

As Passed by the Senate

131st General Assembly

Regular Session

2015-2016

S. B. No. 38

Senator Seitz

Cosponsors: Senators Eklund, Jones, Patton, Beagle, Coley, Jordan, LaRose

A BILL

To enact sections 9.49, 9.491, 9.492, 9.493, 9.494, 1
9.495, 9.496, 9.497, and 9.498 of the Revised 2
Code to provide transparency in contracts 3
between the state and private attorneys. 4

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 9.49, 9.491, 9.492, 9.493, 9.494, 5
9.495, 9.496, 9.497, and 9.498 of the Revised Code be enacted to 6
read as follows: 7

Sec. 9.49. Sections 9.49 to 9.498 of the Revised Code 8
shall be known as the transparency in private attorney contracts 9
act. 10

Sec. 9.491. As used in sections 9.49 to 9.498 of the 11
Revised Code: 12

(A) "Legal matter" means any administrative proceeding, 13
case, group of cases, or legal issue for which the state 14
requires legal representation or advice. 15

(B) "Private attorney" means any attorney in the private 16
practice of law or a law firm but does not mean an attorney 17

appointed by the attorney general pursuant to section 109.08 of 18
the Revised Code for the purpose of collecting debts certified 19
to the attorney general for collection under any law or debts 20
that the attorney general is authorized to collect. 21

(C) "State" means this state and any officer, department, 22
board, commission, division, bureau, council, or unit of 23
organization, however designated, of the executive branch of 24
government of this state and any of its agents. 25

(D) "Securities class action" means an action brought as a 26
class action that includes a violation of the "Securities Act of 27
1933," 15 U.S.C. 77a and following, or the "Securities Exchange 28
Act of 1934," 15 U.S.C. 78a and following. 29

Sec. 9.492. (A) The state shall not enter into a 30
contingency fee contract with a private attorney unless the 31
attorney general or the attorney general's designee makes a 32
written determination prior to entering into that contract or 33
within a reasonable time after entering into the contract that 34
private representation is both cost-effective and in the public 35
interest. Any written determination shall include findings for 36
each of the following factors: 37

(1) Whether there exist sufficient and appropriate legal 38
and financial resources within the attorney general's office to 39
handle the matter involved; 40

(2) The nature of the legal matter for which private 41
representation is required so long as divulging that information 42
would not violate any ethical responsibility of the attorney 43
general or privilege held by the state. 44

(B) If the attorney general or the attorney general's 45
designee makes the determination described in division (A) of 46

this section, the attorney general or the attorney general's 47
designee shall request qualifications from private attorneys to 48
represent the state, unless the attorney general or the attorney 49
general's designee determines that requesting qualifications is 50
not feasible under the circumstances and sets forth the basis 51
for this determination in writing. 52

(C) (1) Except as otherwise provided in division (C) (2) of 53
this section and subject to divisions (C) (3) and (4) of this 54
section, the state shall not enter into a contingency fee 55
contract with a private attorney that provides for the private 56
attorney to receive an aggregate contingency fee in excess of 57
the total of the following amounts: 58

(a) Twenty-five per cent of any damages up to ten million 59
dollars; 60

(b) Twenty per cent of any portion of any damages of ten 61
million dollars or more but less than fifteen million dollars; 62

(c) Fifteen per cent of any portion of any damages of 63
fifteen million dollars or more but less than twenty million 64
dollars; 65

(d) Ten per cent of any portion of any damages of twenty 66
million dollars or more but less than twenty-five million 67
dollars; 68

(e) Five per cent of any portion of any damages of twenty- 69
five million dollars or more. 70

(2) Except as provided in division (D) of this section 71
with respect to security class actions, the aggregate 72
contingency fee under division (C) (1) of this section, exclusive 73
of reasonable costs and expenses, shall not exceed fifty million 74
dollars, regardless of the number of lawsuits filed or the 75

number of private attorneys retained to achieve the recovery, 76
unless the contract expressly authorizes a contingency fee in 77
excess of fifty million dollars. The attorney general shall not 78
enter into a contract authorizing a contingency fee in excess of 79
fifty million dollars without the approval of the controlling 80
board. 81

(3) A contingency fee in a contingency fee contract under 82
division (C) (1) of this section shall not be based on penalties 83
or civil fines awarded or on any amounts attributable to 84
penalties or civil fines. 85

(4) The amount of a contingency fee paid to a private 86
attorney under a contingency fee contract between the state and 87
the private attorney shall be the percentage of the amount of 88
damages actually recovered by the state to which the private 89
attorney is entitled under division (C) (1) of this section. 90

(D) In any contingency fee contract covering a securities 91
class action in which this state is appointed as lead plaintiff 92
pursuant to section 27(a) (3) (B) (i) of the "Securities Act of 93
1933," 15 U.S.C. 77z-1(a) (3) (B) (i) or section 21D(a) (3) (B) (i) of 94
the "Securities Exchange Act of 1934," 15 U.S.C. 78u-4(a) (3) (B) 95
(i) or in which any state is a class representative, division 96
(C) (2) of this section applies only with respect to the state's 97
share of any judgment, settlement amount, or common fund and 98
does not apply to the amount of attorney's fees that may be 99
awarded to a private attorney for representing other members of 100
a class certified pursuant to Rule 23 of the Federal Rules of 101
Civil Procedure or state class action procedures. 102

(E) (1) A contract entered into between the state and a 103
private attorney under this section shall include all of the 104
following provisions that apply throughout the term of the 105

contract and any extensions of that term: 106

(a) The private attorney shall acknowledge that the 107
assistant attorney general retains complete control over the 108
course and conduct of the case involved. 109

(b) An assistant attorney general with supervisory 110
authority shall oversee the litigation of the case. 111

(c) An assistant attorney general shall retain veto power 112
over any decisions made by the private attorney. 113

(d) Any opposing party in the case may contact the 114
assistant attorney general directly without having to confer 115
with the private attorney unless the assistant attorney general 116
instructs the opposing party otherwise. 117

(e) An assistant attorney general with supervisory 118
authority for the case may attend all settlement conferences. 119

(f) The private attorney shall acknowledge that final 120
approval regarding settlement of the case is reserved 121
exclusively to the discretion of the attorney general. 122

(2) Nothing in division (E) (1) of this section shall be 123
construed to limit the authority of the client regarding the 124
course, conduct, or settlement of the case. 125

Sec. 9.493. The state shall not enter into a contract with 126
a private attorney located outside this state unless the 127
attorney general determines that at least one of the following 128
applies: 129

(A) There are no private attorneys with an office in this 130
state that are willing to accept the legal representation. 131

(B) All private attorneys with offices in this state that 132

possess the necessary experience or capability are conflicted 133
and unable to represent the state or the attorney general or 134
lack necessary personnel and capacity in the firm to take on the 135
engagement. 136

(C) The attorney general is prevented from engaging a 137
private attorney with an office in this state under the rules of 138
the controlling board regarding waiver of competitive selection. 139

(D) There are no private attorneys with offices in this 140
state that possess the necessary experience, capability, or 141
capacity required by the contemplated engagement. 142

Sec. 9.494. (A) A copy of the executed contingency fee 143
contract between the state and a private attorney pursuant to 144
section 9.492 or 9.493 of the Revised Code and any corresponding 145
submission by the attorney general to the controlling board 146
pursuant to division (C) (2) of section 9.492 of the Revised Code 147
shall be posted on the attorney general's web site and shall 148
remain posted on the web site for the duration of the contract. 149

(B) A private attorney under a contingency fee contract to 150
provide services to the state pursuant to section 9.492 or 9.493 151
of the Revised Code shall maintain from the inception of the 152
contract until at least three years after the contract expires 153
or is terminated detailed current records, including 154
documentation of all expenses, disbursements, charges, credits, 155
underlying receipts and invoices, and other financial 156
transactions that concern the provision of the attorney 157
services. The private attorney shall maintain detailed 158
contemporaneous time records for the attorneys and paralegals 159
working on the legal matter and shall promptly provide these 160
records to the attorney general upon request. 161

Sec. 9.495. By the first day of September of each year, 162
the attorney general shall submit a report to the president of 163
the senate and the speaker of the house of representatives 164
describing the use of contracts with private attorneys in the 165
preceding fiscal year. The report shall include the following: 166

(A) Identification of all contracts entered into during 167
the fiscal year and all previously executed contracts that 168
remain current during any part of the fiscal year or that have 169
been closed during any part of the fiscal year, and for each 170
contract a description of all of the following: 171

(1) The name of the private attorney with whom the state 172
has contracted, including the name of the private attorney's law 173
firm if the private attorney is an individual; 174

(2) The nature of the legal matter that is the subject of 175
the contract so long as divulging that information would not 176
violate any ethical responsibility of the attorney general or 177
privilege held by the state; 178

(3) The state entity the private attorney was engaged to 179
represent or counsel; 180

(4) The total legal fees approved by the attorney general 181
for payment to a private attorney by the state for legal 182
services rendered during the preceding fiscal year. 183

(B) Copies of any written determinations made pursuant to 184
sections 9.492 to 9.494 of the Revised Code during the fiscal 185
year. 186

Sec. 9.496. Sections 9.491 to 9.495 of the Revised Code do 187
not apply to contingency fee contracts and renewals thereof that 188
are in existence on the effective date of this section. 189

Sec. 9.497. Nothing in sections 9.49 to 9.496 of the 190
Revised Code shall be construed to expand the authority of any 191
state agency or state agent to enter into contracts if no such 192
authority previously existed. 193

Sec. 9.498. The general assembly intends that any 194
limitations on entering into a contingency fee contract, as 195
provided by sections 9.491 to 9.495 of the Revised Code, are to 196
be applied only to contracts with a private attorney retained on 197
a contingency fee basis by the state. These limitations shall 198
not apply to contingency fee contracts between private parties 199
and contracts not involving the state. 200