See Will, supra note 220.
297. Levy, supra note 242, at 640-41 (describing legislation authored by Chris Cox that would limit the hourly fee to $150 per hour).
erate under contingency fee contracts, the Attorneys General have created an inherent conflict between an attorney's personal goals and the goals of the state.

2. How Much Money is "Reasonable?"

Special Assistants employed across the country have a right to be compensated for their efforts. That statement should not be in dispute. Some supporters argue that the appointed attorneys, acting as Special Assistants, are merely business persons taking a risk on an investment; therefore, supporters argue that Special Assistants are entitled to reap the benefits of the contracts, whatever they may be. However, it is questionable whether contingency fee contracts were ever intended to be used in the context of government action.

The use of contingency fee contracts in the private field have proven to be a vital tool to keep the legal system open to the public. Through the use of contingency fee contracts, consumers or injured parties with limited funds are able to secure legal representation and have their day in court. Although the private legal system benefits from the use of contingency fee contracts, the result is quite different when a contingency fee is placed in the context of a government action.

299. See Capra, supra note 204, at 2830 (comments of Professor Brickman).
300. The American Bar Association's Model Code of Professional Responsibility states that "a lawyer generally should decline to accept employment on a contingent-fee basis by one who is able to pay a reasonable fixed fee." See MODEL CODE OF PROF'L RESPONSIBILITY EC 2-20 (1992). There is a significant argument that the individual state governments involved in the tobacco suits have the resources to pay normal fees on an hourly basis. See id.
301. See Capra, supra note 204, at 2836. Contingency fees are in fact unique to the United States because they are unlawful in the United Kingdom and most other legal systems throughout the world. See supra note 220. The United States has maintained the use of contingency fees to keep the legal system open to all persons, regardless of their financial status. See id. There are critics on the other side of the issue that argue contingency fees should not be used at all. See generally Walter Olson, Sue City: The Case Against the Contingency Fee, 55 POL'Y REV. 46 (Winter 1991) (noting that contingency fees encourage ethical abuses in the American legal system). The contingency fee provides incentive to private attorneys to take on a case even if their client does not have money to pay attorneys fees. "There are people who cannot afford to pay lawyers, there are industries that will not be taken on there are cases that will not be brought unless we allow contingency fees." Capra, supra note 204, at 2847 (comments of Barbara Gillers).
302. Bob Montgomery, one of the attorneys that represented the State of Florida against the tobacco industry, commented that the contingency fee is the only tool that allows him to take on big business. See Capra, supra note 204, at 2836. Since large industries simply try to out spend their opponents in litigation, attorneys need the contingency fee to be able to fund their own efforts. See id. "How in the hell, without the contingency fee from all the persons that I have represented . . . [could I] take on insurance companies that spend dollar-for-dollar-every damn dollar they spend, I spend two dollars." Id.
303. Barbara Gillers has suggested that since the private attorneys were serving as Special Assistants for the "public purpose," they may have a moral or professional calling to return to
For example, the Delaware Supreme Court has held that in determining payment of Special Assistants, "the compensation must be substantial, but it must also be considerably less than that which would be allowable in private practice." The Delaware Supreme Court has highlighted a significant fact with this statement. In becoming Special Assistants, private attorneys have consciously foregone their role as a typical plaintiff's attorney advocating for a client. As a result, the private attorney exchanges his usual role and becomes an advocate of the state and not of his own purse.

Since any private attorney appointed as a Special Assistant has accepted the role voluntarily, the attorney must be willing to forego many of the aspects of private practice that would normally be associated with such a position. A Special Assistant must be willing to provide his services at a rate of reasonable compensation, realizing that he will not receive the benefit of a large contingency should his valiant efforts prove successful. Although such a result may be entirely appropriate for private practice, such an outcome is inconsistent with an individual who is serving as the "chief legal officer of the State."

Under the Model Code of Professional Responsibility, fees collected by an attorney in any action must not be "clearly excessive." Many states have taken this ethical rule one step further by requiring that attorney's fees not only comply with the "clearly excessive" rule, but that they also be "reasonable." These rules of ethical conduct beg the question, "[a]re these fees, which in many cases amount to effective hourly rates of return of tens of thousands – and even hun-

the state some of the money they have collected. Capra, supra note 204, at 2847 (comments of Barbara Gillers). Although she indicates that there is no ethical rule which requires such action, she acknowledges that there may be a conflict in interest when a government employee receives such compensation. See id.

304. Application of Young, 104 A. 2d. 263, 266 (Del. 1954).
305. Id.
306. Id.
307. Id.
308. Id.
309. See E.P.A. v. Pollution Control Bd., 372 N.E.2d at 50.
311. See MODEL RULES OF PROF'L CONDUCT RULE 1.5 (1998) (requiring attorneys fees to be reasonable); MICH. RULES OF PROF'L CONDUCT RULE 1.5 (1998) (adopting the reasonable requirement in the MODEL RULES OF PROF'L CONDUCT); WYO. RULES OF PROF'L CONDUCT RULE 1.5 (1998) (stating that a lawyers fee must be reasonable); N.Y. CODE OF PROF'L RESPONSIBILITY DR 2-106 (1990) (requiring that attorneys fees not be excessive).
Hundreds of thousands—of dollars an hour, reasonable? I think to ask the question is to answer it."312

In the wake of the billion-dollar tobacco litigation settlements, one must realize that "[s]tate prosecutors are doling out multibillion-dollar contingency fee contracts to private trial lawyers. What is worse, those contracts are awarded without competitive bidding to attorneys who are often bankrolling state political campaigns."313 Many of the Attorneys General participating in the tobacco litigation chose friends, colleagues, and financial contributors as the attorneys to participate in the windfall settlements.314 Even if the motives of the parties involved were established in pure altruism, the billions of dollars involved had an immediate and permanent taint on the entire transaction.315

Critics of contingency fees, in this context, argue that every dollar which goes into the pocket of a Special Assistant is one dollar less that the public will receive.316 Former Speaker of the House Newt Gingrich commented that the billions of dollars going to attorneys "could be spent on health in general and on children’s health in particular rather than enriching a small group of trial lawyers."317 The Special Assistants of the tobacco litigation respond to this argument by stating that without their efforts the state would not have received any of the funds that it is now entitled to receive.318 Despite this counter argument, it cannot be overlooked that "[t]he money paid by the tobacco companies to the lawyers reduces the amount the tobacco companies would have been willing to pay to the state to settle the suit . . . .

312. Capra, supra note 204, at 2830 (comments of Professor Brickman). Professor Brickman acknowledges that this same argument could be used against the use of contingency fees in general. Id. However, this Comment is directed solely at the use of contingency fees in the context of government-sponsored lawsuits. A counter-argument to the perceived excessiveness of the fees is to claim that the fees are in fact reasonable, based upon market forces. This argument ties into the idea that the since the attorneys took the risk and made the investment, the market requires that this amount of compensation be paid. To further explore this market theory forces a wide statistical analysis of attorney’s fees associated with risk to have to be completed. The author was unable to locate any source that has taken this approach at present.

313. Levy, supra note 242 at 641.

314. See supra notes 241-255.

315. See Capra, supra note 204, at 2848-849 (comments of Professor Brickman) (stating that it was inevitable that the process for selecting attorneys to represent each state would become tainted by the volume of money that was going to be received).

316. See generally Capra, supra note 204 (critiquing the tobacco litigation and settlement processes).

317. See Grimaldi, supra note 237.

318. See infra notes 373-382 and accompanying text.
That's money taken directly from the pockets of every American taxpayer.”

3. Who is Really in Control?

The concern of some critics is not that a few Special Assistants have become filthy rich, but rather that, as a result, private firms across the country will become the puppeteers, and the Attorneys General the puppets. Can a private attorney actually make decisions as well as or better than the Attorney General? The answer must be no, otherwise the entire purpose of the office would need to be questioned. “[T]he use of these new legal bounty hunters - invested with the power of the state but still heavily motivated by personal gain - places the legitimacy of that system at serious risk.”

If contingency fee contracts continue to be used as a means to pay Special Assistants, there will soon be a situation where “[i]t is not the people’s representatives who are making the critical choices; [but rather] contingency fee lawyers acting for heretofore unimagined profits.” Critics of government sponsored contingency fee suits argue that as a result of creating these rich and influential Special Assistants, the policies and practices of the Attorney General and the state legislature will no longer be led by the officials that the people have elected. “If this trend continues, economic and social decisions affecting all Americans will be made not by the democratically elected [government], but instead by trial lawyers.”

Critics also fear that these private firms may assume control of the Attorney General’s office and thus have a convincing voice in the ini-

320. In The Tobacco Litigation and Attorneys’ Fees, Professor Brickman expressed his earnest concern for the use of contingency fees by the State Attorneys General. See Capra, supra note 204, at 2832-33. He expressed concern that the success of these new litigation efforts would encourage a new way of creating public policy during times when the legislature failed to heed to the public demand. See id. Using the courts as the new form of setting policy denies the public the political accountability that the republican form of government has created. See id. at 2833. This would result in the formation of alliances. The deep-pocket industries and the wealthy plaintiff firms, and the contingency fee attorneys will possess a frightening amount of power that is exercised outside of the ordinary machinery of representative government. See id.
321. See id.
323. Capra, supra note 204, at 2833.
There are "serious concerns over the use of the new legal bounty hunters to control litigation." Considering the use of the awesome power of a state against an unpopular defendant . . . . Normally, as a matter of policy, we do not allow the use of the power of government for self-enrichment, since such a power inevitably is abused." The recent increase in the use of Special Assistants is indicative of a scenario in the near future where the machine of contingency fee contracts proceeds to roll over every unpopular or financially lucrative industry under the guise of consumer protection.

B. It Can be Done Without Outside Counsel

Special Assistants have often argued that the states could not have fought the tobacco industry without the help of private resources. However, there are four states that have proven this statement to be untrue and have conducted their entire suit against the tobacco industry without using the appointment of Special Assistants. California, Colorado, New Hampshire, and Missouri have managed the litigation through the use of in-house counsel within the office of the Attorney General. Within each of these states, however, the Attorney General did need the support of the legislature for additional funds. For example, in California, the legislature appropriated an additional $14 million to hire 132 staffers, including 32 lawyers, to help fight the tobacco industry.

The Attorney General's office in California commented that "[t]he fact that we are not using outside counsel lends a lot more credibility to the legitimacy of these claims."

The Attorney General of Colorado also commented that her decision to keep the litigation in-house was driven by the fact that outside contingency fee attorneys are motivated more by the prospect of money than the pursuit of justice. "We tend to be more objective than private counsel who are employed on a contingency fee basis and who maintain their own per-

325. Id.
326. Redish, supra note 299.
327. Capra, supra note 204, at 2832.
328. See supra notes 384-387 and accompanying text.
329. Id.
330. See supra note 237.
331. See supra note 237.
332. See supra note 237.
333. See supra note 237.
sonal financial interest in the outcome of the litigation . . . . It gives them different motives."334 

In Alaska, the Attorney General's office has successfully adopted an alternative method of paying private counsel based on an hourly basis.335 For instance, in the wake of the 1989 Exxon Valdez disaster where 11 million gallons of crude oil were spilled onto the Alaskan shores, the state hired the Seattle law firm of Preston Gates & Ellis to handle the lawsuit.336 After lengthy litigation, the state incurred $32 million in legal fees, but recovered over $900 million in a settlement.337

C. Challenges to the Contingency Fees

With a few exceptions, the authority of State Attorneys General to appoint Special Assistants is well established. However, there may be enough support in a few states to pass legislative initiatives that would restrict or limit the Attorney General's power to enter into contingency fee contracts with private attorneys.338 For example, in Meredith v. Ieyoub, an association of oil and gas producers in Louisiana successfully prevented the Attorney General from hiring a private law firm on a contingent fee basis to represent the state for environmental law prosecution.339 The Supreme Court of Louisiana held that the Attorney General had no authority to enter into contingency fee contracts.340 The court held that "under the separation of powers doctrine, unless the Attorney General has been expressly granted the power in the constitution to pay outside counsel contingency fees from state funds, or the Legislature has enacted such a statute, then he has no such power."341 In rejecting the contingency fee contract, the court found that while the powers and duties of the Attorney General were broad, the authority to pay "outside attorneys to prosecute legal claims on behalf of the state is a financial matter" and is held by the legislative branch of the government.342

334. See supra note 237 (comments of Colorado Attorney General Gale Norton).
335. See supra note 237.
336. See supra note 237.
337. See supra note 237.
338. Such legislative action, however, would be ineffective in Illinois since the courts previously have held that the common law powers of the Attorney General cannot be limited or removed by the legislature. See Finnegan, 38 N.E.2d at 715.
340. See id. at 481.
341. Id.
342. Id. at 483.
In the wake of the Louisiana decision, manufacturers of asbestos in the state of North Dakota attempted to challenge the Attorney General's use of Special Assistants and contingency fees. Unfortunately, in State v. Hagerty, the Supreme Court of North Dakota disagreed with the Supreme Court of Louisiana and subsequently upheld the use of contingency fee contracts. However, despite the decision to uphold contingency fee contracts, the Supreme Court of North Dakota recognized the state legislature's authority to restrict the power of the Attorney General. Although the North Dakota legislature could restrict the power, such a constraint on the office does not currently exist.

In Maryland, the tobacco industry made an unsuccessful attempt to challenge the authority of the State Attorney General to enter into a contingency fee contract with Special Assistants. Using arguments similar to those used in North Dakota and Louisiana, the tobacco company argued that the use of contingency fee contracts enabled the office of the Attorney General to direct the expenditure of state funds, an act which was in express violation of state statutes as well as separation of powers. In rejecting the tobacco company's claim, the Maryland Court of Appeals held that the Attorney General has the power to set "proper compensation of assistant counsel" at his discretion. Rather than looking for a statute which authorized the Attorney General to make contingency fee contracts, the court upheld the contract because the state statutes did "not [expressly] prohibit contingency fee contracts."

In contrast, in West Virginia, the tobacco industry itself successfully challenged the contingency fee contract between Special Assistants and the Attorney General. The West Virginia Circuit Court agreed

\footnotesize{343. State v. Hagerty, 580 N.W.2d 139, 143 (N.D. 1998) (arguing that the use of contingency fee contracts violates state statutes requiring all monies to be deposited and allocated from state treasury).}
\footnotesize{344. See id. at 148.}
\footnotesize{345. It is important to note that the legislative option suggested by the Supreme Court of North Dakota would be unavailable in Illinois. Since Illinois courts have expressly held that the legislature cannot revoke the common law powers of the Attorney General, the legislature would have no authority to place a restriction on a power that the Illinois Attorney General has inherited through the common law. See supra notes 174-178 and accompanying text.}
\footnotesize{346. See Philip Morris Inc v. Glendening, 709 A.2d 1230 (Md. 1998).}
\footnotesize{347. See generally Hagerty, 580 N.W. 2d 139.}
\footnotesize{348. See Meredith, 700 So.2d 478.}
\footnotesize{349. See Philip Morris Inc., 709 A.2d at 1240.}
\footnotesize{350. Id.}
\footnotesize{351. Id.}
that the one-third recovery fee, the largest fee agreement of any state, was unconstitutional. The court accepted the tobacco company’s argument that allowing outside counsel to wield “the coercive, regulatory and punitive powers of the state,” compromised the “independence and impartiality of the quasi-judicial role vested in state prosecutors.” The attorney for the tobacco industry, Robert King, argued that such contingency fee contracts “permit[ted] the power of the state to be exercised by attorneys with a direct financial stake in the exercise of that power.”

In New Jersey, the tobacco industry once again attempted to invalidate another contingency fee agreement. However, unlike West Virginia, New Jersey courts have held in favor of the Attorney General. The tobacco industry attempted to argue that the Attorney General “has no business committing the state to pay money without the approval of the Legislature.” Unfortunately, the New Jersey court was not receptive to the industry’s argument. “Not only did Judge Jack Lintner find the contingency fee agreement valid, he said it was the arrangement that most benefited the state and the public.”

Other states have been successful in placing restrictions on the fees of Special Assistants through regular legislative channels. Since most states have the authority to establish or eliminate the powers of the Attorney General through legislative enactments, this appears to be the simplest solution. The state legislature of Maine capped its attorney’s fees for the tobacco litigation at $150 per hour. The state of Vermont has already stipulated that its attorney fees cannot rise over $200 thousand dollars. However, not every state is willing or able to exercise this legislative authority over the Attorneys General.

In an effort to make a uniform national policy, critics have suggested that federal action may be needed to eliminate the use of contingency fee contracts by the Attorneys General. In 1997, the

Attorney General possesses no common law authority or power and thus lacks standing to institute or prosecute” such an action. Id. at *2.

353. See Grimaldi, supra note 237.
354. Id.
355. Id.
357. See id. at 1.
358. Id.
359. Id.
360. See Ridenour, supra note 1.
361. See id.
362. There may be a significant problem with an attempt to restrict the authority of the Attorneys General through federal legislation since each of the fifty states are sovereign bodies under
Senate passed an amendment to the nationwide settlement agreement that limited the attorneys fees to $250 per hour with a five million dollar cap. This amendment sponsored by Representative Jeff Sessions of Alabama was approved by only one vote in the Senate and was not adopted by the House. Additional legislation proposed in 1998, by Representative Chris Cox of California, Representative Paul McHale of Pennsylvania, and Representative Scott McInnis of Colorado suggested the establishment of an hourly rate cap at $150 per hour. Since there has been no further progress on the passage of federal legislation, it is unlikely that the federal government will play any major role in determining the future of Special Assistants and contingency fee contracts. If any change is going to take place, it will occur within the courts and legislatures of the individual states.

D. Is There Really a Problem With Contingency Fee Contracts?

Despite all of the controversy over contingency fee contracts, there are two observations about the tobacco litigation that should be recognized. First, the Special Assistants were victorious in these suits, thereby enabling the states to hold the tobacco industry financially responsible for the harm it has caused. Second, a few private attorneys did become rich as a result of these suits, but accomplished a feat that no one else had been able to achieve. Perhaps this achievement justifies the compensation, no matter how excessive.

Following the success of the tobacco litigation, there are many who stand by the millionaire appointed attorneys. Some supporters have argued that “[t]he attorneys who have filed lawsuits against big tobacco have spent millions of dollars out of their own pockets without any assurance that a single penny will ever come back to them.” For example, Michael Ciresi, one of the attorneys that represented the State of Minnesota, defended his fee in stating that he went up against the control of their individual state governments. The power of the Attorneys General does not derive from federal law, therefore any national legislation may be unenforceable against any of the United States.

363. See Grimaldi, supra note 237. Recall that the national settlement was a non-binding agreement. See supra note 232 and accompanying text. Therefore, even if this fee-limiting measure was approved by all of Congress, any state wishing to be excluded from this agreement could pursue attorney’s fees through their own means of litigation or arbitration. See id.

364. See Grimaldi, supra note 237. This small victory against attorney’s fees was short-lived because the Senate also adopted another amendment that exempted any state that entered into a contract with private attorneys. See id.

365. See Will, supra note 220.

366. See Capra, supra note 203.

some of the most powerful law firms in the country.\textsuperscript{368} Ciresi stated that his firm looked at over thirty-three million documents, argued over 200 motions, including seven appeals to the Minnesota State Supreme Court and two to the United States Supreme Court, and won the case against tobacco.\textsuperscript{369} "We spent millions of dollars, \[and\] tens of millions of dollars, in time and out-of-pocket costs."\textsuperscript{370}

The idea that the private attorneys have assumed the risk of the litigation and therefore are entitled to the reward has merit,

though far less than meets the eye [because] \[t\]he lawyers who spearheaded the tobacco litigation effort \ldots were privy to the disclosures with regard to their own degree of success \ldots [T]he strategy employed to beat the tobacco companies was \ldots less a matter of law, than one \ldots of war: mass your troops and overwhelm the tobacco companies by allying with enough state attorneys general to raise the financial threat to intolerable levels. Success in this political endeavor dramatically reduced the risks involved.\textsuperscript{371}

Despite continued criticism, the attorneys who represented the states against the tobacco companies believed state-sponsored contingency fee contracts were necessary to take on an industry that had escaped liability in the past. The tobacco industry had continuously avoided being held accountable, not because of the particular merits of its claims, but because it had the ability to drown its opposition in costly litigation.\textsuperscript{372} Supporters argue that without the contingency fee contracts and the Special Assistants, the tobacco industry may have never been defeated.\textsuperscript{373} "Now we beat 'em, we defeated the cigarette industry and caused the greatest public-health advances in the history of this country, and all you read in the press is how rich the lawyers are going to get."\textsuperscript{374}

Another argument in support of the contingency fee contracts for Special Assistants is based on the use of hindsight; using the present perspective to look back in time in order to determine the reasonable-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{368} See Capra, supra note 204, at 2837 (comments of Michael Ciresi).
\item \textsuperscript{369} Id.
\item \textsuperscript{370} Id.
\item \textsuperscript{371} See Capra, supra note 204, at 2831.
\item \textsuperscript{372} See id., at 2836 (comments of Bob Montomery). Mr. Montomery stated:
\begin{quote}
The contingency fee allows me to take [big business] on, and I am delighted to do so. If you take away the contingency fee, you are falling right into the hands of corporate America, the insurance companies \ldots I am proud of that contingency fee. If you ever take it away from me, you better duck, because you don't have a chance.
\end{quote}
\item Id.
\item \textsuperscript{373} Id.
\item \textsuperscript{374} See Grimaldi, supra note 237 (comments of Don Barrett, Special Assistant Attorney General for Mississippi).
\end{itemize}
\end{footnotesize}
ness or excessiveness of the fees collected. Thus, if the contingency fee contracts were fairly entered into, then they should not be disputed merely because the numbers are much higher than anyone expected.

Under the ethics rules, contingency fee arrangements are judged at the time that they are made, not in hindsight. If you can say that the agreement was reasonable at the time that it was made, it does not then become unreasonable at the end of the day when the fees are very high.

Although the motives of the private attorneys involved in the tobacco litigation have been continuously scrutinized, the attorneys continue to defend their intentions as a genuine concern for the harm tobacco has inflicted on society. For example, Philip H. Corboy, the attorney handling the litigation on behalf of Cook County in Illinois, defended his position as a Special Assistant to the county by stating, "the 'overwhelming force' behind [my] decision . . . has nothing whatsoever to do with greed and personal gain." Mr. Corboy believes that his fee, estimated at $125 million, is entirely justified because "[t]he risks of bringing such cases . . . are enormous. Still, these lawyers . . . have taken on this fight because they believe it is winnable and is the right thing to do.”

The Attorney General of West Virginia Darrel McGraw defended his decision to use Special Assistants by stating that, "the State and her citizens stand only to benefit. The State has no exposure. There are no lawyer hourly fees. There are no costs. The taxpayers are thus fully protected." Another supporter commented that, "[t]hese 'tobacco lawyers' are responsible for recouping and ultimately saving the American public . . . billions of dollars over years to come. When the states' attorneys general . . . needed help . . . they went to the brightest and most creative legal minds in the country.”

Perhaps the Special Assistants were the final step necessary to force the tobacco industry to take responsibility for its actions. "Think

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375. See Capra, supra note 204, at 2841 (comments of Barbara Gillers).
376. Id. See also Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 875 (9th Cir. 1979) (holding that attorney's fee of one million dollars was not clearly excessive or unreasonable when it had been negotiated by two sophisticated parties).
377. See Capra, supra note 204, at 2841 (comments of Barbara Gillers).
379. See Douglas, supra note 368.
380. Levy, supra note 242, at 641 (citing Memorandum in Opposition to Defendants' Joint Motion to Prohibit Prosecution of Action Due to Plaintiff's Unlawful Retention of Counsel).
about it. After all those years trying to fight smoking with regulations and ad campaigns, some politicians recruited a platoon of contingency fee-lawyers and- - bingo! - Big Tobacco is on the ropes."382 Corboy wrote:

[I] consider [my] work for Cook County and its citizens a public service and one that we have been honored to take on. State and county legal departments, while full of able talent, do not have the resources and experience to seek from the tobacco industry what rightfully belongs to all of their citizens . . . . For me and many others, the fight against the tobacco industry is about much more than money, however. It's about really holding the tobacco industry accountable for the havoc it has wreaked on our society.383

V. IMPACT: A LOOK INTO THE FUTURE

The use of contingency fee contracts against the tobacco industry is only the beginning. Private industries that are profitable, but yet unpopular with much of the public, are now preparing themselves for the imminent attack by Special Assistants. This scenario is what many critics of the Special Assistants have worried about. As a result of the enormous money at stake in future litigation, the office of the Attorneys General may soon become the puppets of the Special Assistants.

Since contingency fee contracts have been used in areas such as tobacco384 and asbestos385 litigation, the ultimate question is who or what will be the next target of state sponsored litigation in the future? Recent filings by various states, such as California, indicate that it is the gun industry that will soon be on the defensive.386 Another target of the Special Assistants is HMOs.387 Richard Scruggs, the Special Assistant Attorney General who led the State of Mississippi in the tobacco litigation, recently filed a suit against five HMOs on behalf of the State of Mississippi.388 In addition, Special Assistants using contingency fee contracts have filed suits against lead paint manufacturers in Rhode Island.389 "These lawsuits are in fact part of a disturbing

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382. McCarron, supra note 255.
383. See Corboy, supra note 378.
384. See supra notes 235-256.
385. See supra notes 251, 343.
387. See Janan Hanna, Five HMOs Face Lawsuits Charging Subpar Care; Tobacco Case Lawyer Alleges Racketeering by Health-Care Firms, Chi. TRIB., Nov. 25, 1999, at A1.
388. Id.
trend in which plaintiff’s lawyers move from one legal, but out-of-favor, industry to the next in search of outrageous contingency fees. These lawsuits raise the same troubling question . . . who’s next?"\textsuperscript{390}

The creation of the Special Assistant, armed with a list of injured clients in one hand, and a contingency fee contract signed by the State Attorney General in the other hand, has now become the worst nightmare of most industries. “No industry is immune, especially when there is the tantalizing prospect of billions of dollars in contingency fees.”\textsuperscript{391}

VI. CONCLUSION

When the Attorney General approaches the podium to take the oath of the office, his role is inherently different than any attorney in private practice. The Attorney General becomes an advocate for the people, forced to leave behind his personal biases or influences in representing the state. The United States Supreme Court has held that the Attorney General “is the representative not of an ordinary party.”\textsuperscript{392} The clients of the Attorney General seek justice and do not expect to receive large compensation for their injuries. When a private attorney accepts a position as a Special Assistant, he has accepted a role consistent with the oath of office taken by the Attorney General. Unfortunately, it is inherently impossible for a Special Assistant, compensated on the basis of a contingency fee contract, to uphold the principles of impartiality and neutrality that represent the office.

The controversy of the Attorney General’s authority to enter into contingency fee contracts must be decided within each individual state across the country. If the above cases are any indication, this controversy is just beginning. Although the tobacco industry has ended its fight with the Special Assistants, it is fairly certain that the war is far from over. As more contingency suits are filed on behalf of the Attorney General, more industries will be reluctantly pulled into this battle. It is in the industries’ best interest to keep disputing the authority of


\textsuperscript{391} Chamber Criticizes Government Lawsuits: No Industry Immune When Trial Lawyers, Government Hunt for Money (visited Dec. 2, 1999), at http://www.uschamber.org/media/releases/june99/062299a.html; see also Ridenour, supra note 1 (stating that if Special Assistants can make billions on tobacco, they will be encouraged to exploit the adverse health effects of liquor, sports cars, or junk food).

\textsuperscript{392} Berger v. United States, 295 U.S. 78, 88 (1935).
the Attorneys General. Thus, we can safely assume that the new targets of the Special Assistants will not go down without a fight.

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