

*The Huntington Herald-Dispatch (February 5, 2007)*

**Legislators must act now to rein in A.G. McGraw**

*The Wheeling Intelligencer (May 21, 2007)*

**McGraw Policy May Be Costly**

# **SPECIAL REPORT: Flaunting Laws You Are Charged To Protect**

**A Critical Look at Fourteen Years in the  
Office of Attorney General Darrell McGraw**

A Report By  
West Virginia Citizens Against Lawsuit Abuse

**June 2007**

*The State Journal (February 23, 2006)*

**A.G. Funds Drawing Legislative Ire**

*Charleston Daily Mail (January 26, 2007)*

**The state should curb McGraw**

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## Introduction

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Since West Virginia Attorney General Darrell McGraw first took office in 1993, he has built a powerful political machine involving the questionable use of public office intermixed with political patronage, campaign shenanigans, fiscal irresponsibility and the appearance of ethical impropriety.

Just a few weeks ago, West Virginians were presented with another in a long line of examples of questionable behavior from Attorney General McGraw and his office – a federal agency is investigating whether the Attorney General’s office may have illegally withheld lawsuit settlement dollars from the State’s Medicaid program.<sup>1</sup>

For years, West Virginia Citizens Against Lawsuit Abuse (WV CALA) has raised concerns, and worked to educate the public, about dubious acts emanating from the office of the Attorney General. WV CALA has also pointed out how misbehavior in the Attorney General’s office creates an unfair legal climate in West Virginia and undermines the public trust of our state government. WV CALA members have urged legislators to pass reasonable reforms to shine a light on actions in the Attorney General’s office and to end abusive hiring and spending practices.

Misconduct in the Attorney General’s office has created great outrage among the public, the state and national media, members of the state bar, national civil justice organizations, the business community, the state legislative auditor, a circuit judge, and many state legislators. Sadly, little has actually been done to rein in Attorney General McGraw’s abuse of office.

The overwhelming amount of evidence compiled in this one report suggesting that Darrell McGraw has abused the sanctity of the office of the Attorney General and the power entrusted to him by the West Virginia electorate should demonstrate to the public and our elected officials that reasonable controls are urgently needed to ensure that the West Virginia Attorney General’s office is run in a fair and equitable manner and with full public disclosure and legislative oversight.

## OxyContin Litigation Reveals Several Abuses

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The most controversial case involving Attorney General Darrell McGraw is undoubtedly his office’s lawsuit against pharmaceutical companies for the allegedly deceptive advertising of the pain medication OxyContin. McGraw’s suit and subsequent settlement have touched upon several serious ethical issues: lucrative lawyers’ fees for campaign contributing friends, questionable spending of public funds, and allegations of Medicaid misuse.

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<sup>1</sup> Letter from federal Centers for Medicare & Medicaid Services to WV Bureau for Medical Services, May 15, 2007.

## Enriching Campaign Contributing Lawyers

In 2001, Attorney General McGraw appointed four private law firms – Salsbery & Druckman; Brumfield & Watson; DiTrapano, Barrett & DiPiero; and, Cohen, Milstein, Hausfeld & Toll – to represent the Attorney General’s office in the OxyContin lawsuit. The attorneys were appointed in letters signed by either Attorney General McGraw or Chief Deputy Attorney General Fran Hughes (even though Ms. Hughes has no appointment powers) which stated that “it is contemplated that you should earn a proper, reasonable and customary fee, the total of which should not exceed one-third recovery,” the exact same type of agreement that was declared unlawful by Judge Irene Berger in the tobacco litigation mentioned later in this report.<sup>2</sup>

At the time of their appointment, two of the four firms were already Darrell McGraw campaign contributors. William Druckman of Salsbery & Druckman had contributed \$2,000 to McGraw’s 1996 election efforts. Persons related to the DiTrapano firm had also contributed at least \$12,000 to McGraw’s campaigns prior to 2001.<sup>3</sup>

After their hiring, all four firms were linked to campaign contributions to Darrell McGraw’s next election campaign, with the DiTrapano firm and family contributing a whopping \$30,000 to McGraw during the 2004 election cycle.<sup>4</sup>

One questionable \$1,000 contribution came from Carlo DiTrapano (a first cousin to Special Assistant AG Rudolph DiTrapano), whose address is listed on McGraw’s 2004 First Primary Report as Provincincia Latina, Sezze, Italia, and who contributed to the Attorney General’s campaign approximately one month prior to his death.

Under the Federal Election Campaign Act, acceptance or solicitation of campaign contributions from foreign nationals is ***an illegal act subject to fine and imprisonment.***<sup>5</sup>

In all, the OxyContin “special assistant attorneys general” were linked to \$47,500 in Darrell McGraw campaign contributions. For the 2004 election cycle alone, these private attorneys accounted *for nearly one third of all Darrell McGraw’s large campaign contributions.*<sup>6</sup>

Two days after the 2004 general election, a settlement was reached in the OxyContin case for \$10 million. The campaign contributing private attorneys were ultimately given \$3.3 million of the total \$10 million settlement. Also, the private attorneys were paid first under the terms of the settlement agreement.<sup>7</sup>

2 Memorandum in Support of Petition for an Award of Reasonable Attorney Fees & Cost at 21, *State ex rel. McGraw v. Purdue Pharma, L.P., et al.*, Civil Action No. 01-C-137-S, McDowell County Circuit Court (all OxyContin court documents cited herein are publicly available at the McDowell County Circuit Clerk’s office).

3 Darrell McGraw’s campaign finance reports are publicly available at [www.wvsos.com/elections/cfreports](http://www.wvsos.com/elections/cfreports).

4 At the beginning of the OxyContin litigation, Molly McGinley Han was one of the attorneys of record for the Washington, D.C. firm of Cohen, Milstein, Hausfeld & Toll. Complaint. By March of 2004, Ms. Han is listed on Darrell McGraw’s 2004 campaign finance reports as an attorney for DiTrapano, Barrett & DiPiero – begging the question as to whether the Washington, D.C. firm was picked because of its ties to DiTrapano, Barrett & DiPiero.

5 In fact, McGraw appears to have a duty to investigate the contribution further, given the fact that the contributor’s address is listed outside of the United States. <http://www.fec.gov/pages/brochures/foreign.shtml>

6 Contributions greater than \$250 require reporting of occupation and employer information.

7 As set forth in the settlement agreement, the Attorney General’s office was to be paid in four yearly installments of \$2.5 million, the last of which is to be made in December 2007. Order Awarding Fees and Expenses to Plaintiffs’ Counsel at 2-3.

## Did McGraw Violate Legal Ethics by Defrauding State Agency Clients?

When Attorney General McGraw first filed the OxyContin lawsuit, he did not include any state agencies as plaintiffs in the initial lawsuit, even though the injuries alleged in his Complaint were particular to certain state agencies.<sup>8</sup> As a result, the McDowell County Circuit Court ruled that the Attorney General's office had to add injured state agencies as plaintiffs to the case.<sup>9</sup>

In the Amended Complaint, McGraw's attorneys alleged that millions of dollars in damages were suffered by the WV Bureau of Employment Programs (for Workers' Compensation), WV Department of Health & Human Resources (for Medicaid), and WV Public Employees' Insurance Agency as a result of the alleged mis-marketing of OxyContin.<sup>10</sup>

And yet while McGraw's office alleged substantial injuries on behalf of these plaintiff state agencies, none of the agencies received any money under the OxyContin settlement agreement.<sup>11</sup> Nor do they appear to have been included in the settlement discussions at all.<sup>12</sup>

Under the West Virginia Rules of Professional Conduct, Rules 1.2(a) and 1.4(a), it appears the Attorney General and his appointed counsel were required to sufficiently consult with the plaintiff state agencies regarding any settlement agreements.<sup>13</sup> Failure to do so is an ethical violation.

Tom Susman, the former director of PEIA, was under the impression that "financial losses incurred by PEIA members should go back to PEIA." As the executive director of the Workers' Compensation Commission, Greg Burton also noted that **"the attorney general, who was representing us in that lawsuit, did not check with us on the final agreement. We found out about it after the fact... And we anticipated getting some money back."**<sup>14</sup>

While Chief Deputy Attorney General Fran Hughes has argued that all state agency parties were included in the settlement talks, she has failed to identify any state agency representatives who were kept apprised of the settlement talks. Nor does the OxyContin case file indicate that the plaintiff state agencies had independent representation. As such, the evidence suggests that the Attorney General's office did not adequately consult its clients in the OxyContin case.

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8 Complaint at 10-12

9 Memorandum in Support of Petition for an Award of Reasonable Attorney Fees & Costs at 4.

10 The Amended Complaint specifically demanded restitution and reimbursement for all prescription drug costs related to the defendants' alleged wrongful conduct in marketing OxyContin. Attorney General McGraw cited the following losses as examples: \$440,000 for PEIA between July 1, 2000 and March 31, 2001; \$4.6 million for DHHR Medicaid for the 2000 calendar year; and, \$2.23 million for Workers' Compensation for April 2000 to April 2001. Amended Complaint at 6-7.

11 Final Order at 2; See also Transcript of Settlement Hearing, November 4, 2004.

12 "AG Funds Drawing Legislative Ire," *The State Journal*, February 23, 2006.

13 Specifically, Rule 1.2(a) sets forth that "a lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." Rule 1.4(a) further states that "a lawyer shall keep a client reasonably informed about the status of a matter."

14 "AG Funds Drawing Legislative Ire," *The State Journal*, February 23, 2006.

## McGraw's Misconduct Jeopardizes Federal Medicaid Funds

The Attorney General's actions in the OxyContin settlement have directly threatened \$10 million in future Medicaid payments to the state of West Virginia. On May 15, 2007, the federal Centers for Medicare and Medicaid Services (CMS) wrote to the State Bureau for Medical Services stating that it may withhold the full amount of the OxyContin settlement because McGraw diverted funds to his office that are owed to the federal agency.<sup>15</sup>

In its letter, CMS took exception with Chief Deputy Attorney General Fran Hughes' intentional scheme of diverting OxyContin settlement funds from the plaintiff state agencies to the Attorney General's office.

CMS specifically cites testimony that Fran Hughes gave to legislators during the 2007 Legislative Session. In her testimony, Ms. Hughes noted that the Attorney General's office intentionally withheld settlement money from the plaintiff state agencies for fear that the federal government would have otherwise retained the portion it contributed through Medicaid.<sup>16</sup>

CMS further quotes Chief Deputy Attorney General Hughes as saying "[w]e have arranged a methodology that has prevented the federal government from coming back and seizing the money."<sup>17</sup>

The dispute between CMS and the Attorney General's office raises many unanswered questions:

- Did Chief Deputy AG Fran Hughes inform the state Health Department of her "arrangement" to avoid payment to the federal Medicaid office?
- Aren't the federal Medicaid office, the state Health Department, the Public Employees' Insurance Agency, and the Workers' Compensation Fund all owed a portion of the Attorney General's OxyContin settlement? If so, what portion of the settlement should each receive?
- Don't the named plaintiff state agencies have a fiduciary duty, on behalf of those paying into their respective funds, to secure payment under the settlement from the Attorney General's office?<sup>18</sup>
- How much money will the Attorney General's office have available to reimburse the owed agencies?<sup>19</sup>

In the past, Chief Deputy AG Hughes has argued that legislative appropriation of AG settlement moneys was impossible as those settlement expenditures were supposedly decreed by court order.

15 Letter from federal Centers for Medicare and Medicaid Services to WV Bureau for Medical Services, May 15, 2007.

16 The federal government pays 73 cents of every dollar that the state pays in Medicaid. "McGraw Policy May Be Costly," *The Wheeling Intelligencer* (May 21, 2007).

17 Letter from federal Centers for Medicare and Medicaid Services to WV Bureau for Medical Services, May 15, 2007. Citing "McGraw will stop giving away money, top deputy says," *WV Record* (Feb. 16, 2007).

18 Each of the three plaintiff state agencies was funded by specific contributions from consumer premium payments: WV Workers' Compensation by employers; PEIA by public employees; and, DHHR Medicaid by the provider tax.

19 The Attorney General's office is set to receive one final \$2.5 million payment under the OxyContin settlement. Assuming that payment doesn't cover the damages owed to the plaintiff state agencies, does the Attorney General's office have other monies available in its other accounts?

But as Fran Hughes' quotes make clear, the circuit courts may merely rubber stamp settlements as proposed by the Attorney General's office.

In response to CMS's letter, Chief Deputy AG Hughes now readily admits that "one of the beauties of *the way the Attorney General's office has fashioned the (settlement)* is that it makes it so CMS is not entitled to any of the money."<sup>20</sup>

CMS notes in its letter that Ms. Hughes' interpretation of the settlement is irrelevant – the State of West Virginia must account for the federal government's overpayment to the State's Medicaid regardless.

While this dispute is not yet resolved, one thing is clear. The Attorney General's efforts to keep all of the OxyContin settlement money for his office and for private counsel could ultimately prove costly for our state.

## Legislative Auditor Questions Legality of McGraw Hiring & Spending Practices

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In January of 2002, the Office of the Legislative Auditor published a special report detailing Attorney General McGraw's questionable conduct in his pursuit of litigation against several tobacco companies.<sup>21</sup>

Specifically, the Attorney General's office filed a lawsuit on behalf of the state against 17 tobacco companies in 1994, seeking to recoup costs the state allegedly incurred as a result of smoking-related illnesses. But Attorney General McGraw chose not to handle the case on his own. Instead, McGraw appointed several personal injury law firms as outside counsel to represent the state. All of the outside counsel but one have contributed to Darrell McGraw's election campaigns.

When appointed, the outside counsel were told that they would receive "a proper, reasonable and customary fee, subject to approval of the court, and not to exceed one-third of recovery."<sup>22</sup> However, during the course of litigation Kanawha County Circuit Judge Irene Berger ruled that the Attorney General's fee agreement was illegal, and that Attorney General McGraw *did not* have the authority to hire private lawyers to litigate the case.<sup>23</sup> Specifically, Judge Berger found that there was no "statutory or constitutional provision [for the Attorney General] to hire outside counsel."<sup>24</sup>

Despite Judge Berger's order prohibiting the use of private lawyers, Attorney General McGraw

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20 "McGraw's office, Medicaid official at odds over money," *Charleston Daily Mail* (May 18, 2007).

21 "Special Report: Attorney General's Office," Office of Legislative Auditor (January 2002, PE01-28-227).

22 Appointment letter from the Attorney General's office, July 21, 1994.

23 "Outside Lawyers Can't Argue State's Tobacco Suit," *Charleston Gazette* (October 21, 1995).

24 "Outside Lawyers Can't Argue State's Tobacco Suit," *Charleston Gazette* (October 21, 1995).

continued the case with outside counsel. A settlement was reached, and the private lawyers received \$33.5 million in legal fees.

Most notable is the fact that outside counsel Richard Lindsay received \$3.85 million even though he was barely involved in the case, if at all. As Lindsay specifically admitted to *The Charleston Daily Mail*, “I think I was on the original complaint and then I was off.”<sup>25</sup>

The Legislative Auditor’s report specifically found that:

- Attorney General McGraw had “**no clear authority**” to hire private attorneys as was done in the tobacco litigation.
- Outside counsel were appointed to highly lucrative legal contracts “without any provision in place to guarantee fair and equal access to work or competitive access on merit.”
- Any future fee arrangements similar to contingency fee agreements with private lawyers could “*subvert the West Virginia Constitution’s requirement that the Legislature is the governmental branch responsible for appropriating state funds.*”
- The Attorney General’s office intentionally structured the tobacco settlement so as to avoid statutory limitations requiring McGraw’s office to transfer funds to the State’s General Revenue Fund.

The Legislative Auditor’s office recommended that the West Virginia Legislature clarify the W.Va. Code with regard to the Attorney General’s questionable hiring practices. The Auditor’s report further recommended that all future attorney fees be deposited into the State’s General Revenue Fund, and that Attorney General McGraw return those funds that his office had improperly withheld.

To date, the West Virginia Legislature has yet to take action on the recommendations issued by the Legislative Auditor’s office.

## **Cronyism, Political Favoritism and Secret Hirings**

In recent years, Attorney General McGraw’s questionable hiring practices have continued. The Attorney General’s office has hired private attorneys to serve as Special Assistant AGs more than 25 times in the last three years.<sup>26</sup>

A vast majority of these appointments involve lawyers who have made large contributions to Darrell McGraw’s election campaigns. And the appointment letters are often the only written

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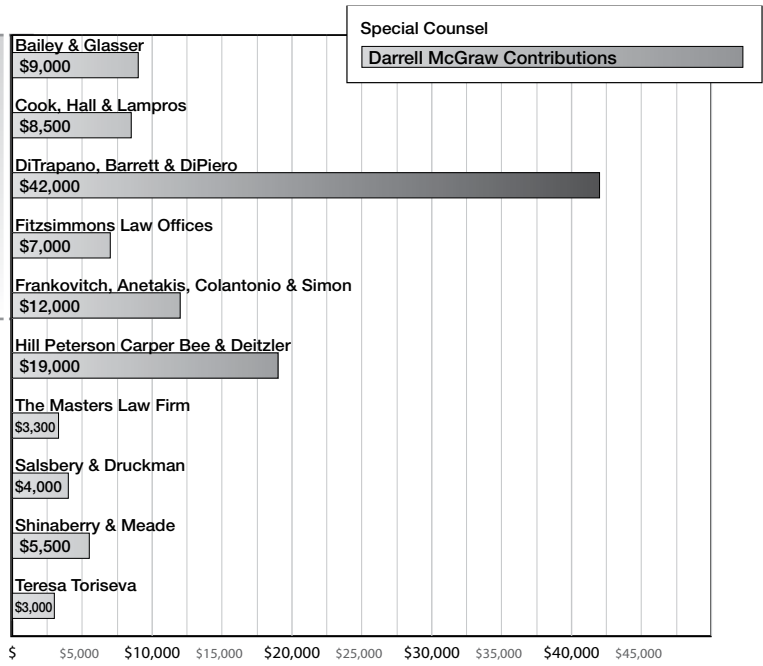
25 “Lawyer receives \$3.85 million; Attorney was only briefly involved in tobacco lawsuit,” *Charleston Daily Mail* (June 27, 2002).

26 “AG’s practices questioned by House Committee,” *WV Record* (February 2, 2007).



Fig. 1

Top 10 Special Assistant AG Contributors to McGraw's election campaigns (includes contributions from family and firm members)



communication made between the Attorney General's office and the private attorneys during the course of litigation.<sup>27</sup>

The selection of the Special Assistant AGs often takes place outside of the public eye – there is no reporting process whereby the Attorney General must disclose his hires. The Special Assistant AGs also appear to be hired on a “no-bid” basis.

With no legislative oversight whatsoever, Attorney General McGraw's hiring practices can often reach the absurd. In 2006, Attorney General McGraw “deputized” personal injury lawyers M. Eric Frankovitch and Michael Simon in a case the lawyers were already litigating against Cooper Wiring Devices and Leviton Manufacturing. These lawyers' firm and family members have contributed more than \$10,000 to McGraw's past election efforts.

Then, with the enhanced authority of the state bestowed upon them by the Attorney General, Frankovitch and Simon sought to subpoena documents they could not have otherwise readily obtained in the litigation as private attorneys. When the defendants filed lawsuits against the Attorney General's office questioning the legality of McGraw's hires, the appointments of Special Assistant AGs Frankovitch and Simon were quickly terminated.<sup>28</sup>

Fig. 2

### Special Assistant Attorneys General

Here is a list of attorneys appointed as special assistant attorneys general to represent state Attorney General Darrell McGraw's office since 2000. The information is from Attorney General Darrell McGraw's office through a Freedom of Information Act request from *The West Virginia Record*:

Appointee	Assignment/Case
Troy N. Giatras	Capital One and other credit card companies
Joseph N. Kravec Jr.	Capital One and other credit card companies
John C. Evans	Capital One and other credit card companies
DiTrapano, Barrett & DiPiero	Purdue Pharma
Cohen Milstein Hausfeld & Toll	Purdue Pharma
G. David Brumfield	Purdue Pharma
Law Office of William Druckman	Purdue Pharma
Troy N. Giatras	Marsh and McLennan and AIG
Robert Fitzsimmons	Marsh and McLennan and AIG
Marvin Masters	Marsh and McLennan and AIG
Edward S. Cook	Marsh and McLennan and AIG
William S. Druckman	Medco Health Solutions
Robert A. Goldberg	Risperdal (Johnson & Johnson, Janssen)
Robert A. Goldberg	Legal action against Risperdal
Barry Hill	Risperdal and Duragesic
Troy N. Giatras	Initiate action against Capital Finance
John C. Evans	Initiate action against Capital Finance
Joseph N. Kravec Jr.	Initiate action against Capital Finance
John C. Evans	Directed brokerage commissions for mutual funds
DiTrapano, Barrett & DiPiero	Abbott & Geneva (Hytrin)
Teresa Toriseva	State vs. Visa USA and MasterCard
Timothy C. Bailey	State vs. Visa USA and MasterCard
Guy R. Bucci	State vs. Visa USA and MasterCard
Cohen Milstein Hausfeld & Toll	AWP case (Warrick, Dey and Abbott)
DiTrapano, Barrett & DiPiero	AWP case (Warrick, Dey and Abbott)
Troy N. Giatras	Action against Eli Lilly & Company (Zyprexa)

#### Court Approved Attorneys Fees

Here is a list of court-approved attorney fees for special assistant attorneys general. The information is from Attorney General Darrell McGraw's office through a Freedom of Information Act request from *The West Virginia Record*:

- **State ex rel. McGraw vs. Abbott Laboratories & Geneva Pharmaceuticals (Hytrin)**, \$1.3 million settlement. DiTrapano, Barrett & DiPiero received \$300,000 (\$180,000 paid by Abbott, \$120,000 paid by Geneva)
- **State ex rel. McGraw vs. Warrick Pharmaceuticals, Dey Inc., Abbott Laboratories (Albuterol, etc.)**. Warrick was dismissed, Dey settled, Abbott still pending. \$1 million settlement. DiTrapano, Barrett & DiPiero received \$250,000 from Dey.
- **State ex rel. McGraw vs. Purdue Pharma. \$10 million settlement.** DiTrapano Barrett & DiPiero, Cohen Milstein Hausfeld & Toll, G. David Brumfield and The Law Office of William Druckman each received \$833,331.24. That amount for each assigned SAAG is to be paid by Purdue over a four-year period.

27 “AG's office has no paper trail on assistant appointments,” *WV Record* (September 15, 2006).

28 “Appointment of special assistant AGs terminated,” *WV Record* (April 20, 2006).

## Use of Public Resources for Campaign Purposes

During his tenure, Darrell McGraw has used the office of the Attorney General for political purposes, using state resources to plan and implement campaign tactics and spending millions in public funds advertising the “McGraw” name. While McGraw claims that his expenditures are made in the name of “consumer education,” most people would have a hard time distinguishing between the Attorney General’s office and the McGraw political machine. Many also question McGraw’s authority to spend public funds, a power typically reserved for the Legislature.

### Campaign Season Television Blitz

In 2004, the Attorney General’s office spent nearly \$1 million on television advertisements that appeared to be designed to build public recognition of the McGraw name.<sup>29</sup> In the previous four years, the Attorney General’s office had never spent more than \$50,000 on television advertisements.<sup>30</sup>

At the time, many questioned the motive of McGraw’s advertising purchases that prominently featured the McGraw name, as the ads were run at a time when both Darrell and his brother Warren McGraw were running for re-election.

“Using the power of a government office to help one’s brother win an election is an insult to the taxpayers’ intelligence.” - *Charleston Daily Mail*, Oct. 31, 1998.

Many also questioned the large references to the Attorney General’s alleged nickname as “Darrell ‘Judge’ McGraw” at the time when his brother, Warren McGraw, was running for judicial office. Were public funds paying for the Attorney General to help his brother get re-elected?

Recently, a former employee in the Attorney General’s office testified **under oath** that Chief Deputy Attorney General Fran Hughes told him of a “plan which was already in place to raise more than \$1,000,000 through the Attorney General’s Office lawsuit settlements that were to be used to run television spots featuring Darrell during his election year to benefit both Darrell and [Supreme Court Justice] Warren [McGraw].”<sup>31</sup> The former AG-employee also testified that Fran Hughes told him that “after spending that much money advertising the name McGraw, *‘nobody will be able to touch us in this or any future campaign.’*”<sup>32</sup>

The allegations surrounding the Attorney General’s 2004 purchase of television advertisements clearly underscore the need for increased scrutiny and legislative oversight of Attorney General McGraw’s spending practices.

29 “McGraw spending grows; GOP critics allege political motive for advertising,” *Charleston Daily Mail* (March 9, 2004).

30 “McGraw’s ad costs skyrocket,” *Charleston Daily Mail* (March 5, 2004).

31 Deposition of Allen Loughry at 17-18 (taken January 4, 2007), *Whanger v. McGraw*, Civil Action No. 05-C-2206, Kanawha County Circuit Court (cited court documents from the Whanger lawsuit are publicly available at the Kanawha County Circuit Clerk’s office).

32 Deposition of Allen Loughry at 17-18 (taken January 4, 2007), *Whanger v. McGraw*.

## Trinket Troubles Lead to Wrongful Termination Settlement

On the heels of the 2004 television advertisements, the Attorney General's office made another questionable purchase with public funds – \$141,000 worth of trinkets (pens, pencils and pillboxes) bearing the Attorney General's name.<sup>33</sup> When public outcry over the trinkets grew, the Attorney General's office fired one of its employees for allegedly purchasing the trinkets without authority. That employee subsequently filed a wrongful discharge lawsuit against the Attorney General's office.<sup>34</sup>

During the lawsuit against the Attorney General's office, the discharged employee testified **under oath** that:

- She was told to purchase the trinkets, and that the trinkets “did not have to be bid [like most state purchases] because they were being purchased with consumer settlement funds.”<sup>35</sup>
- Attempts were made in the Attorney General's office to “participate in a bid cover up” aimed at concealing the illegal purchase of the trinkets.”<sup>36</sup>
- The Attorney General's office coordinated “consumer protection” efforts in order to help **both** Darrell and Warren McGraw's re-election efforts, including use of public employees on state time.<sup>37</sup>

The Attorney General's office settled the lawsuit for \$125,000 in May 2007. Was this expenditure of public funds justifiable – or does it represent taxpayer spending merely to extricate McGraw from public embarrassment?

### “Consumer Protection” Fleet – or Mobile Campaign Billboards?

To help spread his consumer education efforts, Attorney General McGraw has also employed a fleet of six “mobile offices” or consumer protection vans that are “emblazoned with the [McGraw] family name” to cruise the state during an election cycle.<sup>38</sup>

Proof of the political nature of these “consumer protection” vans has come in the form of sworn testimony.

One former employee in the Attorney General's office recently testified that the Attorney

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33 This wasn't the first questionable purchase of trinkets by the Attorney General's office. In 1998, Attorney General McGraw spent thousands of dollars passing out approximately 160,000 magnets bearing the name “Judge” McGraw. This was done while both Darrell and Warren McGraw were running for election. “Tactics: Using public resources to boost a brother's political career is wrong,” *Charleston Daily Mail* (October 19, 1998).

34 Complaint, Whanger v. McGraw.

35 Deposition of Debra Whanger at 105 (taken December 21, 2006), Whanger v. McGraw.

36 Deposition of Debra Whanger at 113 (taken December 21, 2006), Whanger v. McGraw.

37 Specifically, Debra Whanger testified under oath that there was a “campaign plan” in the Attorney General's office that included, among other things, a strategic map designating targeted areas for building McGraw family name identification. Deposition of Debra Whanger at 391-392 (taken December 21, 2006), Whanger v. McGraw.

38 “Another misuse of public funds: Spending \$141,815 in public funds for personal promotion is wrong,” *Charleston Daily Mail* (August 25, 2004).

General's interns were told to attend a rally for then-Presidential candidate John Kerry "and take the vans and get a good parking spot so that the vans with the Attorney General's name on them could be seen."<sup>39</sup>

A current employee in the Attorney General's office seconded the notion that "consumer protection" vehicles were used for political purposes: "I know that the interns went in a consumer van." When asked if it was appropriate for the Attorney General's office to spend state resources on a campaign rally, the employee responded "yes."<sup>40</sup>

## **Abusing the Power of the Legislature**

Attorney General McGraw typically structures lawsuit settlement so that most of any settlement funds are paid to his "Consumer Protection" account or other unappropriated accounts, rather than the State's General Revenue Fund. By doing so, McGraw has created his own personal "slush fund" to spend at his will in an apparent effort to build political support.

In a recent \$1.3 million antitrust settlement, McGraw kept most of the settlement money, \$762,000 to be exact, for AG office operating expenses.<sup>41</sup> McGraw spent another \$40,000 of the settlement money to sponsor a Sesame Street exhibit on the human body. State Senator Andy McKenzie criticized Attorney General McGraw for "putting this money in his own little piggy bank to disburse at his will and pleasure."<sup>42</sup>

In addition, Attorney General McGraw's spending of the OxyContin settlement money has raised the ire of West Virginia legislators. Ignoring damages claimed to have been suffered by the plaintiff state agencies in the lawsuit, McGraw has seen fit to spend the settlement money elsewhere.

Rather than reimburse the plaintiff state agencies for their losses, the Attorney General's office made a \$500,000 contribution to a private university's pharmacy school and has also spent hundreds of thousands of dollars on day reporting centers. There appears to be no process for applying for such grants.

Legislators have objected to the Attorney General's spending abuses. Delegate John Doyle told Chief Deputy Attorney General Fran Hughes that "it isn't within the purview of the attorney general to appropriate money."<sup>43</sup> As discussed later in this report, numerous media outlets have also called on the Legislature to rein in Attorney General McGraw.

Facing increased scrutiny during the 2007 legislative session, Fran Hughes told legislators that the Attorney General's office would stop its controversial habit of disbursing settlement funds without legislative approval. Yet only one month after Hughes' promise, the Attorney General's office had "handed out \$1 million of lawsuit settlement money to various groups around the state."<sup>44</sup>

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39 Deposition of Debra Whanger at 136 (taken December 21, 2006), Whanger v. McGraw

40 Deposition of Tammy Arthur at 36-37 (taken February 5, 2007), Whanger v. McGraw.

41 "McGraw using lawsuit money to help exhibit," *Charleston Daily Mail* (December 12, 2006).

42 "McGraw using lawsuit money to help exhibit," *Charleston Daily Mail* (December 12, 2006).

43 "AG's practices questioned by House committee," *WV Record* (February 02, 2007).

44 "AG's post-promise handouts hit \$1 million," *WV Record* (March 13, 2007).

In fact, Attorney General McGraw himself appears to have reneged on Fran Hughes' promise to legislators, noting that he questioned whether settlement money "*should go to the Legislature, into the general revenue fund to be 'blown.'*"<sup>45</sup> Given McGraw's comment, it is clear that the Attorney General's office will not follow the law unless forced to do so by the WV Legislature.

## Attorney General McGraw's Actions Harm West Virginia

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The Attorney General's abuse of office and disregard for legislative authority harm West Virginia in many ways. The most obvious impact is the large amount of public funds wasted by the Attorney General's office. As referenced above, Attorney General McGraw has spent millions of public dollars to seek to increase his own political clout. In the most recent crisis over his treatment of funds, McGraw's greed has created the possibility of a shortfall in West Virginia's Medicaid budget.

Perhaps more importantly, McGraw's questionable behavior has an impact that reaches far beyond West Virginia's borders in ways that affect the state's competitive position in the nation and in turn threaten the well-being of West Virginia citizens. People outside of our state are taking notice of our Attorney General's abusive actions. The Competitive Enterprise Institute has ranked McGraw as the *sixth worst* Attorney General in the nation.<sup>46</sup> *The Wall Street Journal* also recently criticized Attorney General McGraw on its editorial page for being "dismissive of legislators' desire to spotlight his trial-bar contracts."<sup>47</sup> The American Tort Reform Association has cited Attorney General McGraw as one of the reasons why West Virginia is currently ranked the No. 1 Judicial Hellhole in the nation.

Local and national discontent with the Attorney General's office has a serious impact on the ability to bring jobs to our state. Businesses are not likely to locate or remain in a state like West Virginia where the Attorney General appears to act outside the limits of the law. The potential for harassment from "deputized" personal injury campaign contributors is also a deterrent to doing business in this state.

## What Others Are Saying about the Problem

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Concerns about the actions of Attorney General McGraw and his staff are widespread, as the following comments demonstrate.

"The Legislature needs to hold the attorney general accountable. The money he collects in settlements belongs not to him, but to the public at large." *Charleston Daily Mail*, December 13, 2006.

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45 "McGraw calls criticism of fund distribution 'picayune,'" *Charleston Daily Mail* (February 23, 2007).

46 "The Nation's Top Ten Worst State Attorneys General," Hans Bader (January 24, 2007). <http://www.cei.org/pdf/5719.pdf>

47 "Sunshine for Hoods: State AGs and their trial-bar cronies," *The Wall Street Journal* (February 20, 2007).

“It isn’t within the purview of the attorney general to appropriate money. It is within the purview of the Legislature.” Delegate John Doyle, quoted in the *WV Record*, February 2, 2007.

“The problem that I have is, here again, (McGraw’s) acting like a fourth branch of government.” State Senator Andy McKenzie, quoted in the *Charleston Daily Mail*, December 12, 2006.

“The office of West Virginia AG Darrell McGraw has been similarly dismissive of legislators’ desires to spotlight his trial-bar contracts.” *The Wall Street Journal*, February 20, 2007.

“West Virginia’s attorney general has appointed local plaintiffs lawyers to the post of ‘special assistant attorneys general’ to represent the state in litigation... These special assistants are often hand-selected by the attorney general without undergoing a competitive bidding process.” Former Virginia Attorney General Jerry Kilgore, *Legal Times* (July 10, 2006).

“Money received in court settlements is not [McGraw’s] personal money to disburse as he pleases. It belongs to the people of West Virginia.” *The Herald-Dispatch*, February 5, 2007.

“Darrell McGraw, attorney general of West Virginia since 1993, has violated the most basic duty of his office: to defend the state in court.” The Competitive Enterprise Institute, “The Nation’s Top Ten Worst State Attorneys General,” January 24, 2007.

“McGraw’s arrogance combined with legislators’ timidity in cracking down on him may cost poor West Virginians dearly.” *The Wheeling Intelligencer*, May 21, 2007.

## **“Sunshine” Act Aims at Limiting McGraw’s Bad Behavior**

For the past several years, the West Virginia Legislature has had before it legislation aimed at curbing the abusive practices of the Attorney General’s office. In 2006, the House of Delegates considered the Private Attorney Retention Sunshine Act (PARSA), HB 4767, a bill that would have:

- Eliminated contingency fee hirings in the Attorney General’s office.
- Limited “outside counsel” attorney fees to \$500/hr.
- Required the Attorney General to immediately report outside counsel hires.
- Required the Attorney General to comply with the state bidding process.
- Required legislative appropriation of settlement funds.

The PARSA bill advanced to near-final passage in the House, but was held back apparently for fear that the state Senate would not consider the bill.

During the 2007 legislative session, criticism of Attorney General McGraw reached a new high. As described above, many legislators and local newspapers expressed their discontent with McGraw’s abusive practices. Numerous bills were proposed in both the state Senate and House to limit the practices of the Attorney General’s office, but nothing was enacted.

The public clearly supports legislative action on this issue. In a recent WV CALA public opinion survey, 82% of West Virginians surveyed feel that the hiring practices of Attorney General McGraw must be regulated. In a similar survey conducted by the American Tort Reform Association, 74% percent of West Virginians support a wide range of regulations for the Attorney General's office.

Clearly, there is a broad consensus for reform in the Attorney General's office. The question remains as to whether or not the Legislature will act to place appropriate limits on the Office of the Attorney General to ensure that West Virginia laws, the public trust and public funds are being protected.

## **Conclusion**

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This report is by no means an exhaustive summary of questionable actions by the office of Attorney General Darrell McGraw. Many other notable examples of misdeeds by the Attorney General could be referenced. However, as the series of documented activities in this report shows, there is a constant theme of abuse of power, flagrant disrespect for good government principles and clear disregard for the law. McGraw has used his office for political gain and for the personal profit of his campaign contributors.

To date, McGraw's actions have gone largely unchecked. WV CALA is hopeful that this report will raise the public discussion about the need for reform of the office of the Attorney General.



## About WV CALA

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West Virginians concerned about our unfair and unbalanced court system have joined West Virginia Citizens Against Lawsuit Abuse (WV CALA). A nonprofit citizens watchdog group committed to equal justice for all West Virginians, WV CALA has been fighting lawsuit abuse in the state for more than 10 years.

To obtain additional copies of this report you can contact WV CALA at 866-WATCH (WV) or visit our website at [www.wvjusticewatch.org](http://www.wvjusticewatch.org).