1999 SENATE JUDICIARY

SB 2047

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2047

Senate Judiciary Committee

❑ Conference Committee

Hearing Date February 10, 1999

Tape Number	Side A	Side B	Meter #
1	x		0 - 3339
2-15-99 2	x		870 - 1670
Committee Clerk Signature	Jackie Follman		

Minutes:

SB2047 relates to contingent fee arrangements for compensating special assistant attorneys general.

SENATOR STENEHJEM opened the hearing on SB2047 at 9:00 a.m.

All were present.

SENATOR STENEHJEM testified in support of SB047. This bill came out of the Interim Committee. The Legislative Branch of government should have some oversight over when state agencies hire attorneys on contingent fee basis. This bill doesn't require legislative approval but it does have some legislative involvement because it would require that in order for a contingency fee arrangement to be authorized, it would require approval in advance from the State Emergency Commission. The Emergency Commission is composed of among others the Governor and the Chairman of the Appropriations Committee of the two chambers of the

legislature. I would have no objection to amending that to say approval of the Legislative Council. I believe the Legislature should have oversight in this matter.

VONNETTE RICHTER, Legislative Council, testified in support of SB2047. Testimony attached. Interim Committee report. The members of the Emergency Commission is the Governor, the Chairman of the Legislative Council, the Secretary of State, and the Chairman of the House and Senate Appropriations Committee.

HEIDI HEITKAMP, Attorney General, testified in opposition of SB2047. Testimony attached. The North Dakota Supreme Court was the first to rule on this issue of contingency fee contract and public monies. Our Supreme Court ruled that it did not violate State government.

SENATOR STENEHJEM stated that he was not criticizing any decisions that have been made in your office. It is not criticism of your office but is a proper role of the legislative branch of government to have oversight in these areas where there are large cases pending.

HEIDI HEITKAMP stated that I recognize it is not a criticism but it is an attack on the power of an elected official. It is not the legislature that will have the oversight, it is the Emergency Commission.

SENATOR TRAYNOR asked about the tobacco settlement, the state wasn't actually a party to the suit.

HEIDI HEITKAMP stated that they eventually filed a suit.

SENATOR TRAYNOR asked that this was after the settlement had been achieved.

HEIDI HEITKAMP stated that is correct. The actual cause of action we filed makes a claim for the misrepresentation. It is a claim made for violation for our consumer fraud and consumer protection.

SENATOR STENEHJEM stated that the jist of the whole ruling, we believe she has the authority to employ special assistants unless such agreements are prohibited by statute.

HEIDI HEITKAMP asked what agreements are specifically prohibited by the statute.

SENATOR STENEHJEM stated all the agreements that are for the amount over $150,000 in controversy for which approval by the Emergency Commission has not been granted.

JACK MCDONALD, North Dakota Trial Lawyers Association, testified in opposition of SB2047. Testimony attached.

SENATOR STENEHJEM asked if the Attorney General were to hire somebody with resources it would have to be pursuant to appropriations or the legislature, the problem that I have is that isn't this an appropriation that goes to private attorneys.

JACK MCDONALD stated that he disagreed and there is a basic difference.

SENATOR STENEHJEM CLOSED the hearing on SB2047.

February 15, 1999 Tape 2, Side A

SENATOR NELSON made a motion for DO NOT PASS, SENATOR BERCIER seconded.

Motion failed. 2 - 4 - 0

SENATOR WATNE made a motion for DO PASS, SENATOR TRAYNOR seconded. Motion carried. 4 - 2 - 0

SENATOR WATNE will carry the bill.

Date: 2-15-99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2047

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Do Not Pass

Motion Made By Nelson Seconded By Bercier

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem		X			
Senator Darlene Watne		X			
Senator Stanley Lyson		X			
Senator John Traynor		X			
Senator Dennis Bercier	X				
Senator Caroloyn Nelson	X				

Total (Yes) 2 No 4

Absent 0

Floor Assignment

Date: 2-15-99
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2047

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Watne Seconded By Traynor

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier		X			
Senator Caroloyn Nelson		X			

Total (Yes) 4 No 2

Absent 0

Floor Assignment Senator Watne

REPORT OF STANDING COMMITTEE

SB 2047: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends **DO PASS** (4 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2047 was placed on the Eleventh order on the calendar.

1999 HOUSE JUDICIARY

SB 2047

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2047

House Judiciary Committee

❑ Conference Committee

Hearing Date 3/15/99

Tape Number	Side A	Side B	Meter #
1	x		0.0-8.3
Committee Clerk Signature	Alan Gindlay -taken by Robin Small		

Minutes: REP. DEKREY called the meeting to order.

SEN. W. STENEHJAM introduced the bill. SEE HANDOUT.

REP. DELMORE asks if this ties the Attorney Generals hands and or any losses. WAYNE comments that it does have a check of oversight.

REP. DEKREY asks how does this work with public money? WAYNE replies that is in another bill.

VONETTE RICHTER, LEGISLATIVE COUNCIL. SEE HANDOUT.

NO QUESTIONS.

NO OPPOSITION.

The hearing was then closed.

49+

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2047

House Judiciary Committee

❑ Conference Committee

Hearing Date 3-16-99

Tape Number	Side A	Side B	Meter #
One SB 2047		x	13.0 to 48.0
Committee Clerk Signature	Orlin Hanson		

Minutes:

Summary of bill: continuation from hearing 3-15-99. Sponsored by Legislative Council.

Heidi Heitkamp: Attorney General.. Fundamentally SB 2047 is a dispute over who has control of Atty General during litigation in State of ND. What you are saying is the Emergency Commission should have the yes or no over the responsibilities and duties of litigation in the State of ND. If you pass this bill. You should ask yourselves who do the people of North Dakota want representing them in the State of ND. This bill is a solution in search of a problem.

Who is responsible for decisions?

Who are you really restricting?

Rep Hawkins: If a ND agency wants a lawyer do you appoint & pay for them.??

Heidi Heitkamp: No If they want a lawyer they have to seek an appointment from my office and we don't pay compensation to that lawyer.

Rep Mahoney: Tend to agree don't see any problem. Some cases are on a contingency basis.

Heidi Heitkamp: Highly unlikely that the Atty. En office will use contingency fees. Lot of people who disagree with this.

Rep Meyer: When you hire an attorney on a contingency basis do you have to appoint them as an assistant Atty Gen?

Heidi Heitkamp: Yes we usually do.

Rep Delmore: How many assist Atty Gen do you have?

Heidi Heitkamp: Rep Klemin has been appointed Special Atty Gen, Rep Mahoney too. Just signed an appointment for

Rep Gorder: How much is the hourly rate for these lawyers?

Heide Heithkamp: The rates for lawyers in the Asbestos trail litigation was approx. $75 per hour up to $500 per hour for trial lawyers. If a case goes to trial on a contingency basis these are the rates that will apply.

Rep Klemin: In defense of contingency fee attorneys if they don't always win and when they don't get anything then.

Heidi Heithkamp: This really is about who should decide these cases.

Rep DeKrey: What would be a reasonable figure that the State would proceed on in some of these cases?

Heidi Heithkamp: I don't know, $3.3 mill is what we went on in the Gypsum case.

Rep Maragos: What is the core of the issue in the WR Grace case.?

Heidi Heithkamp: The core issue in the WR Grace Case was whether the WR Grace company sold products and misrepresented the products to all of their institutions and consumers out there and as a result have created a great burden on them in the removal of all the asbestos.

Rep Maragos: How many litigation's are they involved in at this time?

Heidi Heithkamp: One of the Asbestos companies have gone into bankruptcy already. Others are looking that way of taking care of the financial end of the deal. Hazardous working conditions are one of the problems we are running into and must be resolved before we can go on.

Hearing closed.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2047

House Judiciary Committee

❑ Conference Committee

Hearing Date : March 23, 1999

Tape Number	Side A	Side B	Meter #
1	X		10
Committee Clerk Signature			

Minutes:

COMMITTEE ACTION

REP. KOPPELMAN moved that the committee recommend that the bill DO PASS. Rep. Maragos seconded and the motion passed on a roll call vote with 9 ayes, 6 nays and 0 absent.

Rep. Klemin was assigned to carry the bill.

Date: 3/23
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1047

House JUDICIARY Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Koppelman Seconded By Maragos

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY	✓		REP. KELSH	✓	✓
REP. CLEARY		✓	REP. KLEMIN	✓	
REP. DELMORE		✓	REP. KOPPELMAN	✓	
REP. DISRUD	✓		REP. MAHONEY	✓	✓
REP. FAIRFIELD		✓	REP. MARAGOS	✓	
REP. GORDER	✓		REP. MEYER		✓
REP. GUNTER	✓		REP. SVEEN	✓	
REP. HAWKEN	✓				

Total Yes 9 No 6

Absent 0

Floor Assignment Klemin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2047: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (9 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). SB 2047 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

SB 2047

Uniform Guardianship and Protective Proceedings Act (1997)

The Uniform Guardianship and Protective Proceedings Act (1997), which was recommended by the National conference in 1997, is a revision of Article V of the Uniform Probate Code, which North Dakota enacted in 1973. Article V of the Uniform Probate Code consists of NDCC Chapters 30.1-27 through 30.1-30.

Testimony in explanation of the revised Article V indicated that the major objectives of the revision are to provide for standby guardians for children; require better control of conservators; and allow delegation of investment authority.

Testimony in opposition to the revised Article V indicated that the present law regarding guardianships is more specific and clear than the revised Act and that there are no major defects in the current structure. The testimony further indicated that there are areas of concern with the revised Act including the removal of the requirement to appoint a guardian ad litem in each case, the establishment of a guardianship without a hearing, the reduction of the time limit for an emergency temporary guardianship to 60 days, the lack of specificity in defining the areas of a limited guardianship, and the removal of the guardian's authority to place a ward in a mental health care facility under "voluntary" admission status for up to 45 days. The committee received no testimony in support of the revised Article V.

The committee makes no recommendation regarding the Uniform Guardianship and Protective Proceedings Act (1997).

CONTINGENT FEE ARRANGEMENTS

By the directive of the chairman of the Legislative Council, the committee conducted a study of the authority of the Attorney General to enter contingent fee agreements with private attorneys. The committee received and considered information and recommendations relating to contingent fee arrangements and a North Dakota Supreme Court decision in which the court affirmed the constitutionality of the contingent fee arrangement that existed in that case.

Authority of Attorney General

Testimony received from a representative of the Attorney General's office indicated that the Attorney General's office does not have any agreements in which the office has agreed to pay special assistant attorneys general on a contingent fee basis. The testimony indicated, however, there are several special assistant attorneys general with contingency fee contracts with state agencies. Several state agencies have entered agreements with collection agencies, not particular attorneys, to do collection work for those state agencies. If it is necessary for the collection agency to sue to collect a debt on behalf of the state agency, the attorney the collection agency uses to bring the lawsuit in the name of the state agency must be appointed as a special assistant attorney general for that litigation. The attorneys the collection agencies use in these circumstances are paid by the collection agencies on a contingency fee basis.

Under NDCC Section 54-12-08, the power to appoint special assistant attorneys general lies with the Attorney General, but the special assistants' compensation is agreed to and paid by the agencies the attorneys are appointed to represent. The requesting agency and the attorney agree upon the attorney's compensation. That compensation may be an hourly fee, a flat fee, or a contingency fee. On a few occasions, agencies have agreed to pay attorneys on a contingent fee basis.

State v. Hagerty

The committee also received testimony from a representative of the Attorney General's office regarding the North Dakota Supreme Court decision *State v. Hagerty*, 580 N.W.2d 139 (1998), in which the court declared that because of the longstanding acceptance of contingent fee arrangements and in view of the historical authority of the Attorney General, the Attorney General has the authority to employ special assistant attorneys general under contingent fee agreements unless the agreements are specifically prohibited by statute. In *Hagerty* the agencies the attorneys represented had entered contracts providing the attorneys would be compensated on a contingent fee basis. The Attorney General then appointed the attorneys involved in the case as special assistant attorneys general. The Supreme Court concluded this arrangement did not violate the "public moneys" provision of the Constitution of North Dakota, Article X, Section 12. Section 12 provides, in part:

> All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the state receiving the same, to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature;

The committee considered two bill drafts. One provided that the Attorney General may not appoint a special assistant attorney general in a civil case in which the amount in controversy exceeds $150,000, and the special assistant attorney general is to be compensated by a contingent fee arrangement unless the arrangement is approved by the Legislative Council; and the other provided that the arrangement must be approved by the Emergency Commission.

Testimony in opposition to the bill drafts indicated that the bill drafts raised the issue as to whether the approval of the contingent fee arrangements is an executive or legislative function because the court, in *Hagerty*, held that the decision to enter the arrangements is a core function of the Attorney General. A concern was also

expressed over the confidentiality issues that would arise if the Legislative Council had the authority to approve the arrangement because the Legislative Council meetings may not be closed to the public. The testimony indicated that a constitutional amendment would be necessary for the Legislative Council to conduct closed meetings.

Recommendation

The committee recommends Senate Bill No. 2047 to provide that the Attorney General may not appoint a special assistant attorney general in a civil case in which the amount in controversy exceeds $150,000, and the special assistant attorney general is to be compensated by a contingent fee arrangement unless the arrangement is approved by the Emergency Commission. The bill provides that any proceeding or information used by the Emergency Commission under the bill is not subject to the open records and meetings provisions of NDCC Sections 44-04-18 and 44-04-19.

PUBLIC HEARINGS ON BALLOT MEASURES

By directive of the chairman of the Legislative Council, the committee conducted public hearings on the constitutional measures scheduled to appear on the primary and general election ballots. The purpose of the hearings was to promote public discussion and debate on the measures and to create a public history.

Measure No. 1 - Primary Election

The only constitutional measure on the June 1998 primary election ballot related to the filling of judicial vacancies. The measure, which would amend the Constitution of North Dakota, Article VI, Section 13, provided that persons appointed to the Supreme Court or district court positions would serve for at least two years before having to face an election.

Testimony in support of the measure indicated that the measure would be a means to ensure the future quality of the judiciary in North Dakota. The measure would alleviate the immediate financial pressures associated with running in an election and would allow a newly appointed judge an opportunity to serve the public for a two-year grace period. According to the testimony, the measure provides a balance between finding qualified individuals willing to seek judicial appointment and the voters' right to elect judges.

There was no testimony in opposition to the primary election ballot measure.

The measure was approved in the June 9, 1998, primary election.

Measure No. 1 - General Election

Measure No. 1 on the general election ballot would remove the references to the names, locations, and missions of the institutions of higher education from the Constitution of North Dakota.

Testimony in support of measure No. 1 indicated the original drafters of the constitution designated various cities to house the various institutions of higher learning in order to make education accessible to the people of the state, but that was over 100 years ago. With the knowledge and technology available today, the mode of higher education has changed. Having the names and missions in the constitution is restrictive to the schools and the removal of the language would allow the Legislative Assembly and the State Board of Higher Education to move higher education forward into the twenty-first century. The number of full-time students enrolled in higher education institutions in the state is declining because of fewer higher school graduates, but there is continually increased funding for higher education. The testimony further indicated that measure No. 1 is about allowing for flexibility, not about closing colleges. The only reason a college should remain open is for excellence in education.

Testimony in opposition to measure No. 1 argued that the drafters of the constitution believed it was necessary to name the locations of the institutions of higher education and that thinking has withstood the test of time. The purpose of the constitution is to protect the rights of the people and a vote in support of the measure would give away the power reserved to the people to protect the colleges. The testimony further indicated that those in support of the measure claim passage of the measure would make institutions more responsive, would free administration and faculty to become more innovative, would make institutions operate more efficiently, and would give the Board of Higher Education more latitude; however, the real intent and purpose of the measure is to ask the people of the state to give up their constitutional protection that requires educational decisions to be made on an institution-by-institution basis.

Other testimony in opposition to the measure indicated that all of the institutions of higher education are necessary for education to be accessible to all areas of the state. The opposition claimed the measure would take power away from the people and place it with an unelected board. It also was argued that the University System in the state is a tremendous asset and is a solution to the state's economic problems, not the problem. The testimony in opposition further claimed that the passage of the measure would send a message of uncertainty to the staff at the institutions and may make staff and faculty recruitment more difficult.

Testimony from the Chancellor of the North Dakota University System indicated that it is a myth that all the University System does is educate people to leave the state. In 1995, 61 percent of North Dakotans enrolled in the University System remained in the state, and 25 to 30 percent of out-of-state students remained in the state after graduating from the University System. In addition, 50 to 60 percent of the physicians in North Dakota have attended the University of North Dakota School of Medicine and Health Sciences. The testimony further

Testimony of Attorney General Heidi Heitkamp
Before Senate Judiciary Committee on
SB 2047

For the record, I am Attorney General Heidi Heitkamp, and I rise in opposition to SB 2047. This bill is not founded on good public or legal policy.

I ask you one simple question, why is this law change being proposed today? Is it because of abuse of power by the Attorney General? Is it because the authority of the Office of Attorney General has been misused? NO.

At its core, this bill is about who is responsible for litigation on behalf of the people of the State of North Dakota--the Attorney General who has been elected by the people to serve as the State's lawyer, or the North Dakota Emergency Commission, which holds no constitutional authority or mandate and no particular legal expertise.

SB 2047: A Solution in Search of a Problem.

For the past 110 years, the Office of Attorney General has provided legal services to the people of North Dakota. The authority to provide services derives from the North Dakota constitution, the common law and statutory law. During that entire period, the Office of Attorney General has had available to it the use of contingency fee contracts to secure legal services for the state of North Dakota.

Most of North Dakota's legal work is done by attorneys who are full-time employees of the State. The vast majority of private lawyers who have been appointed as Special Assistant Attorneys General represent state boards and commissions and the Bank of North Dakota, typically for foreclosures and loan closing. On occasion this office appoints private attorneys to represent state agencies. Examples of the use of outside private counsel include the hiring of private counsel in complex civil liability litigation, in cases involving conflicts, or in cases litigated out of state.

In those cases where the State employs private attorneys, the vast majority of private attorneys work on a fee for services basis. When compensation is being paid by the Attorney General, the attorneys are required to sign the attached contract.

As Attorney General, I have NEVER hired an attorney to work on a contingency fee contract. However, in very rare circumstances, and at the request of agencies controlled by other elected and appointed officials, I have appointed attorneys who have been hired on a contingency fee basis. In the attached affidavit, we outlined for the court the number of contingent fee cases in which the State was involved. In all of these cases, the State acted prudently and appropriately, and in fact acted in a manner substantially similar to a private litigant.

The Attorney General is Accountable for her Appointment Decisions

If the argument is about the accountability of the Attorney General, I would note that the Attorney General is responsible first and foremost to her clients, the people of the state of North Dakota who have entrusted her, by their votes, with those constitutional obligations. If the Attorney General has failed to adequately represent the State, the people hold the power to replace the Attorney General.

If your argument is who is to protect the public from unreasonable attorney's fee awards, please consider page 10 of the decision in State ex rel. v. Hagerty, 580 NW2d 139 (ND 1998) (copy attached), which discusses the role of the judiciary in supervising the charging of attorney's fees.

In addition, I have serious doubts about the Legislature's constitutional authority to dictate to the Attorney General how, and in what circumstances, the Attorney General may exercise her appointment authority. If the Attorney General retains any inherent constitutional authority, it is the authority to appoint special assistant attorneys general free of interference.

Conclusion

I would ask that you carefully consider what forces motivated this bill. I ask the question that is frequently asked by legislators: what problem are you seeking to remedy? I believe the fair answer to that question is "none." Please give this bill a DNP recommendation.

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

DISTRICT COURT
SOUTH CENTRAL DISTRICT

W.R. GRACE & CO.-CONN.,

Plaintiff,

v.

STATE OF NORTH DAKOTA and HEIDI HEITKAMP, Attorney General for the State of North Dakota,

Defendants.

AFFIDAVIT OF BETH ANGUS BAUMSTARK

Case No. 94-C-2079

Beth Angus Baumstark states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am an Assistant Attorney General employed by the North Dakota Office of Attorney General. I am the Director of the State and Local Government Division.

3. One of my responsibilities as Director of the State and Local Government Division of the Office of Attorney General is to monitor the appointment of special assistant attorneys general.

4. A review of the records of the Office of Attorney General indicates there are currently 173 appointed special assistant attorneys general. Twenty-two of the special assistant attorneys general are full-time state employees hired by state agencies. Nine of the special assistant attorneys general are local government

employees hired for child support enforcement. The remaining special assistant attorneys general are not government employees.

5. Records in the Office of Attorney General indicate special assistant attorneys general were appointed to represent state agencies as early as 1954. The records also demonstrate that as early as 1973 Oaths of Office appointed special assistant attorneys general without compensation from the Office of Attorney General when the requesting state agency was paying the compensation.

6. The Office of Attorney General generally does not know the specific contract terms between the state agency requesting appointment of a special assistant attorney general and the special assistant attorney general. The Office of Attorney General is aware that at least 9 of the current special assistant attorneys general are compensated on a contingency fee basis. Office of Attorney General records indicate contingent fee agreements were entered into by the Attorney General or state agencies at least as early as 1984.

7. As part of its routine practice, the Office of Attorney General provided to the Legislative Council a copy of the October 1, 1996, Attorney General's Opinion to Mr. Larry Isaak on or about the date that opinion was issued.

8. Attached are true and correct copies of records kept at the Office of Attorney General. The records attached are records regarding the appointment of Jon M. Arntson as Exhibit 1; records regarding the appointment of Steven C. Lian as Exhibit 2; records regarding the appointment of Robert N. Hill as Exhibit 3; records regarding the appointment of Daniel A. Speights as Exhibit 4; records

regarding the appointment of Amanda Graham Steinmeyer as Exhibit 5; records regarding appointment of certain special assistant attorneys general in 1973 as Exhibit 6; and Report of the Attorney General of North Dakota to the Governor (July 1, 1954 to June 30, 1956), pages 1-8 as Exhibit 7.

Dated this 9 day of October, 1997.

By: Beth Angus Baumstark
Beth Angus Baumstark

Subscribed and sworn to before me
this 9th day of October, 1997.

Jenney J. Laub Smith
Notary Public

JENNEY J. LAUB
Notary Public, State of North Dakota
My Commission Expires 4-18-2003
STATE OF NORTH DAKOTA
NOTARY PUBLIC SEAL

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SPECIAL ASSISTANT ATTORNEY GENERAL
APPOINTMENT AND REPRESENTATION AGREEMENT

1. Heidi Heitkamp, Attorney General of the State of North Dakota, (hereinafter "the Attorney General") has appointed _____ (hereinafter "the special assistant attorney general") as a special assistant attorney general to serve at the pleasure of the Attorney General specifically to provide legal services on behalf of the Office of Attorney General subject to the conditions set forth in this agreement.
2. The special assistant attorney general shall provide legal services to _____ (hereinafter "the Client") in _____ (hereinafter "the Litigation").
3. The special assistant attorney general recognizes that the appointment of a special assistant attorney general is personal in nature and does not extend to any other lawyer or member of any law firm with which the special assistant attorney general is associated as an associate, partner, or otherwise.
4. The special assistant attorney general shall not undertake legal work for the Client outside of the scope of the appointment.

COMPENSATION:

5. The special assistant attorney general shall be compensated in accordance with the Special Assistant Attorney General Billing Policy (attached to and incorporated into this agreement) (hereinafter "Billing Policy").
6. The special assistant attorney general's compensation shall be paid by _____.
7. The special assistant attorney general shall be compensated only in accordance with the express written provisions of this agreement and shall not be compensated by any other party for the Litigation.
8. The special assistant attorney general shall be considered an independent contractor and not an employee of the State of North Dakota or the Office of Attorney General and shall not be eligible for any State employee leave or other benefits except those expressly provided in this agreement.

CONFLICTS:

9. The special assistant attorney general agrees to follow the North Dakota Rules of Professional Conduct (hereinafter "Rules of Professional Conduct") and the conflict of interest policy set forth in the North Dakota Office of Attorney General Policy Regarding Special Assistant Attorney General Appointments (attached to and incorporated into this agreement) (hereinafter "the Conflict Policy"). If there is a more stringent standard in the Conflict Policy than in the Rules of Professional Conduct, the Conflict Policy controls over the Rules of Professional Conduct.
10. The special assistant attorney general may not represent a party involved in a claim, dispute, or transaction of any kind which would create a conflict of interest for the special assistant attorney general, the Office of Attorney General, or the Client unless and until the special assistant attorney general has informed the Office of Attorney General and the Client of the proposed representation and received the written approval of the Attorney General and the Client to proceed with the representation. The special assistant attorney general understands that this duty to inform and obtain approval applies to potential as well as actual conflicts of

interest and to conflicts imputed to the attorney under North Dakota Rule of Professional Conduct 1.10.

11. If at any point during the period of the special assistant attorney general's appointment the attorney becomes aware of an actual or potential conflict of interest as described in this agreement, the special assistant attorney general shall immediately notify the Office of Attorney General and the Client.
12. If the special assistant attorney general wishes to obtain a waiver of a conflict or potential conflict of interest, the attorney shall submit a written request for waiver to the Office of Attorney General, with a copy to the Client, that contains the following information: a) full disclosure of the scope of the matter the special assistant attorney general or the member of the special assistant attorney general's firm desires to perform for the named entity or individual, and b) a statement of the reason why the conflict would not be so substantial as to be deemed likely to interfere with the lawyer's exercise of independent professional judgment or affect the integrity of services which the Office of Attorney General expects and the special assistant attorney general has contracted to perform.

CONDUCT OF LITIGATION:

13. Subject to the terms of the special assistant attorney general's appointment, it is recognized and agreed that the special assistant attorney general shall act as chief litigation counsel for the Client in the Litigation. However, the Attorney General retains the Attorney General's authority as the chief legal officer of the State of North Dakota.
14. The Solicitor General with the Office of Attorney General (hereinafter "Solicitor General") or the Solicitor General's delegate shall monitor the Litigation on behalf of the Office of Attorney General and serve as the primary contact person for the special assistant attorney general with the Office of Attorney General.
15. The special assistant attorney general shall represent the Client in a manner that is consistent with the Office of Attorney General's philosophy of pursuing litigation in an aggressive and forthright manner while maintaining the overall objective of resolving litigation in the most expeditious and cost-effective manner.
16. The special assistant attorney general shall avoid taking extreme advocacy positions that are not likely to have a substantive impact on the Litigation. Coercive, delaying, or obstructive tactics are also not permissible.
17. Dispositive motions that have a significant likelihood of success shall be filed as early in the Litigation as possible.
18. Discovery practice shall be handled reasonably. Lengthy interrogatories or extensive requests for document production or requests for admission solely for the purpose of burdening another party are not permitted. "Standard" interrogatories, requests for production of documents, and requests for admission shall be closely reviewed before being issued to make sure that the information or documents being requested are relevant and necessary.
19. The special assistant attorney general shall identify and consider early in the proceedings, and at each subsequent stage, the settlement possibilities of the Litigation to achieve the greatest degree of cost-effectiveness while protecting the public interest.
20. The special assistant attorney general has no authority to settle the Litigation without prior consultation with the Office of Attorney General.
21. The special assistant attorney general shall promptly report any settlement overtures received to the Office of Attorney General and the Client.

22. The special assistant attorney general shall be alert to and apprise the Office of Attorney General and the Client of any opportunities for using non-judicial dispute resolution approaches.
23. The special assistant attorney general may not take an appeal without prior consultation with the Office of Attorney General, but the special assistant attorney general shall protect the Client's appeal rights pending a decision to appeal.
24. The special assistant attorney general is not authorized to initiate affirmative litigation, including filing a counterclaim or cross-claim on behalf of a defendant, except as expressly authorized in writing in advance by the Office of Attorney General. Requests for such approval shall be submitted to the Office of Attorney General with a draft of the proposed pleading and any relevant background information or documents.
25. Unless the special assistant attorney general and the Attorney General agree otherwise in writing, the special assistant attorney general shall not use the Attorney General's name in the signature block on court filings for the Client and, instead, shall use the following signature block on those filings:

_____
[Name of special assistant]
Special Assistant Attorney General
[Bar registration #, if required]
[Address of special assistant]
[Telephone number of special assistant]
[Facsimile number of special assistant, if desired]

Attorney for [specify Client(s)]

COMMUNICATIONS WITH OFFICE OF ATTORNEY GENERAL AND CLIENT:

26. If a special assistant attorney general has been appointed to handle the Litigation because the Office of Attorney General has a conflict of interest, the Office of Attorney General shall issue to the special assistant attorney general a written waiver of the provisions of paragraphs 20, 23, 27, 28, 29, 30, and 31 of this agreement and of those portions of paragraphs 5, 21, 22, 33, 35, and 46 of this agreement concerning communications with the Office of Attorney General. Under those circumstances, the special assistant attorney general is required to submit to the Office of Attorney General only that information required by law and that information specifically requested by the Office of Attorney General to respond to requests for information about pending or threatened litigation or settlements from the North Dakota State Auditor or the North Dakota Office of Management and Budget.
27. Well-established lines of communication between the special assistant attorney general and the Office of Attorney General are very important. In general, as set forth below, the Office of Attorney General shall be consulted throughout the Litigation on all significant policy and other major substantive issues affecting the Litigation, as defined below, and all important court papers, as defined below, shall be approved by the Office of Attorney General before they are filed or served.
28. The special assistant attorney general shall consult with and obtain the prior approval of the Office of Attorney General concerning all significant policy and other major substantive

issues affecting the Litigation. "Significant policy and other major substantive issues affecting the Litigation" include, but are not limited to, a decision to file or not file a dispositive motion, the response to be made to constitutional or major statutory interpretation questions, whether to submit a matter to alternative dispute resolution, and other issues having a significant financial impact on the State of North Dakota. "Significant financial impact" is defined as $_____ or more. Such consultations shall take place sufficiently in advance of applicable deadlines so that the Office of Attorney General has sufficient time to provide substantive input into strategic decisions and review draft documents.

29. The special assistant attorney general shall provide the Office of Attorney General with a reasonable opportunity to review and approve all important court papers before they are filed or served. Therefore, drafts must be forwarded to the Solicitor General with sufficient time for effective review. The special assistant attorney general shall inform the Solicitor General of the relevant filing or service deadline when a draft of the any important court papers is provided for review. "Important court papers" include, but are not limited to, all dispositive motions, briefs in support of those motions, and appellate briefs.
30. Status meetings shall be held at the request of the Solicitor General, the Solicitor General's delegate, or the special assistant attorney general.
31. The special assistant attorney general shall submit a status report on the Litigation to the Office of Attorney General each quarter. Quarterly reports are due on each January 1, April 1, July 1, and October 1. Each status report shall include a summary of the present status of the Litigation, copies of all significant correspondence, memoranda, pleadings, motions, briefs, orders, and other documents issued or received by the special assistant attorney general in the Litigation during the preceding quarter. The status report shall also include proposed strategies for future work in the case.
32. The special assistant attorney general shall also provide regular status reports on the Litigation to the Client. The content and frequency of those status reports shall be agreed upon by the special assistant attorney general and the Client.
33. If there is an adverse ruling, the special assistant attorney general shall notify the Office of Attorney General and the Client promptly so that a decision may be made regarding possible appeals and other necessary actions taken.
34. At the conclusion of the Litigation (that is, when the Litigation is settled or the final judicial decision in the Litigation is rendered) the special assistant attorney general shall submit a closing report to the Office of Attorney General. This closing report shall provide a clear, concise summary of relevant information on the Litigation which can be disclosed upon a public records request. Such relevant information includes a brief summary of the case, the result, and the total cost of handling the Litigation.
35. At the conclusion of the Litigation and at appropriate times throughout the handling of the Litigation the special assistant attorney general shall recommend to the Attorney General and the Client any significant changes in statute, regulation, policy, or procedure the special assistant attorney general believes would prevent or minimize future similar litigation.

TERMINATION:

36. This agreement may be terminated by either party at any time and shall remain in effect until so terminated.

37. In the event of termination, the special assistant attorney general shall be paid for the reasonable value of the work performed or services rendered in the Litigation through the date of termination in accordance with the Billing Policy.
38. In the event of termination, the original copies of all pleadings, exhibits, notices, attorney's memoranda, forms, photographs, expert's reports, correspondence, and other documents and discovery or evidentiary materials related to the Litigation, including all those prepared by or for the special assistant attorney general, shall become the property of the Office of Attorney General and shall be delivered to the Office of Attorney General within a reasonable time after termination or upon conclusion of the Litigation, unless other storage/retention arrangements are approved by the Office of Attorney General.

MISCELLANEOUS:

39. The Attorney General may provide attorneys or other members of the Office of Attorney General staff to work on the Litigation with the special assistant attorney general. The identity and responsibilities of such personnel so assigned shall be determined solely by the Attorney General. Coordination of the Office of Attorney General staff's work on the Litigation will be handled principally by the Solicitor General or the Solicitor General's delegate, in consultation with the special assistant attorney general.
40. The special assistant attorney general understands that the Office of Attorney General or the Client may evaluate the attorney's performance in providing representation at any point during the attorney's representation or after its conclusion.
41. The special assistant attorney general agrees to have and keep in force during the term of this agreement and for one year following the termination of this agreement insurance covering the attorney's professional errors, omissions, or negligent acts with limits of not less than $1,000,000 per claim and $_____ aggregate. The special assistant attorney general shall be financially responsible for the premiums and deductibles on such insurance.
42. The special assistant attorney general agrees to notify the Attorney General either orally or in writing if any disciplinary complaints are filed against the attorney during the pendency of the appointment and of the disposition of any such complaints that are filed.
43. The special assistant attorney general understands that only the Attorney General, and not the special assistant attorney general, may issue official opinions of the Attorney General.
44. The special assistant attorney general may hold himself or herself out as a special assistant attorney general only when representing the Client in the Litigation or as otherwise specifically authorized in advance by the Office of Attorney General. Neither the designation of special assistant attorney general nor the name of the State of North Dakota shall be used in any advertising or promotional context by the special assistant attorney general or the special assistant attorney general's firm without the prior written consent of the Office of Attorney General.
45. The special assistant attorney general understands copies of briefs or other pleadings submitted to the Office of Attorney General may be included in the Office of Attorney General's brief bank system.
46. All records, documents, and account procedures and practices of the special assistant attorney general relevant to the Litigation or this appointment shall be subject to examination by the Office of Attorney General and are considered records of the Office of the Attorney General for the purposes of the North Dakota open records law.
47. The special assistant attorney general understands that his or her representation of the Client is subject to and governed by North Dakota's open records and open meetings laws. The

special assistant attorney general shall be familiar with those laws and exceptions and follow those laws. Under those laws the special assistant attorney general may not agree -- either in writing, including in a settlement agreement, or orally -- to keep confidential any information or documents that would fall within the purview of the North Dakota open records law unless a state or federal statute specifically exempts such information or documents from the open records law. If the special assistant attorney general has a question about the application of the State's open records or open meetings law to a particular fact situation, the special assistant attorney general shall consult with and follow the decision of the Office of Attorney General on that issue.

48. The special assistant attorney general agrees that the special assistant attorney general and his or her agents and employees shall follow the Office of Attorney General Debt Collection Policy (attached to and incorporated into this agreement) when engaging in any debt collection activities for the Client.
49. The special assistant attorney general may not assign, transfer, or subcontract this agreement unless that assignment, transfer, or subcontract is approved by the Attorney General.
50. The Office of Attorney General and the undersigned special assistant attorney general are the only parties to this agreement and are the only parties entitled to enforce its terms. Nothing in this agreement gives, is intended to give, or shall be construed to give any benefit or rights, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name in this agreement and expressly described as intended beneficiaries of the terms of this agreement.
51. The failure of the Attorney General to enforce any provision of this agreement shall not constitute a waiver by the Attorney General of that or any other provision.
52. This agreement is governed in all respects, whether as to validity, construction, capacity or otherwise, by the laws of the State of North Dakota. Any litigation arising out of or relating in any way to this agreement or the performance under this agreement shall be brought in the courts of North Dakota and the special assistant attorney general hereby consents to such jurisdiction.
53. The special assistant attorney general shall comply with all applicable federal, state, and local laws, regulations, and judicial rules of procedure.

Dated this _____ day of _____, 19___

_____

Heidi Heitkamp
Attorney General

Dated this _____ day of _____, 19__

_____

_____

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

1998 ND 122

State of North Dakota and Heidi Heitkamp, Attorney General for the State of North Dakota, Bismarck State College, Department of Human Services, Department of Transportation, Job Service North Dakota, North Dakota State University, North Dakota State University- Bottineau, University of North Dakota, University of North Dakota-Lake Region, Jon M. Arntson, Arntson & Stewart, P.C., Steven C. Lian, Farhart, Lian & Maxson, P.C. (formerly Farhart, Lian, Maxson, Louser & Zent, P.C.), Daniel A. Speights, Amanda Graham Steinmeyer, Robert N. Hill and Speights & Runyan, Petitioners
v.
The Honorable Gail Hagerty, Judge of District Court, South Central Judicial District, and W.R. Grace & Co.-Conn., Respondents

Civil No. 980039

Supervisory Writ.
GRANTED.
Opinion of the Court by VandeWalle, Chief Justice.
M. K. Heidi Heitkamp, Attorney General, Bismarck; Douglas A. Bahr, Assistant Attorney General, Bismarck, (on brief); and J. Philip Johnson, of Wold Johnson, P.C., Fargo, for petitioners.
J. Michael Schwartz, of Plunkett, Schwartz & Peterson, Minneapolis, MN, for respondents.

State ex rel. Heitkamp v. Hagerty

Civil No. 980039

VandeWalle, Chief Justice.

[¶1] The State of North Dakota, Heidi Heitkamp, Attorney General for the State of North Dakota, Bismarck State College, Department of Human Services, Department of Transportation, Job Service North Dakota, North Dakota State University, North Dakota State University-Bottineau, University of North Dakota, and University of North Dakota-Lake Region (hereinafter collectively referred to as the Attorney General) have petitioned this court for a supervisory writ directing the district court to vacate its September 29, 1997, order requiring them to cease and desist from using special assistant attorneys general retained under contingent fee agreements to prosecute the underlying action.

[¶2] Jon M. Arnston, Arntson & Stewart, P.C.; Steven C. Lian,

Farhart, Lian & Maxson, P.C.; Daniel A. Speights, Amanda Graham Steinmeyer, Robert N. Hill, and Speights & Runyon (Special Assistants Attorney General and law firms retained under contingent fee agreements to prosecute the underlying action, hereinafter collectively referred to as the Special Assistants) filed a supplemental petition for a supervisory writ directing the district court to vacate its September 29, 1997, order.

[¶3] We conclude this is an appropriate case in which to exercise our supervisory jurisdiction, and we grant the petitions.

I

[¶4] By complaint of July 11, 1994, W.R. Grace & Co. - Conn., (Grace) sued for a declaratory judgment determining its rights and duties associated with construction products containing asbestos designed, manufactured or sold by Grace and installed in public buildings owned or operated by the State. The State answered and counterclaimed on August 11, 1994. The State was represented by the Special Assistants under contingency fee agreements.

[¶5] On July 22, 1997, Grace requested a cease and desist order declaring the contingency fee agreements violate the North Dakota Constitution and North Dakota statutes, and prohibiting the Special Assistants from further prosecuting the underlying action pursuant to the contingency fee agreements. On September 29, 1997, the district court issued an order granting Grace's motion for a cease and desist order. The trial court later denied a motion to alter or amend the cease and desist order and denied a request for certification under Rule 54(b), N.D.R.Civ.P., permitting entry of a final judgment as to one or more but fewer than all of the claims or parties. The Attorney General and the Special Assistants then filed these petitions for a supervisory writ.

[¶6] This court's authority to issue supervisory writs is derived from Art. VI, § 2, N.D. Const., which vests this court with appellate and original jurisdiction "with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction." Traynor v. Leclerc, 1997 ND 47, ¶6, 561 N.W.2d 644. See also N.D.C.C. 27-02-04 ("In the exercise of its appellate jurisdiction, and in its superintending control over inferior courts," this court "may issue such original and remedial writs as are necessary to the proper exercise of such jurisdiction."). The power to issue a supervisory writ is a discretionary power, which we exercise "rarely and cautiously," Comm'n on Medical Competency v. Racek, 527 N.W.2d 262, 264 (N.D. 1995), "only to rectify errors and prevent injustice in extraordinary cases where no adequate alternative remedy exists." Trinity Med. Ctr., Inc. v. Holum, 544 N.W.2d 148, 151 (N.D. 1996).

[¶7] To be appealable, an interlocutory order must satisfy one of the criteria specified in N.D.C.C. 28-27-02 and the trial court must certify the appeal under Rule 54(b), N.D.R.Civ.P. Mitchell v. Sanborn, 536 N.W.2d 678, 681 (N.D. 1995). However, if denying immediate appellate review of an interlocutory order creates a

substantial injustice, our supervisory jurisdiction acts as a safety net for the restrictive use of Rule 54(b). Id. at 682. Here, the case is extraordinary, the injustice if the trial court erred is significant and the Attorney General has no adequate alternative remedy. We conclude this is an appropriate case in which to exercise our supervisory jurisdiction.

II

[¶8] Relying on Bies v. Obregon, 1997 ND 18, 558 N.W.2d 855, the Attorney General contends Grace's challenge of the contingent fee agreements is not ripe for adjudication because there can only be a controversy if there is a recovery in the underlying litigation. For a court to adjudicate, there must be before it an actual controversy that is ripe for review. Id. at ¶9. "An issue is not ripe for review if it depends on future contingencies which, although they might occur, necessarily may not, thus making addressing the question premature." Id. at ¶9. But, whether Grace has a right not to have litigation prosecuted against it by special assistant attorneys general retained under continent fee agreements on behalf of the State is an actual controversy which is ripe for review without waiting to see if the litigation results in a recovery.

[¶9] Alternatively, relying on Diocese of Bismarck Trust v. Ramada, Inc., 553 N.W.2d 760 (N.D. 1996), the Attorney General contends Grace's challenge is barred by laches. We discussed laches in Diocese of Bismarck Trust:

> "Laches does not arise from the passage of time alone, but is a delay in enforcing one's right which is prejudicial to another. In addition to the passage of time, parties against whom a claim of laches is sought to be invoked must be actually or presumptively aware of their rights and must fail to assert those rights against parties who in good faith changed their position and cannot be restored to their former state."

Id. at 767 (citations omitted). We are not persuaded the Attorney General was prejudiced by the timing of Grace's challenge.

[¶10] The Special Assistants contend Grace lacks standing to challenge the legality of the contingent fee agreements. We explained standing in State v. Carpenter, 301 N.W.2d 106 (N.D. 1980):

> "The question of standing focuses upon whether the litigant is entitled to have the court decide the merits of the dispute. It is founded in concern about the proper--and properly limited--role of the courts in a democratic society. Without the limitation of the standing requirements, the courts would be called upon to decide purely abstract questions. As an aspect of justiciability, the standing requirement focuses upon whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to justify exercise

of the court's remedial powers on his behalf."

Id. at 107 (citations omitted), quoted in Shark v. U.S. West Communications, Inc., 545 N.W.2d 194, 198 (N.D. 1996). In State v. Erickson, 72 N.D. 417, 7 N.W.2d 865 (N.D. 1943), the Insurance Commissioner was sued by the State of North Dakota in a complaint signed by a private attorney who had no authority from the attorney general. The defendant challenged the authority of the attorney to represent the State. The trial court, agreeing with the defendant, dismissed the complaint and this court affirmed, holding the statute involved did not authorize an attorney other than the attorney general to represent the State in actions. Under Carpenter and Erickson, we conclude Grace had standing to challenge the authority of the Special Assistants to prosecute litigation against it.

III

[¶11] The basis for the trial court's order is Grace's contention the contingent fee agreements violate Art. X, § 12, N.D. Const., and statutes requiring all State moneys to be paid into the treasury and disbursed only pursuant to legislative appropriation.

[¶12] Art. X, § 12(1), N.D. Const., provides, in part:

> "All public moneys, from whatever source derived, shall be paid over monthly . . . to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature."

[¶13] "When interpreting constitutional sections, we apply general principles of statutory construction." Comm'n on Med. Competency v. Racek, 527 N.W.2d 262, 266 (N.D. 1995). "Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement." Id. "The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself." Bulman v. Hulstrand Constr. Co., Inc., 521 N.W.2d 632, 636 (N.D. 1994).

[¶14] Grace argues "[w]hatever is paid by way of either settlement or judgment, constitutes public money for the public's claims, all of which must be deposited into the state treasury to be appropriated by the Legislature." Grace's position is supported by Meredith v. Ieyoub, 700 So.2d 478 (La. 1997), where the Louisiana Supreme Court held that state's attorney general could not hire private attorneys to prosecute environmental litigation on a contingency basis:

> "Thus, 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. . . .
>
> "The Attorney General and Intervenors argue that the

> Attorney General's powers to institute civil proceedings and to appoint assistant attorneys includes the inherent authority to hire outside attorneys on a contingency fee basis to prosecute these claims. We disagree. Paying outside attorneys to prosecute legal claims on behalf of the state is a financial matter. As our prior jurisprudence indicates, the power over finances must be expressly granted by the constitution to another branch of government or else that power remains with the Legislature. We find nothing in Article IV, § 8, nor any other constitutional provision, which expressly grants the attorney general the power to hire and pay outside legal counsel on a contingency fee basis. The power to institute suit on behalf of the state, while extremely broad, does not expressly give him this power. Nor does the power to appoint assistant attorneys to serve at his pleasure."

Id. at 481-2.

[¶15] The Attorney General argues in this case:

> "Contingent fees owed to special assistant attorneys general are not 'public moneys' and are not 'receiv[ed]' by public officials and, accordingly, are not paid over to the state treasurer. . . .
>
> "Under a traditional contingent fee arrangement, only the net proceeds of the recovery remaining after payment of the attorneys' fees are paid to the client -- in this case the client State Agencies. . . . Therefore, only those net proceeds would be deposited in the state treasury and subject to the appropriations process. See N.D. Const. art. X, § 12."

This view is supported by Button's Estate v. Anderson, 112 Vt. 531, 28 A.2d 404 (1942), where the Vermont Supreme Court held that state's governor could contract with private attorneys to prosecute a claim against the United States on a contingency fee basis:

> "Even though the petitioners have a lien on the fund [for a contingency fee], is payment barred to them because of the provisions of our Constitution and statutes? We hold not. Section 27 of chapter II of the Constitution provides that 'no money shall be drawn out of the Treasury, unless first appropriated by act of legislation'. The purpose of this provision is 'to secure regularity, punctuality and fidelity in the disbursements of the public money.' City of Montpelier v. Gates, 106 Vt. 116, 120, 170 A. 473, 474, quoting from Story, Const., sec. 1342. This provision means that no money shall be drawn from the treasury except in pursuance of law. . . . It is apparent that if [] a literal construction were given absurd results might follow. If it should appear that

> through some mistake the sum of, to illustrate, ten dollars belonging to a certain person had found its way into the state treasury, then under a literal construction of the Constitution it could not be paid out without a special appropriation although all parties agreed that the State had no right to it, legally and equitably. The amount does not alter the principle involved. Surely the framers of the Constitution could not have intended any such consequences. The clear construction to be given to this provision is that they intended to have it apply only to such funds, the equitable as well as the legal rights to which are in the State and that this intent was recognized at the time of its adoption. . . . Although the legal title to the whole fund no doubt is in the State, the petitioners have equitable rights to that portion of the same which represents their fee. . . . Here the money is to be drawn from the treasury in pursuance of law and this satisfies the requirements of the Constitution."

Id. at 409-10.

[¶16] An ambiguity exists when good arguments can be made for two contrary positions about the meaning of a term in a document. Sellie v. North Dakota Ins. Guar. Ass'n, 494 N.W.2d 151, 156 (N.D. 1992). Because Grace and the Attorney General have posited reasonable, but contrary, arguments about the meaning of Art. X, § 12, N.D. Const., the provision is ambiguous.

IV

[¶17] "If the intentions of the people cannot be determined from the language itself, we may turn to other aids in construing the provision." Johnson v. Wells County Water Resource Bd., 410 N.W.2d 525, 528 (N.D. 1987). We may look at "the background context of what it displaced." Id. In construing a constitutional amendment, "we look first to the historical context of that amendment." State v. City of Sherwood, 489 N.W.2d 584, 587 (N.D. 1992). "A contemporaneous and longstanding legislative construction of a constitutional provision is entitled to significant weight when we interpret the provision." Id. A constitution "must be construed in the light of contemporaneous history -- of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect." Ex parte Corliss, 16 N.D. 470, 481, 114 N.W. 962, 967 (1907). To determine the intent of the people adopting what is now Art. X, § 12, N.D. Const., we look at constitutional provisions, statutes, and decisions about spending, the Attorney General, and attorney fee agreements providing the historical context existing when it was adopted in 1938.

[¶18] Prior to the adoption of the present Art. X, § 12, N.D. Const., in 1938, Art. XII, § 186, N.D. Const., had provided:

> "No money shall be paid out of the state treasury

> except upon appropriation by law and on warrant drawn by the proper officer, and no bills, claims, accounts or demands against the state or any county or other political subdivision, shall be audited, allowed or paid until a full itemized statement in writing shall be filed with the officer or officers, whose duty it may be to audit the same."

Previously however, this court had indicated that not every expenditure of public money requires a legislative appropriation. In State ex rel. Byrne v. Baker, 65 N.D. 190, 192, 262 N.W. 183, 184 (1934), the court held "expenditures necessary to carry the constitutional mandate into effect are authorized by law even though no specific legislative appropriation has been made for the purpose." See also State ex rel. Walker v. Link, 232 N.W.2d 823, 826 (N.D. 1975) ("Neither the Legislature nor the people can, without a constitutional amendment, refuse to fund a constitutionally mandated function.").

[¶19] In provisions originally contained in §§ 82 and 83 of the North Dakota Constitution adopted in 1889, and now renumbered, Art. V, § 2, N.D. Const., provides "[t]he qualified electors of the state . . . shall choose a[n] . . . attorney general," whose "powers and duties . . . must be prescribed by law." Thus, the office of attorney general is "imbedded in the constitution," State ex rel. Fausett v. Harris, 1 N.D. 190, 194, 45 N.W. 1101, 1102 (1890). "The Attorney General is a constitutional officer. He is the law officer of the state and the head of its legal department." State v. Heiser, 20 N.D. 357, 366, 127 N.W. 72, 76 (1910) (reported as State v. Heidt in 127 N.W. 72).

[¶20] Many of the Attorney General's statutory powers and duties specified in N.D.C.C. ch. 54-12 were enacted in the early days of statehood. "The framers of the Constitution of North Dakota were aware of the common law powers of the attorney general." Russell J. Myhre, The Attorney General for the State and the Attorney General for the People: The Powers and Duties of the Attorney General of North Dakota, 52 N.D.L.Rev. 349, 357 (1975). As this court recognized in State ex rel. Johnson v. Baker, 74 N.D. 244, 258, 21 N.W.2d 355, 363 (1945), "many of the members of the first legislative assembly were men who had participated actively in the framing of the constitution and must have prescribed the duties of the attorney general in the light of their understanding of its provisions."

[¶21] Among the relevant statutes in effect in 1938 were C.L. 1913, § 157(2) (1925 Supp.) (now N.D.C.C. § 54-12-01(2)) ("The duties of the attorney-general shall be: . . . 2. 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."); C.L. 1913, § 157(11) (1925 Supp.) (now N.D.C.C. § 54-12-01(13)) ("The duties of the attorney-general shall be: . . . 11. To pay into the state treasury all moneys received by him for the use of the state."); C.L. 1913, § 3376(9) (now N.D.C.C. § 54-12-02) ("The attorney-general or his assistants are authorized to institute

and prosecute any cases in which the state is a party whenever in their judgment it would be to the best interests of the state so to do."); C.L. 1913, § 160 (1925 Supp.) (now N.D.C.C. § 54-12-06) (Authorizing the attorney general to appoint three assistant attorneys general, and also authorizing the appointment of special assistant attorneys general, with or without compensation); and C.L. 1913, § 161 (1925 Supp.) (now N.D.C.C. § 54-12-07) ("The annual salary of the Assistant Attorneys General shall be as provided by law and payable monthly on the warrant of the State Auditor.").(1)

Thus, among the core duties imposed upon the Attorney General was that of instituting and prosecuting litigation on behalf of the state, and to assist with that duty the Attorney General was given the power to appoint salaried assistant attorneys general and to appoint special assistant attorneys general with or without compensation.

[¶22] The statutes relating to the Attorney General's duties and powers did not then and do not now specify in detail the methods by which the Attorney General is to perform and exercise her duties and powers. By providing in the North Dakota Constitution for the election of certain officers, "the framers of the Constitution . . . reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided." Ex parte Corliss, 16 N.D. 470, 475, 114 N.W. 962, 964 (1907). In holding a statute did not allow a private attorney to represent the state in actions without authority from the Attorney General, this court referred to that language in Ex parte Corliss and explained: "The clear implication of this language is that the legislature has no constitutional power to abridge the inherent powers of the attorney general despite the fact that the constitution provides that the 'duties of the *** attorney general *** shall be as prescribed by law.' (Const. Sec. 83)." State v. Erickson, 72 N.D. 417, 422, 7 N.W.2d 865, 867 (1943). The Legislature may not strip officers "'imbedded in the Constitution' . . . of a portion of their inherent functions." Ex parte Corliss, 16 N.D. 470, 476-7, 114 N.W. 962, 965 (1907) (quoting State ex rel. Fausett v. Harris, 1 N.D. 190, 194, 45 N.W. 1101, 1102 (1890)).

[¶23] Furthermore, in addition to their statutory powers, this court long ago held that officers have implied powers as well. "The power of officers, implied and incidental, is . . . 'that, in addition to the powers expressly given by statute to an officer or board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.'" State ex rel. Miller v. District Ct., 19 N.D. 819, 834, 124 N.W. 417, 423 (1910) (citation omitted).

[¶24] Against the foregoing historical backdrop, the people adopted what is now Art. X, § 12(a), N.D. Const., by initiated petition in 1938. In the North Dakota Publicity Pamphlet published by the Secretary of State in connection with the primary election on June 28th, 1938, the North Dakota Taxpayers Association, which sponsored the initiated petition amending § 186, provided the

following explanation for the amendment, in part:

> "Requires all public taxes, fees and licenses be paid into state treasury and only be disbursed upon legislative appropriation. Requires all departments of government to be budgeted and have budget approved by legislative assembly. Special exceptions are made to prevent hardship to claimants against the state."

[¶25] "As a general rule the attorney general has control of litigation involving the state and the procedure by which it is conducted." Bonniwell v. Flanders, 62 N.W.2d 25, 29 (1953). We are unable to discern from the text or history of Art. X, § 12(1), N.D. Const., or more recent amendments of the relevant statutory provisions, an intention to limit the Attorney General's authority to control litigation prosecuted on behalf of the State and to control the appointment and method of compensation of special assistant attorneys general.

[¶26] Not every aspect of the powers of a constitutional officer like the Attorney General may be conveniently spelled out by statute, and the Legislature has not attempted to do so. Public officers have implied and incidental powers in addition to their explicit statutory powers. State ex rel. Miller v. District Ct., 19 N.D. at 834, 124 N.W. at 423. See also Brink v. Curless, 209 N.W.2d 758, 767 (N.D. 1973), overruled on other grounds by City of Bismarck v. Muhlhauser, 234 N.W.2d 1 (N.D. 1975) ("[W]here the powers and duties of an officer are prescribed by the Constitution and statutes, such powers and duties are measured by the terms and necessary implication of such grants and must be exercised in accordance therewith.") As we recently said in Kasprowicz v. Finck, 1998 ND 4, ¶14, 574 N.W.d 564, "leaving the manner and means of exercising an administrative agency's powers to the discretion of the agency implies a range of reasonableness within which the agency's exercise of discretion will not be interfered with by the judiciary."

[¶27] Absent express constitutional or statutory limitations, we see no reason for this court to accord a constitutional officer like the Attorney General a narrower measure of discretion than the range of reasonableness accorded to other public officials, such as school boards (Reed v. Hillsboro Pub. Sch. Dist. No. 9, 477 N.W.2d 237 (N.D. 1991)), or other municipal authorities (Haugland v. City of Bismarck, 429 N.W.2d 449 (N.D. 1988)).

[¶28] We believe moneys awarded to the State of North Dakota as a result of legal action brought by the Attorney General on behalf of the State are public funds. But, contingent fee arrangements with attorneys have long been recognized in North Dakota. In Greenleaf v. Minneapolis, St. P. & S.S. M. Ry. Co., 30 N.D. 112, 151 N.W. 879, 884 (1915) this court observed as to contingent fees: "Their validity is now, at least in America, everywhere recognized, and it is a matter of common knowledge, or should be a matter of common knowledge to every lawyer and judge . . . ." In view of this long-standing acceptance of contingent fee arrangements and in view of the historical authority of the Attorney General, we believe

she has the authority to employ special assistant attorneys general on a contingent fee agreement unless such agreements are specifically prohibited by statute.

[¶29] Our conclusion does not leave the authority of the Attorney General to establish a contingent fee totally unfettered. "Courts have inherent authority to supervise the changing of fees for legal services under their power to regulate the practice of law." 7 Am.Jur.2d Attorneys at Law § 254 (1997). This is not a recent development. With regard to fees, this court long ago held an attorney "to conscionable dealing as an officer of this court." Simon v. Chicago, M & St. P. Ry. Co., 45 N.D. 251, 256, 177 N.W. 107, 108 (1920). As the Special Assistants recognized in their brief and oral argument, attorney fees are now subject to oversight by this court under the North Dakota Rules of Professional Conduct. Under Rule 1.5(a), N.D.R.P.C., an attorney's fee must be reasonable. Rule 1.5(c), N.D.R.P.C., provides: "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law." "In general, the Rules of Professional Conduct apply to a lawyer representing a governmental entity in the same manner as they apply to a lawyer for a private client." Comment, Rule 1.18, N.D.R.P.C.

V

[¶30] For the reasons stated above, we conclude the district court erred in ruling the contingency fee agreements are unlawful. We grant the petitions for a supervisory writ, and we direct the district court to vacate the order declaring the contingency fee agreements violate the North Dakota Constitution and statutes and prohibiting the Special Assistants from further prosecuting the underlying action pursuant to the contingency fee agreements.

[¶31] Gerald W. VandeWalle, C.J.
Herbert L. Meschke
Mary Muehlen Maring
William A. Neumann
David W. Nelson, D.J.

[¶32] David W. Nelson, D.J., sitting in place of Sandstrom, J., disqualified.

Footnote:

1. The appointment of special assistant attorneys general is now governed by N.D.C.C. § 54-12-08, which provides, in part:

> "After consultation with the head of the state department or institution or with the state board, commission, committee, or agency affected, the attorney general may appoint assistant or special assistant attorneys general to represent the state board, commission, committee, or agency. . . . The workers compensation bureau, the department of transportation, the state tax commissioner, the public

> service commission, the commissioner of insurance, the board of higher education, and the securities commissioner may employ attorneys to represent them. These entities shall pay the salaries and expenses of the attorneys they employ within the limits of legislative appropriations. The attorneys that represent these entities must be special assistant attorneys general appointed by the attorney general pursuant to this section. . . . The powers conferred upon special assistant attorneys general are the same as are exercised by the regular assistant attorneys general, unless the powers are limited specifically by the terms of the appointment. . . . The appointment may be made with or without compensation, and when compensation is allowed by the attorney general for services performed, the compensation must be paid out of the funds appropriated therefor. The attorney general may require payment for legal services rendered by any assistant or special assistant attorney general to any state official, board, department, agency, or commission and those entities shall make the required payment to the attorney general. Moneys received by the attorney general in payment for legal services rendered must be deposited into the attorney general's operating fund. . . ."

We construe the provision in § 54-12-08, that compensation for special assistant attorneys general must be paid "within the limits of legislative appropriations" and "out of the funds appropriated therefor" to mean that funds appropriated for another purpose cannot be used to pay the salaries.

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February 10, 1999

SENATE JUDICIARY COMMITTEE
SB 2047

CHAIRMAN STENEHJEM AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of The North Dakota Trial Lawyers Association. We understand the concerns of your Interim Committee that drafted this bill, but we think it sets out an additional burden to the Attorney General's office in finding counsel to handle certain cases and under what terms. We therefore OPPOSE the bill.

First of all, we think attorneys fees, and particularly contingency fees, should be established between the attorney and the client, or the attorney and whomever is hiring him or her. Under this bill, it will be up to the emergency commission to determine the fees. This will introduce a third layer in the legal representation. If the attorney general has a case that may lend itself to a contingency fee arrangement, she would first have to obtain counsel and determine the terms. Then, she will have to get those terms approved by the emergency commission. If the attorney says he or she will do it for 33%, and the emergency commission says it will only allow 25%, then what?

We think this bill will create more problems then it will solve. Therefore, we respectfully request your DO NOT PASS on this bill. If you have any questions, I'll be happy to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

Final Report

Interim Judiciary Committee

1997-98

CONTINGENT FEE ARRANGEMENTS

By the directive of the chairman of the Legislative Council, the committee conducted a study of the authority of the Attorney General to enter contingent fee agreements with private attorneys. The committee received and considered information and recommendations relating to contingent fee arrangements and a North Dakota Supreme Court decision in which the court affirmed the constitutionality of the contingent fee arrangement that existed in that case.

Authority of Attorney General

Testimony received from a representative of the Attorney General's office indicated that the Attorney General's office does not have any agreements in which the office has agreed to pay special assistant attorneys general on a contingent fee basis. The testimony indicated, however, there are several special assistant attorneys general with contingency fee contracts with state agencies. Several state agencies have entered agreements with collection agencies, not particular attorneys, to do collection work for those state agencies. If it is necessary for the collection agency to sue to collect a debt on behalf of the state agency, the attorney the collection agency uses to bring the lawsuit in the name of the state agency must be appointed as a special assistant attorney general for that litigation. The attorneys the collection agencies use in these circumstances are paid by the collection agencies on a contingency fee basis.

Under NDCC Section 54-12-08, the power to appoint special assistant attorneys general lies with the Attorney General, but the special assistants' compensation is agreed to and paid by the agencies the attorneys are appointed to represent. The requesting agency and the attorney agree upon the attorney's compensation. That compensation may be an hourly fee, a flat fee, or a contingency fee. On a few occasions, agencies have agreed to pay attorneys on a contingent fee basis.

State v. Hagerty

The committee also received testimony from a representative of the Attorney General's office regarding the North Dakota Supreme Court decision State v. Hagerty, 580 N.W.2d 139 (1998), in which the court declared that because of the longstanding acceptance of contingent fee arrangements and in view of the historical authority of the Attorney General, the Attorney General has the authority to employ special assistant attorneys general under contingent fee agreements unless the agreements are specifically prohibited by statute. In Hagerty the agencies the attorneys represented had entered contracts providing the attorneys would be compensated on a contingent fee basis. The Attorney General then appointed the attorneys involved in the case as special assistant attorneys general. The Supreme Court concluded this arrangement did not

violate the "public moneys" provision of the Constitution of North Dakota, Article X, Section 12. Section 12 provides, in part:

> All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the state receiving the same, to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature;

The committee considered two bill drafts. One provided that the Attorney General may not appoint a special assistant attorney general in a civil case in which the amount in controversy exceeds $150,000, and the special assistant attorney general is to be compensated by a contingent fee arrangement unless the arrangement is approved by the Legislative Council; and the other provided that the arrangement must be approved by the Emergency Commission.

Testimony in opposition to the bill drafts indicated that the bill drafts raised the issue as to whether the approval of the contingent fee arrangements is an executive or legislative function because the court, in Hagerty, held that the decision to enter the arrangements is a core function of the Attorney General. A concern was also expressed over the confidentiality issues that would arise if the Legislative Council had the authority to approve the arrangement because the Legislative Council meetings may not be closed to the public. The testimony indicated that a constitutional amendment would be necessary for the Legislative Council to conduct closed meetings.

Recommendation

The committee recommends to provide that the Attorney General may not appoint a special assistant attorney general in a civil case in which the amount in controversy exceeds $150,000, and the special assistant attorney general is to be compensated by a contingent fee arrangement unless the arrangement is approved by the Emergency Commission. The bill provides that any proceeding or information used by the Emergency Commission under the bill is not subject to the open records and meetings provisions of NDCC Sections 44-04-18 and 44-04-19.

for any amounts over that amount. Any judgment rendered under this section may not be discharged in bankruptcy and is not subject to the statutes of limitation provided for in chapter 28-01 and the judgment may not be canceled under section 28-20-35.

Source: S.L. 1995, ch. 124, § 11.

Effective Date.
This section became effective August 1, 1995.

27-20-32. Disposition of unruly child. If the child is found to be unruly, the court may make any disposition authorized for a delinquent child except commitment to a secure facility. If after making the disposition the court finds upon a further hearing that the child is not amenable to treatment or rehabilitation under the disposition made, it may make a disposition otherwise authorized by section 27-20-31.

Source: S.L. 1969, ch. 289, § 1; 1995, ch. 120, § 20.

Effective Date.
The 1995 amendment of this section by section 20 of chapter 120, S.L. 1995 became effective August 1, 1995.

27-20-34. Transfer to other courts.

1. After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws, including local ordinances or resolutions of this state, the court before hearing the petition on its merits shall transfer the offense for prosecution to the appropriate court having jurisdiction of the offense if:
   a. The child is over sixteen or more years of age and requests the transfer;
   b. The child was fourteen years of age or more at the time of the alleged conduct and the court determines that there is probable cause to believe the child committed the alleged delinquent act and the delinquent act involves the offense of murder or attempted murder; gross sexual imposition or the attempted gross sexual imposition of a victim by force or by threat of imminent death, serious bodily injury, or kidnapping; or the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance in violation of subdivision a or b of subsection 1 of section 19-03.1-23, except for the manufacture, delivery, or possession with intent to manufacture or deliver marijuana in an amount less than one pound [.45 kilograms]; or the gratuitous delivery of a controlled substance not a narcotic drug or methamphetamine which is a singular and isolated event involving an amount of controlled substance sufficient solely for a single personal use; or
   c. (1) The child was fourteen or more years of age at the time of the alleged conduct;
      (2) A hearing on whether the transfer should be made is held in conformity with sections 27-20-24, 27-20-26, and 27-20-27;
      (3) Notice in writing of the time, place, and purpose of the hearing is given to the child and the child's parents, guardian, or other custodian at least three days before the hearing; and

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(4) The court finds that there are reasonable grounds to believe that:
   (a) The child committed the delinquent act alleged;
   (b) The child is not amenable to treatment or rehabilitation as a juvenile through available programs;
   (c) The child is not treatable in an institution for the mentally retarded or mentally ill;
   (d) The interests of the community require that the child be placed under legal restraint or discipline; and
   (e) If the child is fourteen or fifteen years old, the child committed a delinquent act involving the infliction or threat of serious bodily harm.

2. The burden of proving reasonable grounds to believe that a child is amenable to treatment or rehabilitation as a juvenile through available programs is on the child in those cases in which the alleged delinquent act involves the offense of manslaughter, aggravated assault, robbery, arson involving an inhabited structure, or escape involving the use of a firearm, destructive device, or other dangerous weapon or in those cases where the alleged delinquent act involves an offense which if committed by an adult would be a felony and the child has two or more previous delinquency adjudications for offenses which would be a felony if committed by an adult.
3. In determining a child's amenability to treatment and rehabilitation, the court shall consider and make specific findings on the following factors:
   a. Age;
   b. Mental capacity;
   c. Maturity;
   d. Degree of criminal sophistication exhibited;
   e. Previous record;
   f. Success or failure of previous attempts to rehabilitate;
   g. Whether the juvenile can be rehabilitated prior to expiration of juvenile court jurisdiction;
   h. Any psychological, probation, or institutional reports;
   i. The nature and circumstances of the acts for which the transfer is sought;
   j. The prospect for adequate protection of the public; and
   k. Any other relevant factors.
4. The transfer terminates the jurisdiction of the juvenile court over the child with respect to the delinquent acts alleged in the petition. In addition, any transfer under subdivision b or c of subsection 1 operates to terminate the juvenile court's jurisdiction over the child with respect to any future offense if the child is ultimately convicted of the offense giving rise to the transfer.
5. No child subject to the jurisdiction of the juvenile court, either before or after reaching eighteen years of age, may be prosecuted for an offense previously committed unless the case has been transferred as provided in this section.
6. Statements made by the child at the hearing under this section are not admissible against the child over objection in the criminal proceedings following the transfer except for impeachment.
7. If the case is not transferred, the judge who conducted the hearing may not over objection of an interested party preside at the hearing on the petition. If the case is transferred to a court of which the judge who conducted the hearing is also a judge, the judge likewise is disqualified over objection from presiding in the prosecution.

1998 ND 122 STATE V. HAGERTY (S. Ct. 1998) 1998 N.D. Lexis 132

State of North Dakota and Heidi Heitkamp, Attorney General for the State of North Dakota, Bismarck State College, Department of Human Services, Department of Transportation, Job Service North Dakota, North Dakota State University, North Dakota State University-Bottineau, University of North Dakota, University of North Dakota-Lake Region, Jon M. Arntson, Arntson & Stewart, P.C., Steven C. Lian, Farhart, Lian & Maxson, P.C. (formerly Farhart, Lian, Maxson, Louser & Zent, P.C.), Daniel A. Speights, Amanda Graham Steinmeyer, Robert N. Hill and Speights & Runyan, Petitioners

vs.

The Honorable Gail Hagerty, Judge of District Court, South Central Judicial District, and W.R. Grace & Co.-Conn., Respondents

Civil No. 980039
SUPREME COURT OF NORTH DAKOTA
1998 ND 122, 1998 N.D. LEXIS 132
June 8, 1998, Filed

Supervisory Writ. As Corrected June 12, 1998.

COUNSEL

M. K. Heidi Heitkamp, Attorney General, Bismarck; Douglas A. Bahr, Assistant Attorney General, Bismarck, (on brief); and J. Philip Johnson, of Wold Johnson, P.C., Fargo, for petitioners.

J. Michael Schwartz, of Plunkett, Schwartz & Peterson, Minneapolis, MN, for respondents.

JUDGES

Opinion of the Court by VandeWalle, Chief Justice. Gerald W. VandeWalle, C.J., Herbert L. Meschke, Justice, Mary Muehlen Maring, Justice, William A. Neumann, Justice. David W. Nelson, D.J., sitting in place of Sandstrom, J., disqualified.

AUTHOR: VANDEWALLE

OPINION

VandeWalle, Chief Justice.

P1 The State of North Dakota, Heidi Heitkamp, Attorney General for the State of North Dakota, Bismarck State College, Department of Human Services, Department of Transportation, Job Service North Dakota, North Dakota State University, North Dakota State University-Bottineau, University of North Dakota, and University of North Dakota-Lake Region (hereinafter collectively referred to as the Attorney General) have petitioned this court for a supervisory writ directing the district court to vacate its September 29, 1997, order requiring

them to cease and desist from using special assistant attorneys general retained under contingent fee agreements to prosecute the underlying action.

P2 Jon M. Arnston, Arntson & Stewart, P.C.; Steven C. Lian, Farhart, Lian & Maxson, P.C.; Daniel A. Speights, Amanda Graham Steinmeyer, Robert N. Hill, and Speights & Runyon (Special Assistants Attorney General and law firms retained under contingent fee agreements to prosecute the underlying action, hereinafter collectively referred to as the Special Assistants) filed a supplemental petition for a supervisory writ directing the district court to vacate its September 29, 1997, order.

P3 We conclude this is an appropriate case in which to exercise our supervisory jurisdiction, and we grant the petitions.

I

P4 By complaint of July 11, 1994, W.R. Grace & Co. - Conn., (Grace) sued for a declaratory judgment determining its rights and duties associated with construction products containing asbestos designed, manufactured or sold by Grace and installed in public buildings owned or operated by the State. The State answered and counterclaimed on August 11, 1994. The State was represented by the Special Assistants under contingency fee agreements.

P5 On July 22, 1997, Grace requested a cease and desist order declaring the contingency fee agreements violate the North Dakota Constitution and North Dakota statutes, and prohibiting the Special Assistants from further prosecuting the underlying action pursuant to the contingency fee agreements. On September 29, 1997, the district court issued an order granting Grace's motion for a cease and desist order. The trial court later denied a motion to alter or amend the cease and desist order and denied a request for certification under Rule 54(b), N.D.R.Civ.P., permitting entry of a final judgment as to one or more but fewer than all of the claims or parties. The Attorney General and the Special Assistants then filed these petitions for a supervisory writ.

P6 This court's authority to issue supervisory writs is derived from Art. VI, § 2, N.D. Const., which vests this court with appellate and original jurisdiction "with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction." **Traynor v. Leclerc**, 1997 ND 47, P6, 561 N.W.2d 644. **See also** N.D.C.C. 27-02-04 ("In the exercise of its appellate jurisdiction, and in its superintending control over inferior courts," this court "may issue such original and remedial writs as are necessary to the proper exercise of such jurisdiction."). The power to issue a supervisory writ is a discretionary power, which we exercise "rarely and cautiously," **Comm'n on Medical Competency v. Racek**, 527 N.W.2d 262, 264 (N.D. 1995), "only to rectify errors and prevent injustice in extraordinary cases where no adequate alternative remedy exists." **Trinity Med. Ctr., Inc. v. Holum**, 544 N.W.2d 148, 151 (N.D. 1996).

P7 To be appealable, an interlocutory order must satisfy one of the criteria specified in N.D.C.C. 28-27-02 and the trial court must certify the appeal under Rule 54(b), N.D.R.Civ.P. **Mitchell v. Sanborn**, 536 N.W.2d 678, 681 (N.D. 1995). However, if denying immediate appellate review of an interlocutory order creates a substantial injustice, our supervisory

jurisdiction acts as a safety net for the restrictive use of Rule 54(b). **Id.** at 682. Here, the case is extraordinary, the injustice if the trial court erred is significant and the Attorney General has no adequate alternative remedy. We conclude this is an appropriate case in which to exercise our supervisory jurisdiction.

II

P8 Relying on **Bies v. Obregon**, 1997 ND 18, 558 N.W.2d 855, the Attorney General contends Grace's challenge of the contingent fee agreements is not ripe for adjudication because there can only be a controversy if there is a recovery in the underlying litigation. For a court to adjudicate, there must be before it an actual controversy that is ripe for review. **Id.** at P9. "An issue is not ripe for review if it depends on future contingencies which, although they might occur, necessarily may not, thus making addressing the question premature." **Id.** at P9. But, whether Grace has a right not to have litigation prosecuted against it by special assistant attorneys general retained under continent fee agreements on behalf of the State is an actual controversy which is ripe for review without waiting to see if the litigation results in a recovery.

P9 Alternatively, relying on **Diocese of Bismarck Trust v. Ramada, Inc.**, 553 N.W.2d 760 (N.D. 1996), the Attorney General contends Grace's challenge is barred by laches. We discussed laches in **Diocese of Bismarck Trust** :

> "Laches does not arise from the passage of time alone, but is a delay in enforcing one's right which is prejudicial to another. In addition to the passage of time, parties against whom a claim of laches is sought to be invoked must be actually or presumptively aware of their rights and must fail to assert those rights against parties who in good faith changed their position and cannot be restored to their former state."

Id. at 767 (citations omitted). We are not persuaded the Attorney General was prejudiced by the timing of Grace's challenge.

P10 The Special Assistants contend Grace lacks standing to challenge the legality of the contingent fee agreements. We explained standing in **State v. Carpenter**, 301 N.W.2d 106 (N.D. 1980):

> "The question of standing focuses upon whether the litigant is entitled to have the court decide the merits of the dispute. It is founded in concern about the proper -- and properly limited -- role of the courts in a democratic society. Without the limitation of the standing requirements, the courts would be called upon to decide purely abstract questions. As an aspect of justiciability, the standing requirement focuses upon whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to justify exercise of the court's remedial powers on his behalf."

Id. at 107 (citations omitted), **quoted in Shark v. U.S. West Communications, Inc.**, 545

N.W.2d 194, 198 (N.D. 1996). In **State v. Erickson**, 72 N.D. 417, 7 N.W.2d 865 (N.D. 1943), the Insurance Commissioner was sued by the State of North Dakota in a complaint signed by a private attorney who had no authority from the attorney general. The defendant challenged the authority of the attorney to represent the State. The trial court, agreeing with the defendant, dismissed the complaint and this court affirmed, holding the statute involved did not authorize an attorney other than the attorney general to represent the State in actions. Under **Carpenter** and **Erickson**, we conclude Grace had standing to challenge the authority of the Special Assistants to prosecute litigation against it.

III

P11 The basis for the trial court's order is Grace's contention the contingent fee agreements violate Art. X, § 12, N.D. Const., and statutes requiring all State moneys to be paid into the treasury and disbursed only pursuant to legislative appropriation.

P12 Art. X, § 12(1), N.D. Const., provides, in part:

> "All public moneys, from whatever source derived, shall be paid over monthly . . . to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature."

P13 "When interpreting constitutional sections, we apply general principles of statutory construction." **Comm'n on Med. Competency v. Racek**, 527 N.W.2d 262, 266 (N.D. 1995). "Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement." **Id.** "The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself." **Bulman v. Hulstrand Constr. Co., Inc.**, 521 N.W.2d 632, 636 (N.D. 1994).

P14 Grace argues "whatever is paid by way of either settlement or judgment, constitutes public money for the public's claims, all of which must be deposited into the state treasury to be appropriated by the Legislature." Grace's position is supported by **Meredith v. Ieyoub**, 700 So. 2d 478 (La. 1997), where the Louisiana Supreme Court held that state's attorney general could not hire private attorneys to prosecute environmental litigation on a contingency basis:

> "Thus, 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.
>
> . . .
>
> "The Attorney General and Intervenors argue that the Attorney General's powers to institute civil proceedings and to appoint assistant attorneys includes the inherent authority to hire outside attorneys on a contingency fee basis to prosecute these claims. We disagree. Paying outside attorneys to prosecute legal claims on behalf of the state is a

financial matter. As our prior jurisprudence indicates, the power over finances must be expressly granted by the constitution to another branch of government or else that power remains with the Legislature. We find nothing in Article IV, § 8, nor any other constitutional provision, which expressly grants the attorney general the power to hire and pay outside legal counsel on a contingency fee basis. The power to institute suit on behalf of the state, while extremely broad, does not expressly give him this power. Nor does the power to appoint assistant attorneys to serve at his pleasure."

Id. at 481-82.

P15 The Attorney General argues in this case:

"Contingent fees owed to special assistant attorneys general are not 'public moneys' and are not 'received' by public officials and, accordingly, are not paid over to the state treasurer. . . .

"Under a traditional contingent fee arrangement, only the net proceeds of the recovery remaining after payment of the attorneys' fees are paid to the client -- in this case the client State Agencies. . . . Therefore, only those net proceeds would be deposited in the state treasury and subject to the appropriations process. **See** N.D. Const. art. X, § 12."

This view is supported by **But Button's Estate v. Anderson**, 112 Vt. 531, 28 A.2d 404 (1942), where the Vermont Supreme Court held that state's governor could contract the private attorneys to prosecute a claim against the United States on a contingency fee basis:

"Even though the petitioners have a lien on the fund [for a contingency fee], is payment barred to them because of the provisions of our Constitution and statutes? We hold not. Section 21 chapter II of the Constitution provides that 'no money shall be drawn out of the Treasury, unless first appropriated by act of legislation'. The purpose of this provision is 'to secure regularity, punctuality and fidelity in the disbursements of the public money.' City of Montpelier v. Gates, 106 Vt. 116, 120, 170 A. 473, 474, quoting from Story, Const., sec. 1342. This provision means that no money shall be drawn from the treasury except in pursuance of law. . . . It is apparent that if [] a literal construction were given absurd results might follow. If it should appear that through some mistake the sum of, to illustrate, ten dollars belonging to a certain person had found its way into the state treasury, then under a literal construction of the Constitution it could not be paid out without a special appropriation although all parties agreed that the State had no right to it, legally and equitably. The amount does not alter the principle involved. Surely the framers of the Constitution could not have intended any such consequences. The clear construction to be given to this provision is that they intended to have it apply only to such funds, the equitable as well as the legal rights to which are in the State and that this

> intent was recognized at the time of its adoption. . . . Although the legal title to the whole fund no doubt is in the State, the petitioners have equitable rights to that portion of the same which represents their fee. . . . Here the money is to be drawn from the treasury in pursuance of law and this satisfies the requirements of the Constitution."

28 A.2d at 409-10.

P16 An ambiguity exists when good arguments can be made for two contrary positions about the meaning of a term in a document. **Sellie v. North Dakota Ins. Guat Ass'n**, 494 N.W.2d 151, 156 (N.D. 1992). Because Grace and the Attorney General have posited reasonable, but contrary, arguments about the meaning of Art. X, § 12, N.D. Const., the provision is ambiguous.

IV

P17 "If the intentions of the people cannot be determined from the language itself, we may turn to other aids in construing the provision." **Johnson v. Wells County Water Resource Bd.**, 410 N.W.2d 525, 528 (N.D. 1987). We may look at "the background context of what it displaced." **Id.** In construing a constitutional amendment, "we look first to the historical context of that amendment." **State v. City of Sherwood**, 489 N.W.2d 584, 587 (N.D. 1992). "A contemporaneous and longstanding legislative construction of a constitutional provision is entitled to significant weight when we interpret the provision." **Id.** A constitution "must be construed in the light of contemporaneous history -- of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect." **Ex parte Corliss**, 16 N.D. 470, 481, 114 N.W. 962, 967 (1907). To determine the intent of the people adopting what is now Art. X, § 12, N.D. Const., we look at constitutional provisions, statutes, and decisions about spending, the Attorney General, and attorney fee agreements providing the historical context existing when it was adopted in 1938.

P18 Prior to the adoption of the present Art. X, § 12, N.D. Const., in 1938, Art. XII, § 186, N.D. Const., had provided:

> "No money shall be paid out of the state treasury except upon appropriation by law and on warrant drawn by the proper officer, and no bills, claims, accounts or demands against the state or any county or other political subdivision, shall be audited, allowed or paid until a full itemized statement in writing shall be filed with the officer or officers, whose duty it may be to audit the same."

Previously however, this court had indicated that not every expenditure of public money requires a legislative appropriation. In **State ex rel. Byrne v. Baker**, 65 N.D. 190, 192, 262 N.W. 183, 184 (1935), the court held "expenditures necessary to carry the constitutional mandate into effect are authorized by law even though no specific legislative appropriation has been made for the purpose." **See also State ex rel. Walker v. Link**, 232 N.W.2d 823, 826 (N.D. 1975) ("Neither the Legislature nor the people can, without a constitutional amendment, refuse to fund a

constitutionally mandated function.").

P19 In provisions originally contained in §§ 82 and 83 of the North Dakota Constitution adopted in 1889, and now renumbered, Art. V, § 2, N.D. Const., provides "the qualified electors of the state . . . shall choose an . . . attorney general," whose "powers and duties . . . must be prescribed by law." Thus, the office of attorney general is "imbedded in the constitution," **State ex rel. Fausett v. Harris**, 1 N.D. 190, 194, 45 N.W. 1101, 1102 (1890). "The Attorney General is a constitutional officer. He is the law officer of the state and the head of its legal department." **State v. Heiser**, 20 N.D. 357, 366, 127 N.W. 72, 76 (1910) (reported as **State v. Heidt** in 20 N.D. 357, 127 N.W. 72).

P20 Many of the Attorney General's statutory powers and duties specified in N.D.C.C. ch. 54-12 were enacted in the early days of statehood. "The framers of the Constitution of North Dakota were aware of the common law powers of the attorney general." Russell J. Myhre, **The Attorney General for the State and the Attorney General for the People: The Powers and Duties of the Attorney General of North Dakota**, 52 N.D.L.Rev. 349, 357 (1975). As this court recognized in **State ex rel. Johnson v. Baker**, 74 N.D. 244, 258, 21 N.W.2d 355, 363 (1945), "many of the members of the first legislative assembly were men who had participated actively in the framing of the constitution and must have prescribed the duties of the attorney general in the light of their understanding of its provisions."

P21 Among the relevant statutes in effect in 1938 were C.L. 1913, § 157(2) (1925 Supp.) (now N.D.C.C. § 54-12-01(2)) ("The duties of the attorney-general shall be: . . . 2. 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."); C.L. 1913, § 157(11) (1925 Supp.) (now N.D.C.C. § 54-12-01(13)) ("The duties of the attorney-general shall be: . . . 11. To pay into the state treasury all moneys received by him for the use of the state."); C.L. 1913, § 3376(9) (now N.D.C.C. § 54-12-02) ("The attorney-general or his assistants are authorized to institute and prosecute any cases in which the state is a party whenever in their judgment it would be to the best interests of the state so to do."); C.L. 1913, § 160 (1925 Supp.) (now N.D.C.C. § 54-12-06) (Authorizing the attorney general to appoint three assistant attorneys general, and also authorizing the appointment of special assistant attorneys general, with or without compensation); and C.L. 1913, § 161 (1925 Supp.) (now N.D.C.C. § 54-12-07) ("The annual salary of the Assistant Attorneys General shall be as provided by law and payable monthly on the warrant of the State Auditor.").[1] Thus, among the core duties imposed upon the Attorney General was that of instituting and prosecuting litigation on behalf of the state, and to assist with that duty the Attorney General was given the power to appoint salaried assistant attorneys general and to appoint special assistant attorneys general with or without compensation.

P22 The statutes relating to the Attorney General's duties and powers did not then and do not now specify in detail the methods by which the Attorney General is to perform and exercise her duties and powers. By providing in the North Dakota Constitution for the election of certain officers, "the framers of the Constitution . . . reserved unto themselves the right to have the inherent functions theretofore pertaining to said offices discharged only by persons elected as therein provided." **Ex parte Corliss**, 16 N.D. 470, 475, 114 N.W. 962, 964 (1907). In holding a

statute did not allow a private attorney to represent the state in actions without authority from the Attorney General, this court referred to that language in **Ex parte Corliss** and explained: "The clear implication of this language is that the legislature has no constitutional power to abridge the inherent powers of the attorney general despite the fact that the constitution provides that the 'duties of the * * * attorney general * * * shall be as prescribed by law.' (Const. Sec. 83)." **State v. Erickson**, 72 N.D. 417, 422, 7 N.W.2d 865, 867 (1943). The Legislature may not strip officers "'imbedded in the Constitution' . . . of a portion of their inherent functions." **Ex parte Corliss**, 16 N.D. 470, 476-7, 114 N.W. 962, 965 (1907) (quoting **State ex rel. Fausett v. Harris**, 1 N.D. 190, 194, 45 N.W. 1101, 1102 (1890)).

P23 Furthermore, in addition to their statutory powers, this court long ago held that officers have implied powers as well. "The power of officers, implied and incidental, is . . . 'that, in addition to the powers expressly given by statute to an officer or board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.'" **State ex rel. Miller v. District Ct.**, 19 N.D. 819, 834, 124 N.W. 417, 423 (1910) (citation omitted).

P24 Against the foregoing historical backdrop, the people adopted what is now Art. X, § 12(a), N.D. Const., by initiated petition in 1938. In the North Dakota Publicity Pamphlet published by the Secretary of State in connection with the primary election on June 28th, 1938, the North Dakota Taxpayers Association, which sponsored the initiated petition amending § 186, provided the following explanation for the amendment, in part:

> "Requires all public taxes, fees and licenses be paid into state treasury and only be disbursed upon legislative appropriation. Requires all departments of government to be budgeted and have budget approved by legislative assembly. Special exceptions are made to prevent hardship to claimants against the state."

P25 "As a general rule the attorney general has control of litigation involving the state and the procedure by which it is conducted." **Bonniwell v. Flanders**, 62 N.W.2d 25, 29 (1953). We are unable to discern from the text or history of Art. X, § 12(1), N.D. Const., or more recent amendments of the relevant statutory provisions, an intention to limit the Attorney General's authority to control litigation prosecuted on behalf of the State and to control the appointment and method of compensation of special assistant attorneys general.

P26 Not every aspect of the powers of a constitutional officer like the Attorney General may be conveniently spelled out by statute, and the Legislature has not attempted to do so. Public officers have implied and incidental powers in addition to their explicit statutory powers. **State ex rel. Miller v. District Ct.**, 19 N.D. at 834, 124 N.W. at 423. **See also Brink v. Curless**, 209 N.W.2d 758, 767 (N.D. 1973), **overruled on other grounds by City of Bismarck v. Muhlhauser**, 234 N.W.2d 1 (N.D. 1975) ("Where the powers and duties of an officer are prescribed by the Constitution and statutes, such powers and duties are measured by the terms

and necessary implication of such grants and must be exercised in accordance therewith.") As we recently said in **Kasprowicz v. Finck**, 1998 ND 4, P14, 574 N.W.2d 564, "leaving the manner and means of exercising an administrative agency's powers to the discretion of the agency implies a range of reasonableness within which the agency's exercise of discretion will not be interfered with by the judiciary."

P27 Absent express constitutional or statutory limitations, we see no reason for this court to accord a constitutional officer like the Attorney General a narrower measure of discretion than the range of reasonableness accorded to other public officials, such as school boards (**Reed v. Hillsboro Pub. Sch. Dist. No. 9**, 477 N.W.2d 237 (N.D. 1991)), or other municipal authorities (**Haugland v. City of Bismarck**, 429 N.W.2d 449 (N.D. 1988)).

P28 We believe moneys awarded to the State of North Dakota as a result of legal action brought by the Attorney General on behalf of the State are public funds. But, contingent fee arrangements with attorneys have long been recognized in North Dakota. In **Greenleaf v. Minneapolis, St. P. & S.S. M. Ry. Co.**, 30 N.D. 112, 151 N.W. 879, 884 (1915) this court observed as to contingent fees: "Their validity is now, at least in America, everywhere recognized, and it is a matter of common knowledge, or should be a matter of common knowledge to every lawyer and judge . . . ." In view of this long-standing acceptance of contingent fee arrangements and in view of the historical authority of the Attorney General, we believe she has the authority to employ special assistant attorneys general on a contingent fee agreement unless such agreements are specifically prohibited by statute.

P29 Our conclusion does not leave the authority of the Attorney General to establish a contingent fee totally unfettered. "Courts have inherent authority to supervise the changing of fees for legal services under their power to regulate the practice of law." 7 Am.Jur.2d **Attorneys at Law** § 254 (1997). This is not a recent development. With regard to fees, this court long ago held an attorney "to conscionable dealing as an officer of this court." **Simon v. Chicago, M & St. P. Ry. Co.**, 45 N.D. 251, 256, 177 N.W. 107, 108 (1920). As the Special Assistants recognized in their brief and oral argument, attorney fees are now subject to oversight by this court under the North Dakota Rules of Professional Conduct. Under Rule 1.5(a), N.D.R.P.C., an attorney's fee must be reasonable. Rule 1.5(c), N.D.R.P.C., provides: "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law." "In general, the Rules of Professional Conduct apply to a lawyer representing a governmental entity in the same manner as they apply to a lawyer for a private client." Comment, Rule 1.18, N.D.R.P.C.

V

P30 For the reasons stated above, we conclude the district court erred in ruling the contingency fee agreements are unlawful. We grant the petitions for a supervisory writ, and we direct the district court to vacate the order declaring the contingency fee agreements violate the North Dakota Constitution and statutes and prohibiting the Special Assistants from further prosecuting the underlying action pursuant to the contingency fee agreements.

P31 Gerald W. VandeWalle, C.J.

Herbert L. Meschke, Justice

Mary Muehlen Maring, Justice

William A. Neumann, Justice

David W. Nelson, D.J.

P32 David W. Nelson, D.J., sitting in place of Sandstrom, J., disqualified.

DISPOSITION

GRANTED.

OPINION FOOTNOTES

1 The appointment of special assistant attorneys general is now governed by N.D.C.C. § 54-12-08, which provides, in part:

"After consultation with the head of the state department or institution or with the state board, commission, committee, or agency affected, the attorney general may appoint assistant or special assistant attorneys general to represent the state board, commission, committee, or agency. . . . The workers compensation bureau, the department of transportation, the state tax commissioner, the public service commission, the commissioner of insurance, the board of higher education, and the securities commissioner may employ attorneys to represent them. These entities shall pay the salaries and expenses of the attorneys they employ within the limits of legislative appropriations. The attorneys that represent these entities must be special assistant attorneys general appointed by the attorney general pursuant to this section. . . . The powers conferred upon special assistant attorneys general are the same as are exercised by the regular assistant attorneys general, unless the powers are limited specifically by the terms of the appointment. . . . The appointment may be made with or without compensation, and when compensation is allowed by the attorney general for services performed, the compensation must be paid out of the funds appropriated therefor. The attorney general may require payment for legal services rendered by any assistant or special assistant attorney general to any state official, board, department, agency, or commission and those entities shall make the required payment to the attorney general. Moneys received by the attorney general in payment for legal services rendered must be deposited into the attorney general's operating fund. . . ."

We construe the provision in § 54-12-08, that compensation for special assistant attorneys general must be paid "within the limits of legislative appropriations" and "out of the funds appropriated therefor" to mean that funds appropriated for another purpose cannot be used to pay the salaries.
