

1 **ENGROSSED**

2 COMMITTEE SUBSTITUTE

3 FOR

4 **H. B. 4490**

5 (By Delegates Sponaugle, Reynolds, Skinner,
6 Poore, Wells, Moore, Marcum, Ferro,
7 Pino, Manchin and Hunt)

8 (Originating in the Committee on the Judiciary.)

9 [February 18, 2014]

10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new section, designated §5-3-1a; to amend and
12 reenact §5-3-2, §5-3-3, §5-3-4 and §5-3-5 of said code, all
13 Attorney General Ethics and Accountability Act; defining
14 conflict of interest for the Attorney General; mandating the
15 effect of a disqualification of an assistant or special
16 assistant Attorney General; authorizing the appointment of a
17 special assistant Attorney General in the event of a conflict
18 of interest; legislative abrogation of common law powers;
19 authority of Attorney General to act a counsel for state;
20 describing the duties and powers of the Attorney General;
21 authorizing the Attorney General to enter into contracts for
22 legal services; requiring particular provisions for contracts
23 for legal services; requiring a biannual report to the
24 Governor of the activities of the Attorney General; describing
25 the contents of the biannual report; establishing the Attorney
26 General's Litigation; requiring the deposit of fees, expenses

1 and costs; requiring the deposit of the proceeds of causes to
2 be deposited in the general revenue with specific exceptions;
3 certification of Attorney General's expenses; necessity of
4 appropriation by the Legislature; management of the special
5 revenue account; and requiring detailed records of
6 expenditures and disbursements.

7 *Be it enacted by the Legislature of West Virginia:*

8 That the Code of West Virginia, 1931, as amended, be amended by
9 adding thereto a new section, designated §5-3-1a; and that §5-3-2,
10 §5-3-3, §5-3-4 and §5-3-5 of said code be amended and reenacted,
11 all to read as follows:

12 **CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE GOVERNOR,**
13 **SECRETARY OF STATE AND ATTORNEY GENERAL; BOARD**
14 **OF PUBLIC WORKS; MISCELLANEOUS AGENCIES, COMMISSIONS,**
15 **OFFICES, PROGRAMS, ETC.**

16 **ARTICLE 3. ATTORNEY GENERAL.**

17 **§5-3-1a. General authority of Attorney General; recusal when**
18 **conflict or perceived conflict of interest; and**
19 **common law abrogation.**

20 (a)Conflicts of interest- Because the Attorney General is the
21 legal representative of the State of West Virginia, there exists
22 with this office the highest duty to provide legal services in a
23 manner that preserves public trust and confidence. Therefore, the
24 following ethical standards apply to the Attorney General:

1 (1) Except as law may otherwise expressly permit, the
2 Attorney General may not knowingly undertake, continue
3 representation or participate in any cause where there is a
4 potential or actual conflict of interest.

5 (2) Where a potential or actual conflict exists, the Attorney
6 General shall immediately withdraw from the cause and appoint a
7 special assistant Attorney General pursuant to section three of
8 this article, in his or her place.

9 (A) A person may not be appointed as a special assistant
10 Attorney General if such appointment will result in a conflict of
11 interest with any party to the cause for which the person is being
12 appointed.

13 (B) A special assistant Attorney General engaged pursuant to
14 this subdivision shall be monitored and supervised by the Governor.

15 (3) A withdraw from a cause by the Attorney General pursuant
16 to subdivision (2) is applicable to all assistant Attorneys General
17 and all other employees of the Office of the Attorney General and
18 consequently, no assistant Attorney General or other employee of
19 the Office of the Attorney General may advise or otherwise
20 participate in any cause from which the Attorney General has
21 withdrawn.

22 (b) For purposes of this section, a conflict of interest
23 exists when:

24 (1) The Attorney General or any immediate family member of the
25 Attorney General has been employed, under contract or otherwise

1 received economic compensation from a party to any cause under the
2 jurisdiction of his or her office within five years prior to the
3 commencement of the cause;

4 (2) The Attorney General asserts any legal position or takes
5 any action in a legal proceeding or other representation that is
6 inconsistent with the legal position taken by the state officer,
7 board, agency or other political subdivision whom his or her office
8 is representing; or

9 (3) Representation is precluded by the West Virginia Rules of
10 Professional Conduct.

11 (c) Disqualification of assistant or special assistant.
12 Neither the Attorney General nor the Office of the Attorney General
13 is necessarily deemed disqualified from a cause in which any
14 assistant Attorney General or special assistant Attorney General is
15 disqualified, however, the Attorney General must ensure that the
16 disqualified assistant or special assistant does not participate,
17 in any manner whatsoever, in the cause from which they are
18 disqualified.

19 (d) Common law powers.- The common law authority of the
20 Attorney General is specifically abrogated to the extent it is
21 inconsistent with any provision of this article.

22 (e) "Cause" defined. As used in this article, the term "cause"
23 includes any judicial or other administrative proceeding involving
24 a specific party or parties.

25 **§5-3-2. Act as counsel for state; duties and powers as to**

1 **prosecuting attorneys; defense of National Guardsmen.**

2 (a) The Attorney General shall:

3 (1) Appear as counsel for the state in all causes pending in
4 the Supreme Court of Appeals, or in any federal court, in which the
5 state, ~~is interested~~ officer, board or agency of the state is a
6 party; he

7 (2) ~~shall~~ Appear in any cause in which the state is interested
8 that is pending in any other court in the state, on the written
9 request of the Governor, and when such appearance is entered ~~he~~ the
10 Attorney General shall take charge of and have control of such
11 cause; ~~he shall~~

12 (3) Defend all actions and proceedings against any state
13 officer in his or her official capacity in any of the courts of
14 this state or any of the federal courts when the state is not
15 interested in such cause against such officer, but should the state
16 be interested against such officer, he or she shall appear for the
17 state; ~~he shall~~

18 (4) Institute and prosecute all civil actions and proceedings
19 in favor of or for the use of the state which may be necessary in
20 the execution of the official duties of any state officer, board or
21 commission on the written request of such officer, board or
22 commission. ~~he shall,;~~

23 (5) When requested by the prosecuting attorney of a county
24 wherein a state institution of correction is located, provide
25 attorneys for appointment as special prosecuting attorneys to

1 assist the prosecuting attorney of said county in the prosecution
2 of criminal proceedings when, in the opinion of the circuit judge
3 of said county, or a justice of the West Virginia Supreme Court of
4 Appeals, extraordinary circumstances exist at said institution
5 which render the financial resources of the office of the
6 prosecuting attorney inadequate to prosecute said cases~~7.~~

7 (b) he The Attorney General may:

8 (1) Consult with and advise the several prosecuting attorneys
9 in matters relating to the official duties of their office. ~~and may~~
10 ~~require a written report from them of the state and condition of~~
11 ~~the several causes, in which the state is a party, pending in the~~
12 ~~courts of their respective counties; he may~~

13 (2) Require ~~the several~~ prosecuting attorneys to perform,
14 within the respective counties in which they are elected, any of
15 the legal duties required to be performed by the Attorney General
16 which are not inconsistent with the duties of the prosecuting
17 attorneys as the legal representatives of their respective
18 counties; when the performance of any such duties by the
19 prosecuting attorney conflicts with his or her duties as the legal
20 representative of his or her county, or for any reason any
21 prosecuting attorney is disqualified, ~~from performing such duties,~~
22 the Attorney General may require the prosecuting attorney of any
23 other county to perform such duties. ~~in any county other than that~~
24 ~~in which such prosecuting attorney is elected and for the~~
25 ~~performance of which duties outside of the county in which he is~~

1 ~~elected~~ The prosecuting attorney shall be paid his or her actual
2 traveling and other expenses out of the appropriation for
3 contingent expenses for the department for which such services to
4 another county are rendered.

5 (c) The Attorney General shall keep in proper books, a
6 register of all causes prosecuted or defended by him or her in
7 behalf of the state or its officers and of the proceedings had in
8 relation thereto, and deliver the same to his or her successor in
9 office. ~~and he~~ The Attorney General shall preserve in his or her
10 office all ~~his~~ official opinions of the Office of the Attorney
11 General and publish the same in his or her biennial report.

12 (d) Upon request of any member of the West Virginia National
13 Guard who has been named defendant in any civil action arising out
14 of that guardsman's action while under orders from the Governor
15 relating to National Guard assistance in disasters and civil
16 disorders, the Attorney General shall appear as counsel for and
17 represent such guardsman.

18 **§5-3-3. Assistants to Attorney General; appointment of special**
19 **assistants to the Attorney General.**

20 (a) The Attorney General may appoint such assistant attorneys
21 general as may be necessary to properly perform the duties of his
22 or her office. The total compensation of all such assistants shall
23 be within the limits of the amounts appropriated by the Legislature
24 for personal services. All assistant attorneys general so appointed
25 shall serve at the pleasure of the Attorney General and shall

1 perform such duties as he or she may require of them.

2 (b) If the Attorney General seeks to enter into a contract for
3 legal services with an private attorney or firm, whether or not
4 such private attorney or firm is designated at any time as an
5 assistant or special assistant attorney general, a contract for
6 legal services shall include the following:

7 (1) A statement of the hourly rate or contingent fee to be
8 paid;

9 (2) A statement of the manner in which expenses that may be
10 incurred by the contractor, including, but not limited to, items
11 such as travel, telephone and copying, will be reimbursed;

12 (3) Certification by the contractor that he or she will agree
13 to any relevant statutory confidentiality requirements; and

14 (4) Certification by the contractor that neither he or she,
15 nor any person in practice with the contractor, represents nor may
16 represent during the pendency of the contract, a person who has a
17 claim or putative claim involving any matter for which the
18 applicant or any person in practice with the applicant has been
19 retained by the Attorney General.

20 (c) Nothing in this section creates or expands any rights of
21 the Attorney General that are not otherwise authorized by this
22 code. All laws or parts of laws inconsistent with the provisions
23 hereof are hereby amended to be in harmony with the provisions of
24 this section.

25 **§5-3-4. Biannual report to Governor.**

1 (a) The Attorney General shall ~~annually~~ biannually, on or
2 before May 1 and November 1, deliver to the Governor a report of
3 the state and condition of the several causes, in which the state
4 or the Attorney General is a party, pending in courts mentioned in
5 section two of this article, or in any other chapter of this code,
6 as of December 30 and June 30, immediately preceding May 1 and
7 November 1, or closed or concluded during the preceding six month
8 period.

9 (b) The report required by this section shall also include:

10 (1) The terms and conditions upon which the Attorney General
11 has engaged any special assistant Attorney General or any other
12 person to perform legal services of any kind, including a copy of
13 all contracts for such legal services;

14 (2) Amounts paid to any special assistant Attorney General, or
15 other persons under contract with the Attorney General to perform
16 legal services, for representing the state or a public officer or
17 employee of the state; and

18 (3) The amount of judgments, settlements, costs and fees
19 awarded by the courts to the Attorney General or persons with whom
20 he or she has contracted for legal services, including any special
21 assistant Attorney General, in cases closed or concluded during the
22 preceding fiscal year of the state.

23 ~~§5-3-5. Fees to be paid into State Treasury. Attorney General's~~
24 Litigation Support Fund.

25 ~~On the final determination of any cause in any of the courts~~

1 ~~mentioned in the second section of this article, in which the~~
2 ~~Attorney General appeared for the state, the clerk thereof shall~~
3 ~~certify to the Auditor the fee of the Attorney General which was~~
4 ~~taxed in the bill of costs against the defendant, and when such fee~~
5 ~~shall be collected it shall be paid into the state Treasury and~~
6 ~~placed to the credit of the state fund.~~

7 (a) The Legislature hereby finds and declares that:

8 (1) Public accountability for funds or other assets recovered
9 in a legal action or settlement by or on behalf of the general
10 public, the state or its officers, agencies or political
11 subdivisions is appropriate and required, whether the character of
12 the assets or funds recovered is public or private;

13 (2) Public accountability demands the applicability of the
14 freedom of information law, article one, chapter twenty-nine-b of
15 this code, and the open governmental proceedings law, article
16 nine-a, chapter six of this code, so that the actions of
17 individuals or agencies who are charged with the administration of
18 funds or other assets are conducted in full view, and are open to
19 public scrutiny; and

20 (3) The power to appropriate funds for public purposes is
21 solely within the purview of the legislative branch of government,
22 and the Legislature, as a steward of the budgetary process, shall
23 take steps to assure that settlements are handled in a manner that
24 assures maximum accountability to the citizens of the state and
25 their duly elected legislative representatives.

1 (b) There is established in the State Treasury a special fund
2 to be known as the "Attorney General's Litigation Support Fund."

3 (c) The fund shall consist of any and all attorney fees,
4 expenses and costs awarded to the Attorney General in any cause.
5 Attorney fees, expenses and costs awarded to the Attorney General
6 shall be deposited in the fund and shall be available for
7 expenditure by the Attorney General only upon appropriation by the
8 Legislature in accordance with the provisions of West Virginia
9 Constitution, article six, section fifty-one.

10 (d) All moneys collected or recovered by the Attorney General,
11 pursuant to any cause or in settlement of any cause or claim
12 asserted by or against the people of West Virginia, the State of
13 West Virginia, or any of its departments, agencies, institutions,
14 officers, employees, or political subdivisions thereof, not
15 specifically allocated by a court order as attorney fees, cost and
16 expenses, shall be deposited by the Attorney General in the
17 treasury of the state to the credit of the state fund, general
18 revenue, unless:

19 (1) The recovery or a portion thereof was on behalf of a
20 special fund established under the provisions of this code, in
21 which event those moneys shall be deposited in the special fund if
22 it is established in the State Treasury, or into a special fund
23 established for that purpose in the State Treasury;

24 (2) The recovery or a portion thereof was on behalf of or
25 required to be held in a trust fund, in which event those moneys

1 shall be deposited in a special fund established in the State
2 Treasury to be held in trust;

3 (3) The recovery was on behalf of a political subdivision of
4 the state, in which event the remainder of the recovery shall be
5 transmitted to the treasurer of such political subdivision for
6 deposit in its general fund;

7 (4) Amounts were recovered as attorney fees and expenses
8 separate and apart from any amounts, whether on an hourly or
9 contingent fee basis, recovered by the state or the Attorney
10 General by a person not employed by the state who provided legal
11 services in the matter as a special assistant attorney general
12 appointed by the Attorney General for that purpose, in which event,
13 those attorney fees and expenses may not be deposited into the
14 Treasury of the state nor into the Attorney General's Litigation
15 Support Fund, but retained by the special assistant Attorney
16 General; or

17 (5) The recovery or a portion thereof was for specifically
18 identified persons, in which event those moneys shall be deposited
19 into a pass through account in a banking institution designated by
20 and administered subject to conditions established by the State
21 Treasurer to ensure the accountability of the disbursement of the
22 funds.

23 (e) The actual expenses of the Office of the Attorney General
24 resulting from litigation or a settlement shall be certified by the
25 Attorney General to the Governor, the Secretary of the Department

1 of Administration, the President of the Senate and the Speaker of
2 the House of Delegates.

3 (f) Notwithstanding any provision of this subsection to the
4 contrary, or any other provision of law, the Attorney General may
5 not expend the proceeds of judgments or settlements of any kind, or
6 any part thereof, for the use of the Office of the Attorney General
7 in excess of the actual expenses of the Office of the Attorney
8 General pursuant to the cause or the issue settled.

9 (g) The Attorney General may expend moneys appropriated by the
10 Legislature from the Attorney General's Litigation Support Fund for
11 the performance of any of the powers, functions, duties, and
12 responsibilities of the Office of the Attorney General.

13 (h) The Attorney General's Litigation Support Fund shall be
14 placed under the management or administration of the Attorney
15 General for the purpose of performing any of the functions, duties,
16 powers, and responsibilities of the Office of the Attorney General
17 and all moneys deposited in the fund are available for
18 appropriation to the Office of the Attorney General.

19 (i) The appropriation of these moneys may be in addition to
20 any moneys appropriated to the Office of the Attorney General from
21 any other sources.

22 (j) The Attorney General, nor any employee of that office, may
23 have any financial interest in the investment of moneys in the fund
24 nor receive any commission with respect thereto.

25 (k) The Attorney General shall keep detailed permanent

1 records of all expenditures and disbursements from the fund.

2 (l) Prior to the entry of a judgment order that will result in
3 the recovery of funds or assets by the state, the Attorney General
4 or other officer or agency of the state who is a party to or has
5 entered an appearance in any cause, shall advise the court of the
6 provisions of this section.

7 (m) The Attorney General or other officer or agency of the
8 state acting on behalf of the State, may not agree to the
9 disbursement of the proceeds of any cause that is contrary to the
10 provisions of this section.