



LOUISIANA LEGISLATIVE AUDITOR  
DARYL G. PURPERA, CPA, CFE

December 12, 2013

**Transmitted via Email**  
**Forwarded via U.S. Mail**

Mr. Timothy Doody, President  
All Commissioners  
Southeast Louisiana Flood Protection Authority-East  
2045 Lakeshore Drive, Room 422  
New Orleans, Louisiana 70122

Dear Mr. Doody and Commissioners:

Pursuant to your Resolution adopted November 21, 2013, we have reviewed the relevant statutes granting the Southeast Louisiana Flood Protection Authority East's (SLFPA-E) power to act as a levee district pursuant to Art. VI, §§ 38 and 31 of the Louisiana Constitution. We have also examined in some detail, the statute mandating the designated counsel to SLFPA-E. In addition, we have reviewed relevant statutes for levee districts in general with regard to legal counsel. Finally, we have reviewed the jurisprudence related to contingency fee contracts and, in general, the reasonableness of any contract for legal services.

At the outset we must state again that this review has been done at your request. The Louisiana Legislative Auditor (LLA) is charged by the Constitution to serve as a fiscal advisor to the Legislature and to perform the duties and functions provided by law related to auditing fiscal records of the state, its agencies, and political subdivisions. In this constitutional role, the LLA, as well as the LLA's agents, reviews and audits within the context of compliance with law. We do not in this capacity usurp the role of the Attorney General (AG) who is the chief legal officer of the State or of the Judiciary who have final authority as regards statutory interpretation. In our audit capacity, we look to AG opinions as well as jurisprudence in order to determine legal compliance of the auditee. In responding to your request, we have stayed within this constitutional role and these parameters.

After our review of R.S. 38:330.2, we have determined that the principle responsibility of SLFPA-E is to establish adequate drainage, flood control, and water resource development in the area legally designated as its responsibility. There is no question the SFLPA-E may enter into contracts and agreements to fulfill its responsibilities. The goal mandated by the Legislature is to effect and perfect a comprehensive levee system having for its object the protection from overflow of the entire territory of the SLFPA-E. To affect its significant responsibilities, the SLFPA-E is authorized to employ professionals and to employ a regional director and such employees as it deems necessary for its proper functioning. It appears obvious the consultants, the director, and the employees of the SLFPA-E must have experience in business, engineering, geology, hydrology, natural sciences, environmental sciences, or similar academic fields. The work of these persons is to plan a comprehensive flood control for the SLFPA-E territory.

The SLFPA-E is distinguished from other levee districts. R.S. 38:305 states in relevant part:

**Except as provided in R.S. 38:330.5, each levee board and levee and drainage board for a levee district or levee and drainage district may employ one or more attorneys to represent it and offer advice and assistance of a legal nature...the salary of each attorney shall be determined by the board.**

The Legislature has also provided for counsel to SLFPA-E. The relevant statute in this instance is R.S. 38:330.6:

**The state attorney general and his assistants shall be and are hereby designated as counsel for each flood protection authority in the execution of the purposes of this Chapter and are hereby charged with the responsibility of representing each authority in any and all matters when called upon to do so.**

In addition, the language in R.S. 38:330.6 designating the AG and his assistants as designated counsel differs from the language used in R.S. 16:2 and R.S. 42:261, which designate the district attorney of each parish as the regular counsel for a political subdivision within the parish. R.S. 42:263 provides for special counsel for some levee districts. However, the courts have not yet addressed these unique provisions and their relationship to other general provisions dealing with levee districts.

In the interest of fairness and directness, we have included for your review two statements written by the AG wherein he details his conclusions in this regard. To date, however, there is no AG opinion on the subject nor is there a pending declaratory judgment action.

Because the contract you have presented to us is a contingency fee contract and because the AG has some role in representing SLFPA-E, we have reviewed the jurisprudence found in *Meredith v. Ieyoub* (700 So.2d 478) and *Ieyoub ex rel. State v. W.R. Grace & Company-Conn* (708 So.2d 1227). In those two cases, the Louisiana Supreme Court held that the AG could not utilize contingency fee contracts unless the AG was specifically authorized to do so by the Louisiana Legislature. The Louisiana Supreme Court ruled that absent constitutional or legislative authority, the power to authorize the use of contingency fee contracts rests solely with the Legislature because the power to appropriate funds is a legislative power.

If the contract is cancelled, you specifically request information as to whether SLFPA-E should have to pay all the fees included within paragraph nine (9) of the contract. It is the LLA's conclusion that under Rule 1.5 of the *Rules of Professional Conduct* for attorneys in Louisiana, a court will analyze the required fee using the following eight (8) factors:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;

4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. Whether the fee is fixed or contingent.

The amount of fees owed by SLFPA-E given this analysis is, therefore, debatable and may well be decided by a court. The fees will be predicated on the amount and nature of the work actually performed. In addition, there is no question that the jurisprudence has held that a client retains an absolute right to terminate legal representation even in the case of a contingency fee contract.

Given this statutory framework and the jurisprudence described above, it is our conclusion that there are significant legal questions which are ripe for presentation to a court. The legal procedure may be a suit for declaratory judgment brought by the SLFPA-E. The questions the SLFPA-E may choose to present to the court are:

- 1) Is the SLFPA-E a local political subdivision or is it a state entity?
- 2) Is the SLFPA-E authorized by statute to hire any counsel it wishes for ordinary legal matters?
- 3) Is the SLFPA-E required to seek AG approval for special counsel?
- 4) What is the role of the AG with regard to SLFPA-E?
- 5) What is the meaning of the phrase: **"...the state attorney general and his assistants shall be and are hereby designated as counsel for each flood protection authority..."**?
- 6) What is the meaning of the phrase: **"...when called upon to do so..."**?
- 7) Is the contingency contract entered into by SLFPA-E contrary to the Louisiana Supreme Court's rulings in *Meredith v. Ieyoub* (700 So.2d 478) and *Ieyoub ex rel. State v. W.R. Grace & Company-Conn* (708 So.2d 1227)?; and
- 8) Would the distinction recognized in *Town of Mamou v. Gerald Fontenot, et al.*, (756 So.2d 719) apply to SLFPA-E?

If these matters are presented to a court of competent jurisdiction and decided by the court, it is our conclusion that SLFPA-E will be prepared to answer any questions its auditors may in regard to legal representation and use of public money for contingency fee contracts.

In summary, the decision to seek a declaratory judgment in this matter is ultimately management's decision. It is not within the Constitutional and statutory authority of the LLA to compel SLFPA-E to comply with our recommendations. This factual analysis and recommendation are intended to assist SLFPA-E in determining whether it is in compliance with the law. Non-compliance with the law in the matters described above may result in audit findings depending upon the independent determinations of the auditors contracted to audit SLFPA-E.

Please feel free to contact me or my General Counsel, Jenifer Schaye, if you would like to discuss further.

Sincerely,



Daryl G. Purpera, CPA, CFE  
Louisiana Legislative Auditor

DGP:pm

Enclosures

xc: The Honorable James D. Caldwell  
Louisiana Attorney General  
**(Transmitted via Email)**

Mr. T Robert Lacour, General Counsel  
Southeast Louisiana Flood Protection Authority-East  
**(Transmitted via Email)**

1018-SLFPA-E\_Ltr



JAMES D. "BUDDY" CALDWELL  
ATTORNEY GENERAL

State of Louisiana  
DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 94005  
BATON ROUGE 70804-9005

November 25, 2013

*Via U.S. Mail and email: [adleyr@legis.la.gov](mailto:adleyr@legis.la.gov)*

Honorable Robert Adley  
Louisiana State Senator  
611 Jessie Jones Drive  
Benton, Louisiana 71006

Dear Senator Adley:

We have discussed this issue in the past and I regret that you have turned it into a public discussion. But, by bringing this into the media via your November 19, 2013 LaPolitics OpEd, I am compelled to respond publically as well.

You voted with the majority of the Legislature in the 2006 Extraordinary Session to change the Louisiana constitution to establish regional flood protection authorities; to amend the existing law [RS 38:330] to create the Southeast Louisiana Flood Protection Authorities (SLFPA) East and West; and to empower their governing boards with the authority to have general counsel (salaried attorneys, district attorneys and the attorney general), as well as special legal counsel (outside, private law firms). You voted yes and we expect that you, as a lawmaker, understand the laws that you enact.

However, in your November 19<sup>th</sup> OpEd, you made several mistakes.

First, you cited only a *partial section of the law* to support your assertion that there is some kind of cover up going on and that SLFPA is only allowed representation by the attorney general. Specifically, you wrote:

***This law provides in part: "The state attorney general and his assistants shall be and are hereby designated as counsel . . ."***

However, the words you replaced with an ellipsis are, "when called upon to do so." Perhaps your misunderstanding of the law will be cleared up by reading it without omitting those words, which are essential for comprehension:

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***"The state attorney general and his assistants shall be and are hereby designated as counsel for each flood protection authority in the execution of the purposes of this Chapter and are hereby charged with the responsibility of representing each authority in any and all matters when called upon to do so."***

SLFPA and its levee districts often exercise the constitutional and legal rights the Legislature gave them to hire special counsel and, at any given time, may have scores of lawyers working on a variety of issues including complex real estate litigation, labor law, mineral law and more. [See attached list of special counsel that recently have or are currently are working for the SLFPA.]

You also attempted to differentiate between the "authority" and the "board" by asserting that the "authority" can't hire special counsel. Louisiana law RS 38:330.10 makes it very clear that when referring to the "levee board," "board of levee commissioners" or "board of commissioners" that it is the same as referring specifically to the governing body of the political subdivision SLFPA (the authority).

When SLFPA decided to sue 97 separate oil and gas companies, they abided by the law. The governing body passed a resolution and submitted it to my office to review. As required by law, we reviewed the resolution to ensure that:

- The resolution explains a real necessity.
- The fee is reasonable under the circumstances.
- The resolution is in compliance with Louisiana law.
- The attorney or law firm is in good standing with the Louisiana State Bar.

As I told you when we spoke in person about this, my office approved SLFPA's resolution because a real necessity was described; the contingency fee range of 22.5% – 32.5% is within the legally acceptable range; the law firm they selected is in good standing with the Louisiana State Bar; and the resolution is in compliance with Louisiana law. Due to the law you helped enact, this is as far as we can legally go. It does not allow my office to disapprove a resolution if I happen to disagree with any of its premises.

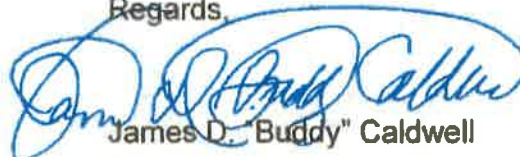
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Louisiana is an oil and gas state. My support of and good relationship with many business and thought leaders in that industry is not something that can influence me or my team's fulfillment of our legal duties under the laws that you and other legislators enacted. As long as the board has acted legally, there is nothing else that I or my staff can lawfully do at this point, whether I agree or disagree personally or professionally with SLFPA's decision to sue these companies or do so via a contingency fee contract.

I suggest that if you don't like the way this law is being used, especially in the oil and gas industry in which you work and make your living, you — as a lawmaker — take action to change it. I — as Louisiana's chief legal officer — cannot.

I welcome you to come by or call my office at any time in the future to discuss the fine points of this or any law about which you have concerns. I much prefer it to airing legal misunderstandings or giving legal counsel to our clients, via the media.

Regards,



James D. "Buddy" Caldwell  
Attorney General

JDC:ct

Enclosure

## SLFPA-E LEGAL SERVICE CONTRACTS PAST AND PRESENT<sup>1</sup>

- 1) Law Office of Michael S. Rolland
- 2) Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P.
- 3) Gregory D. D'Angelo & Associates
- 4) Law Office of Bernard L. Charbonnet, Jr. APLC
- 5) Elkins, PLC
- 6) Dysart & Tabary, L.L.P.
- 7) Duplass, Zwain, Bourgeois, Morton, Pfister & Weinstock
- 8) Kullman Firm
- 9) T. Robert Lacour, APLC
- 10) McCraine, Sistrunk, Anzelmo, Hardy, Maxwell & McDaniel
- 11) Godfrey Law Firm
- 12) Gordon, Arata, McCollam, Duplantis & Eagan, LLC
- 13) Mitchell & Associates, APLC
- 14) Middleberg, Riddle & Gianna
- 15) Oats & Hudson
- 16) Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P.

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<sup>1</sup> Partial list.



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## CALDWELL: Avalanche of Contingency Fee Contracts Coming

November 5, 2013 By Attorney General Buddy Caldwell



*“(The) Louisiana AG’s office expects to receive a virtual avalanche of requests from local parish school boards asking it to review their resolutions to enter into contingency fee contracts...”*

To begin with, I admit that the subject of contingency fee contracts has two strikes against it: it’s complicated and it’s boring. And, in their attempts to write about it and be brief, media and non-media writers (and even some lawyers) can be inaccurate in their reporting and mislead the reader. I like to think this is mostly unintentional and I’ll continue to correct folks as best I can. But it will be helpful if everyone in this state who is now or will be writing about contingency fee contracts would do so accurately. Because the taxpayers of Louisiana are plenty smart enough to understand the truth when we take the time to tell it to them.

The Louisiana Legislature grants the authority to use contingency fee contracts to certain state and all local governing agencies (the Levee Board, local school boards, etc.). Despite the media attention the Louisiana Attorney General’s office has recently received about this topic, the AG’s

office is not one of the agencies authorized to use them. We do, however, have a job to do when an authorized agency that is required to have AG approval determines that a contingency fee contract will fulfill its needs.

I appreciate this opportunity from LaPolitics.com to write about this issue, because it's important that the media and any other reporting entity first understand it. And, it's good timing because—due to an as-yet unresolved funding issue—the Louisiana AG's office expects to receive a virtual avalanche of requests from local parish school boards asking it to review their resolutions to enter into contingency fee contracts, as St. John the Baptist Parish has already done.

Contingency fee contracts are an important tool in the legal arsenal. They allow an attorney representing the agency to keep a percentage of the fee he or she recovers from the case. In cases where the upfront costs of recovering money owed to a state or local entity would make it impossible to take on the case, the contingency fee approach is a viable option. Here are the basics:

- 1.) A contingency fee contract is one in which the attorney who is hired is generally responsible for all the up-front costs and keeps a percentage of the money recovered; that is a portion of the client's money.
- 2.) Contingency fee contracts are used in Louisiana by those state and local agencies that are authorized to do so.
- 3.) Unless the Legislature makes a special exception, the AG cannot hire private attorneys under a contingency fee contract to represent the state.
- 4.) Contingency fee contracts are never permitted in criminal cases. They are usually used to recover (collect) money.
- 5.) Contingency fee contracts are useful to authorized agencies that lack funding to pay for up-front costs to prepare the case. The contingency arrangement allows attorneys to make money only if they collect on behalf of the state. And, because the lawyers aren't paid hourly fees, it ensures that the agency doesn't pay more than it collects (i.e., won't pay \$10,000 in hourly fees to collect a \$5,000 debt).
- 6.) When an authorized entity that is required to have AG approval, such as the levee Board or a local school board, decides to enter into a contingency fee contract, its governing body first passes a resolution defining the need for, and the specifics of, the contract. This is when the AG's office comes in. We review the resolution to determine that:
  - The need for the contract is clearly explained.

- The fee is reasonable under the circumstances.
- The resolution is in compliance with Louisiana law.
- The attorney or law firm is in good standing with the Louisiana State Bar.

On a case-by-case basis, we sometimes become aware of, or purposefully determine if, there is a conflict of interest. For example, in some—but not all—cases, we would not have a firm that is suing the state in one case simultaneously defending it in another.

Once our review is complete, the AG's office notifies the requestor that the resolution has been approved or rejected.

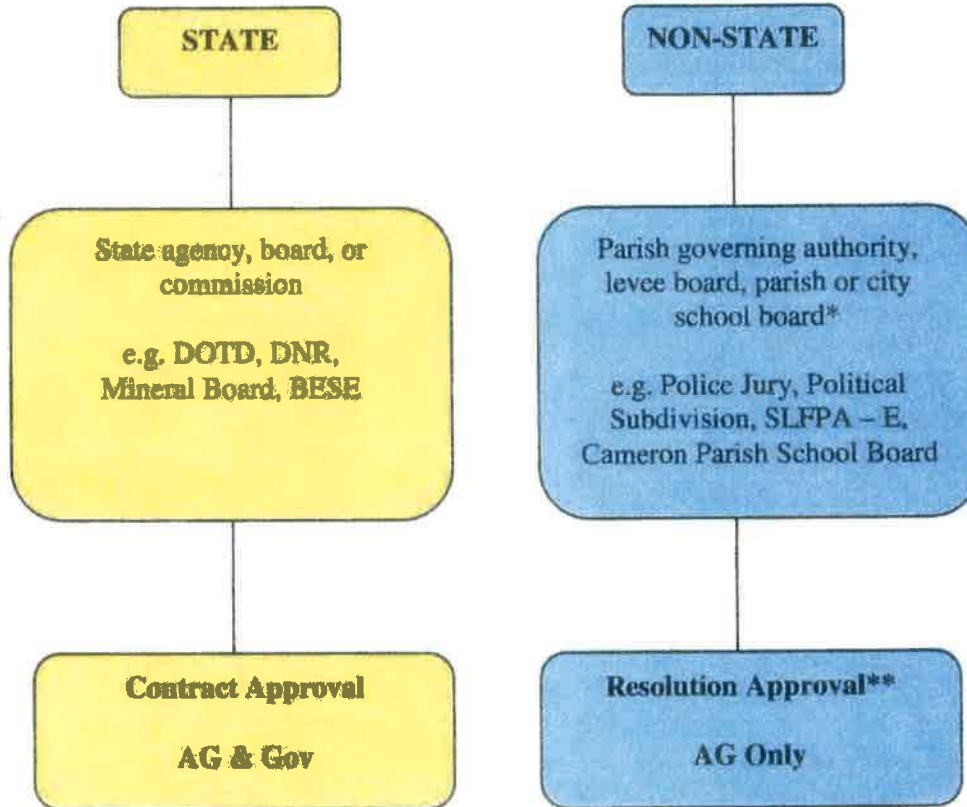
Finally, and this is key, whether or not it approves or rejects the resolution, the AG's office does not advise, approve or reject the state or local entity's decision to use a contingency fee contract. It is the Louisiana Constitution that grants that right. Nor do we recommend a specific attorney, or reject resolutions based on the attorney selected, as long as that attorney is in good standing with the bar.

Our office values performance and the law over politics and attention-generating drama. Given that this issue is so clearly about the law, I hope we can reduce the misunderstandings that surround it and focus on other important issues that actually need public debate in order to be settled.

**(Click here for a flowchart further explaining the procurement process for private legal counsel.)**

Filed Under: Opinion

APPROVAL OF PROCUREMENT OF PRIVATE LEGAL COUNSEL



\* Some exceptions:

1. Cities/municipalities are not required to obtain approval.
2. Parishes with home rule charters are not required to obtain approval.
3. Specifically enumerated entities exempted by statute are not required to obtain approval.

\*\* The following are included in the review of the resolution:

1. Attorney is licensed and in good standing.
2. The reason for the "real necessity" is stated in the resolution.
3. The fee is reasonable under the circumstances.