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CON: — Senate Bill 2188: Should attorney general's outside counsel contracts be regulated?

William M. Quin II • Special to The Clarion-Ledger • February 10, 2008

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Proponents of Senate Bill 2188 describe their offering as "common sense" legislation designed to bring transparency and oversight to the attorney general's process of hiring

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private attorneys who assist the state in the prosecution of civil litigation. While transparency and oversight are worthy legislative goals, SB 2188 purports to serve these ends by erecting insurmountable roadblocks on the road to justice. We can do better.

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The most problematic aspects of the bill are the proposed bid process and \$1 million attorney fee cap.

The inherent flaw of the proposed bid process is that it discourages legal entrepreneurs from developing novel theories of liability which may greatly benefit the state by shopping their confidential work product around to other less-enterprising attorneys.

Consider the bid process in a less politically charged setting: Small businessman X develops a new method for producing a better widget. Before producing the widget, Mr. X applies to the government for a copyright. Does our

government force Mr. X to disclose his proprietary ideas to his competitors and compel Mr. X to undergo a bid process for the copyright? Of course it doesn't. Such a requirement would undermine ingenuity and stunt the entrepreneurial spirit that serves to move our country forward.

The bid process proposed in the Senate bill would similarly quash ingenuity. My own experience serves as an example: After much effort, I developed and presented the attorney general with a theory that suggested WorldCom had defrauded our state of millions of dollars. I undertook this effort and presented my confidential work product to the attorney general because I wanted my firm to be retained to prosecute a case which was based on my ideas. I never would have done so had I known my work product could be co-opted by other lawyers and my efforts render no profit for my law firm.

The proposed \$1 million cap on attorneys' fees is similarly flawed and equally detrimental to the state. The attorneys who pursue complex, costly and risky civil litigation on behalf of the state must conclude that the potential profit of a case outweighs the associated investment and risks of recovery. A \$1 million attorney fee cap would ensure that this analysis would always result in outside counsel declining to pursue a complex, costly and risky endeavor.

My experience in the MCI case proves this point as well: The MCI case was based on a novel theory which was opposed by MCI, MCI's accountants, the coalition of other states pursuing tax claims against the company, the Multi-State Tax Commission and even certain

members within our own State Tax Commission. Given this circumstance, and the nature and venue of the claim, my partners and I estimated that the case would require an investment of litigation costs and attorney time which reached well into the millions of dollars. A \$1 million fee simply would not have outweighed the multi-million dollar risk we faced. We would not have presented the case to the attorney general as a result.

At its core, SB 2188 is about neither oversight nor transparency. The bill is a Machiavellian attempt to utilize the recent troubles of certain lawyers as a means to protect corporate wrongdoers that can only be brought to justice through the attorney general's ability to hire outside counsel who are willing to assume the substantial risks and costs of uncertain litigation.

I pray the House of Representatives will pass a bill that encourages and fairly rewards legal entrepreneurship. To do otherwise would defy "common sense."

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