

Mike Kuglitsch

STATE REPRESENTATIVE • 84TH ASSEMBLY DISTRICT

DATE: March 28, 2013

RE: Testimony on 2013 Assembly Bill 27

TO: The Assembly Committee on Judiciary

FROM: Representative Mike Kuglitsch

Thank you Mister Chairman for allowing me to testify today on Assembly Bill 27. As you may know, some states executive branch have made it a practice to award no-bid contingency fee contracts to plaintiff attorneys. These plaintiff attorneys receive a significant portion of any subsequent state recovery or settlement, often times upwards of one third of any settlement. In Wisconsin, our Governor has the authority to offer these bids to any firm the office deems qualified.

Many of us, throughout our tenure in office, have pledged to make ourselves more visible to the public. Transparency is not a Republican or Democrat issue, and an open government is something we owe to the taxpayers of Wisconsin.

The lack of uniform policies to govern our rationale for use of private plaintiff attorneys increases the potential for abuse and conflict of interest. Assembly Bill 27 solves this problem by creating a transparent process for which contingency based private attorneys enter into contracts with the State of Wisconsin.

Assembly Bill 27 covers five specific issue areas that safeguards Wisconsin's contracting process:

1. It requires a written determination that a contingency fee arrangement with private plaintiff attorneys will be cost-effective and in the best interests of the state;
2. Establishes reasonable, tiered limits on contingency fees based on a percent of the state's recovery;
3. Requires the publishing of executed contingency fee contracts on the state's website;
4. Requires government attorneys to participate in all settlement negotiations and retain ultimate control of the litigation; and,
5. Requires private plaintiff attorneys hired by the state to maintain all financial records related to the legal services provided to the state.

While we are aware that this is currently not an issue, it has been in the past and could again cause problems in the future. We must learn from our mistakes. By creating a

transparent process for hiring these private attorneys, we will solve a potential problem facing Wisconsin in the future.

I hope all of you consider voting in favor of this sunshine legislation. In the past, Wisconsin has seen problems from both sides of the aisle with our current system. We must be proactive and fix this now, before future administrators abuse their power and unfairly award a contract that takes away from the Taxpayers of Wisconsin.

Before I conclude, I would like to discuss Amendment 1 to AB 27. This was introduced to correct a drafting error. This amendment simply cleans up the language regarding the tiered limits for awards given to contracted plaintiffs. For example, a plaintiff attorney would make less recovering \$11 million than \$10 million dollars if this amendment is not included.

STATE REPRESENTATIVE • 84TH ASSEMBLY DISTRICT

Mike Kuglitsch

WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System



Written Testimony of Bill McColium, SNR Denton

Submitted on Behalf of the Wisconsin Civil Justice Council

and the U.S. Chamber Institute for Legal Reform

In Support of AB 27/SB 19

Wisconsin Assembly Committee on Judiciary

March 28, 2013

Representative Jim Ott and members of the of the Wisconsin Assembly Judiciary Committee, on behalf of the Wisconsin Civil Justice Council (WCJC) and the U.S. Chamber Institute for Legal Reform (ILR), thank you for allowing me the privilege to submit written testimony on some very important issues facing our legal system.

State attorneys general once held relatively low-profile roles in state government, serving as legal advisers for governors, state agencies and local governments. Over the past decade, there has been a dramatic transformation in the manner in which state attorneys general enforce their traditional consumer protection and antitrust enforcement powers. Nationwide, attorneys general are actively working to expand their subject matter jurisdiction into areas such as environmental policy and financial services regulation. State officials are stepping up their regulation of the business community and are well on their way to displacing federal authorities as the nation's chief consumer protection watchdogs.

As states become more engaged in major consumer protection issues, the ILR has noticed a willingness by states to hire private plaintiff's firms to pursue litigation on behalf of the state. It should be noted that in Wisconsin, the authority to enter into legal contracts with outside counsel resides with the Governor and the Department of Administration. As payment, these attorneys receive a contingency fee, which is a percentage of whatever amount is recovered on behalf of the taxpayer. In the past, some private law firms received excessively high fees in relation to the amount of work they did on behalf of the state. For example, in Wisconsin, private plaintiff attorneys hired by the State in the late 1990s received approximately \$75 million representing the State in the tobacco litigation settlement. (The private plaintiff attorneys originally sought \$847 million before ultimately agreeing to \$75 million.) *The Wisconsin State Journal, June 22nd, 1999.*

In addition to excessive fees, there is a substantial risk of "pay to play" schemes that may appear when political contributions from plaintiff's firms are traded for contingent fee contracts. At the very least, use of such counsel without the proper safeguards can give the appearance of impropriety and undermine confidence in our legal system.

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Governor Scott Walker and Attorney General J.B. Van Hollen have been a model of transparency and accountability during their respective times in office and have not engaged in the type of private attorney contracting with contingency fee counsel I have described. Past history and experiences in other states demonstrate that future Governors and Attorneys General in Wisconsin may not have the same restraint, judgment and integrity that Governor Walker and General Van Hollen have demonstrated. For this reason, we urge you to enact AB 27 and SB 19.

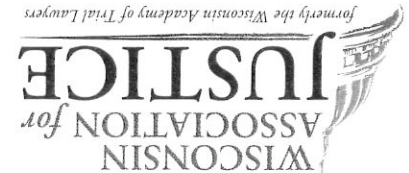
The State should only enter into private attorney contingency fee contracts when it does not have the expertise or ability to handle a matter and the State cannot locate appropriate outside counsel to handle the legal matter on an hourly fee basis. Then, only with complete transparency, a competitive bid process and caps on attorneys' fees, should contingency fee counsel be retained.

AB 27 by Representative Mike Kuglitsch and SB 19 by Senator Glenn Grothman require the state contracting agency to make a written determination that contingency fee counsel is cost effective and in the public interest. The legislation promotes competitive bidding by requiring the contracting agency to request proposals from private counsel, with certain exceptions. In order to rein in excessive attorneys' fees, the bill sets tiers for contingency fees as a percent of recovered amounts ranging from 25% to 5%. To ensure that the private plaintiff's firm is acting in the best interests of the state, and not in the interest of their own profit, the legislation requires government attorneys to maintain control of case and any settlement decisions. Transparency is achieved through the requirement that a copy of the executed fee contract be posted online. In addition, the private attorney must maintain time records and keep detailed records of expenses, disbursements, etc. for 4 years after the contract terminates.

Anytime an office hires private contingency fee counsel on behalf of the State, the State owes it to the taxpayers to be transparent and accountable in how and why they do so. They should be able to articulate and demonstrate the value that outside counsel is providing to the State and the taxpayers.

Conclusion

AB 27 and SB 19 were introduced to promote the principles of transparency and accountability in Wisconsin's private attorney contracting process. The bills are based on model legislation known as Transparency in Private Attorney Contracting (TIPAC). TIPAC or related bills have already been introduced in over a dozen state legislatures and successfully implemented in states like Arizona, Florida, Indiana, Iowa, and Mississippi. I urge this committee to join these states and protect the public interest by passing AB 27 and SB 19.



Testimony of Robert L. Jaskulski Before the Assembly Judiciary Committee March 28, 2013

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My name is, Robert Jaskulski. I am a partner with the Habush, Habush and Rottier law firm in Milwaukee and I serve as Past President and member of the Board of Directors for the Wisconsin Association for Justice (WAIJ). On behalf of the Association, I thank you for the opportunity to appear today to testify against Assembly Bill 27.

WAIJ strongly supports the contingency fee system. For thousands of Wisconsin citizens, the contingency fee opens the door to the courthouse. Attorneys representing injured citizens carefully review the merits of a case before taking it if the case is lost, the attorney is paid nothing.

After reviewing Assembly Bill 27, the first question raised is how many contingency fees agreements does the Governor enter into each year? If there are any cases, what are the cases? Based on news stories, it is far more likely that the Governor and Attorney General hire outside counsel to work on an hourly rate to handle cases. Yet, there is no proposed legislation directing the Governor on how to manage or cap cases that utilize hourly fees. Why wouldn't those contracts be covered under the same provisions of this legislation? Does the Governor already report annually to the Chief Clerk of each house of the Legislature number of contracts for legal services he has entered into over the past year that includes the following information:

- The name of the attorney and the attorney's law firm with which the agency has contracted.
- The nature and status of the legal matter under contract.
- The name of the parties to the legal matter.
- The amount of any recovery.
- The amount of any contingency fee paid.

The legislation is silent on who will pay costs. Often in a contingency fee case, lawyers for the injured party will pay the costs for the litigation – investigating a case, conducting

research, doing interviews, hiring experts, taking depositions and preparing the case for trial – and the expenses are recovered out of any settlement or verdict. These types of cases frequently require firms to invest and risk enormous capital, years of work, and tens of thousands of otherwise billable hours. Is the state responsible for the costs involved in the litigation or the attorneys hired by the contingency fee? Is the attorney and law firm hired responsible for the costs? Wouldn't this have an effect on the rate of the contingency fee?

Will this regulation trigger unnecessary conflict between state and federal law? Many of the cases brought by attorney generals are handled in federal court or involve a number of other states, multi-state litigation. Is a judge to review each state's laws before awarding attorneys fees in multi-state litigation? Should some attorneys representing other states be able to receive more compensation than those hired to represent Wisconsin citizens because of Wisconsin's law?

WAI is concerned this burdensome proposal will cost taxpayers money by preventing Wisconsin from leading, and possibly even participating, in multi-state or national litigation. Law firms that have special expertise in leading complex litigation are naturally going to contract with attorneys general in states that do not impose such heavy restrictions as are proposed here. The requirement that the contract be in writing is not new for Wisconsin attorneys. Already a contingency fee agreement must be in writing and is agreed upon even before the attorney starts the case.

The limits proposed on contingency fees in AB-27 only go one way – against the contingency fee lawyer, i.e., the person representing the state of Wisconsin. Capping or restricting fees must be balanced with equal limits on the fees that big business and insurance companies can pay their attorneys. Without equal limits on what corporations could spend for its attorneys, the State of Wisconsin and its citizens would be disadvantaged. WAI does not see any need AB-27. WAI fears this proposal is actually designed to discourage litigation when the taxpayers have been defrauded. Given there is little justification for this proposal, we suspect that special interests are pressing the Legislature to enact this proposal to protect corporations that defraud taxpayers by making litigation to recover damages more difficult.



TO: Members of the Assembly Judiciary Committee

FROM: Jason Culotta

Director, Tax & Transportation Policy

Wisconsin Manufacturers & Commerce

DATE: March 28, 2013

RE: Support for Assembly Bill 27

Wisconsin Manufacturers & Commerce (WMC) appreciates the opportunity to provide input on Assembly Bill 27, which would create a formal process for the state to select outside legal counsel for use on a contingency fee basis.

WMC is the state's largest business trade association, with over 3,500 members in the manufacturing, service, health care, retail, energy, banking and insurance sectors of our economy. WMC is dedicated to making Wisconsin the most competitive state in the nation to do business, and toward that end, we support legislation encouraging a legal environment that provides fairness under the law and the application of reasonable and clear standards. With those principles in mind, we respectfully request your support of Assembly Bill 27.

The state of Wisconsin presently has no formal process for selecting outside legal counsel used on a contingency fee basis. Assembly Bill 27 would establish a robust process for selecting private attorneys under this basis and also place reasonable limits on these arrangements.

Under Assembly Bill 27, the Governor would need to make a written determination on the need for the state to retain outside counsel on a contingency fee basis. Such a determination would need to prove that such a contract would be cost-effective for the taxpayer and be in the public interest.

For any contingency fee arrangement entered into, state attorneys would maintain control of the litigation. This would include state attorneys participating in any settlement conferences.

The legislation also calls for tiered limits on the amount of contingency fees that could be paid, based on the amount of the recovery. The maximum contingency fee paid would be capped at \$30 million.

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Founded in 1911, Wisconsin Manufacturers & Commerce is the state's chamber of commerce and largest business trade association representing more than 3,500 employers of every size and from every sector of the economy.

The bill provides transparency by requiring a copy of the contingency fee contract and the amount of any contingency fees paid to be posted to the Governor's website. Lastly, the Governor is required to submit to the Legislature an annual report of all contingency fee contracts entered into by the state, the attorneys and firm with whom the contracts have been signed, and information on the legal matter under contract.

Assembly Bill 27 will extend Wisconsin's culture of open governance into an area that has eluded transparency in the past. Thank you for your thoughtful consideration of our support for Assembly Bill 27.

**Statement Before the
Assembly Committee on Judiciary**

By

**Bill G. Smith
State Director
National Federation of Independent Business
Wisconsin Chapter**

**Thursday, March 28, 2013
Assembly Bill 27**

Mr. Chairman, members of the Committee, I have a brief statement to make on behalf of the members of NFIB.

The issue before the committee is not whether the Governor or Department of Justice should have the authority to hire outside legal counsel.

The issue, Mr. Chairman, is whether there should be greater transparency available to the public about contingency fee contracts between the state and private attorneys.

NFIB supports Assembly Bill 27 because it will protect taxpayers by placing reasonable, yet generous, limits on attorney fees, and it provides the Department of Justice with the responsibility and authority to monitor the terms and performance required under the private attorney contracts. It requires government attorneys to participate in all settlement negotiations and must also retain control of the litigation. The taxpayers of Wisconsin deserve no less.

A couple weeks ago, the Department of Justice invited everyone to join in a celebration of Wisconsin's sunshine laws. "These laws," the Attorney General said, "provide broad access to information about how our state and local government operate. The resulting public oversight forms an important foundation of our participating democracy."