

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Committee Substitute

for

House Bill 4007

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[Originating in the Committee on the Judiciary]

1 A BILL to amend and reenact §5-3-3 and §5-3-4 of the Code of West Virginia, 1931, as amended;
 2 and to amend said code by adding thereto a new section, designated §5-3-3a, all relating
 3 generally to appointment of attorneys to assist the Attorney General; authorizing the Attorney
 4 General to appoint special assistant attorneys general; establishing competitive bidding
 5 process for the use of private attorneys on a contingency fee basis by the Attorney General;
 6 requiring written determinations for the Attorney General's selection of private attorneys to
 7 represent the state on a contingency fee basis; setting fees for contingency fee legal
 8 arrangements or contracts between private attorneys and the Attorney General; requiring
 9 appointed private attorneys to accept an award of attorney fees in accordance with, and no
 10 greater than, the established fee limitations; establishing supervision requirements for private
 11 lawyers representing the state on a contingency fee basis; requiring the posting of certain
 12 documents relating to the Attorney General's retention of private attorneys to represent the
 13 state on a contingency fee basis; providing for the designation as a special assistant attorney
 14 general upon appointment; prohibiting campaign contributions to the Attorney General by
 15 members and staff of a private law firm providing legal services to the state; requiring Attorney
 16 General reports on certain legal causes and matters to the Governor, President of the Senate
 17 and Speaker of the House; outlining contents of those reports; updating and removing
 18 outdated provisions; and defining terms.

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 3. ATTORNEY GENERAL.

§5-3-3. Assistants to Attorney General.

1 (a) The Attorney General may appoint such deputy or assistant attorneys general as may
 2 be necessary to properly perform the duties of his or her office. The total compensation of all such

3 deputies or assistants shall be within the limits of the amounts appropriated by the Legislature for
 4 personal services. All deputy or assistant attorneys general so appointed shall serve at the will
 5 and pleasure of the Attorney General and shall perform such duties as ~~he~~ the Attorney General
 6 may require of them.

7 (b) The Attorney General may appoint such special assistant attorneys general as may be
 8 necessary to properly perform the duties of his or her office: *Provided*, That if the appointment
 9 relates to a contingency fee legal arrangement or contract, then the appointment must be in
 10 accordance with the procedures and compensation set forth in W.Va. Code §5-3-3a. All special
 11 assistant attorneys general appointed shall serve at the will and pleasure of the Attorney General
 12 and shall perform such duties as he the Attorney General may require of them.

13 (c) All laws or parts of laws inconsistent with the provisions hereof are hereby amended
 14 to be in harmony with the provisions of this section.

**§5-3-3a. Competitive bidding required for private attorneys, special assistant attorneys
 general.**

1 (a) The following terms, wherever used or referred to in this section, have the following
 2 meanings:

3 (1) "Contingency fee legal arrangement or contract" means any legal fee arrangement that
 4 provides for a private attorney or special assistant Attorney General to be paid a percentage of any
 5 recovery associated with any claims brought by the private attorney or special assistant Attorney
 6 General on behalf of the state or to be paid through a court-approved award of attorney's fees.

7 (2) "Deputy or assistant Attorney General" means an attorney employed by the state as a
 8 staff attorney in the Attorney General's office.

9 (3) "Private attorney" means any attorney who is neither an assistant Attorney General on
 10 the Attorney General's staff nor an employee of another state agency.

11 (4) "Special assistant Attorney General" means an attorney that has been retained or
 12 appointed by the Attorney General to assist in the legal representation of the State.

13 (5) "State" means the State of West Virginia, including state officers, departments, boards,
14 commissions, divisions, bureaus, councils and units of organization, however designated, of the
15 executive branch of state government and any of its agents.

16 (b) The state may not enter into any contingency fee legal arrangement or contract with a
17 private attorney unless the Attorney General, or his or her designee, makes a written
18 determination prior to entering into such a contract that the legal representation is both cost-
19 effective and in the best interest of the public. Any written determination shall include specific
20 findings for each of the following factors:

21 (1) Whether sufficient and appropriate legal and financial resources exist within the
22 Attorney General's office to handle the matter;

23 (2) The time and labor required; the novelty, complexity and difficulty of the questions
24 involved; and the skill requisite to perform the attorney services properly;

25 (3) The geographic area where the attorney services are to be provided, as well as any
26 potential costs associated with providing legal services in that geographic area; and

27 (4) The amount of experience desired for the particular kind of legal services to be
28 provided and the need for a private attorney's experience with similar issues or cases.

29 (c) If the Attorney General, or his or her designee, makes the written determination
30 described in subsection (b) of this section, the Attorney General shall request proposals from
31 private attorneys to represent the state accordingly on the basis of a fee arrangement as set forth
32 in subsection (h) of this section, unless the Attorney General, or his or her designee, makes a
33 written determination that one of the following factors applies:

34 (1) An emergency situation exists that requires time-sensitive legal services that cannot
35 be adequately provided by the Office of Attorney General and for which insufficient time exists to
36 complete the customary competitive bidding process;

37 (2) An appointment, or the continuation of an appointment, is necessary to avoid disruption
38 in pending legal matters by allowing previously appointed outside counsel to continue providing
39 legal representation; or

40 (3) The legal services are to be provided on a *pro bono* basis, and therefore will not benefit
41 from a competitive bidding process.

42 (d) Any requests for proposal shall be posted to the website of the Office of the Attorney
43 General. The time period under which the proposal is open should be clearly stated.

44 (e) When soliciting proposals from private attorneys to represent the state on the basis of
45 a fee arrangement as set forth in subsection (h) of this section, the Attorney General, or his or her
46 designee, shall consider the following factors when determining the most competitive proposal for
47 legal services and make a written determination as to the application of these factors, prior to
48 entering into any contract for outside legal services:

49 (1) Whether the private attorneys possess the requisite skills and expertise needed to
50 handle the legal matters in question;

51 (2) Whether the private attorneys possess requisite staffing and support to handle the
52 scope of the litigation or matter;

53 (3) Whether the private attorneys or any members of the private attorneys' law firm have
54 been subject to discipline by the West Virginia State Bar, or other entities, for unethical conduct;

55 (4) Whether the private attorneys have been peer rated and, if so, what peer ratings they
56 have received, along with any other recognitions or awards for legal services;

57 (5) The estimated fees, costs and expenses of the private attorneys to perform the legal
58 services requested;

59 (6) The willingness of the private attorneys to enter into alternative billing arrangements;

60 (7) Whether the private attorneys are in compliance with all applicable laws of the State of
61 West Virginia;

62 (8) Any potential disqualifying conflicts of interest between the private attorneys and the
63 state;

64 (9) Any relevant input from the state entity client, if applicable, regarding the needed legal
65 services; and

66 (10) Any such other relevant factors as may be identified by the Attorney General or his
67 or her designee.

68 (f) If, after soliciting proposals for legal services, the Attorney General, or his or her
69 designee, determines that the proposals received are insufficient based on an application of the
70 factors set forth in subsection (e) of this section, additional proposals may be solicited pursuant
71 to subsections (b), (c) and (e) of this section.

72 (g) The state shall not enter into a contingency fee legal arrangement or contract as
73 defined herein for private attorney services unless the following requirements are met throughout
74 the contract period and any extensions thereof:

75 (1) The Attorney General, or the deputy or assistant Attorney General involved in the case,
76 shall retain control over the course and conduct of the case;

77 (2) The Attorney General, or the deputy or assistant Attorney General with supervisory
78 authority, is personally involved in overseeing the litigation;

79 (3) The Attorney General, or the deputy or assistant Attorney General involved in the case,
80 retains veto power over any decisions made by any appointed private attorneys; and

81 (4) Decisions regarding settlement of the case are reserved exclusively to the discretion
82 of the state or other client entity. An appropriate representative of the Attorney General's office
83 shall attend settlement conferences whenever possible.

84 (h) The state may not enter into any fee arrangement that provides for the private attorney
85 to receive an aggregate fee in excess of:

86 (1) Twenty five percent of the first \$10 million recovered; plus

87 (2) Twenty percent of any portion of the recovery between \$10 million and \$15 million;

88 plus

89 (3) Fifteen percent of any portion of the recovery between \$15 million and \$20 million; plus

90 (4) Ten percent of any portion of the recovery between \$20 million and \$25 million; plus

91 (5) Five percent of any portion of the recovery exceeding \$25 million.

92 In no event shall the aggregate fee for any legal matter exceed \$50 million for any matters
93 arising from a single event or occurrence, exclusive of reasonable costs and expenses, and
94 irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve
95 the recovery. Any legal fees shall not be based on penalties or fines awarded or any amounts
96 attributable to penalties or fines.

97 To the extent that any private attorneys are to be paid through a court-approved award of
98 attorney's fees, their appointment to represent the state is contingent upon the acceptance of the
99 fee limitations set forth herein. To the extent that any award of attorney's fees is subject to judicial
100 discretion, the private attorneys appointed pursuant to this section may not accept an award of
101 attorney fees greater than the fee limitations outlined in this subsection.

102 (i) The Attorney General shall develop a standard addendum to every contract for private
103 attorney services that shall be used in all cases, describing in detail what is expected of both the
104 contracted private attorney and the Attorney General's office, including, without limitation, the
105 requirements listed in subsection (h) of this section.

106 (j) Subject to the provisions of subsection (l) of this section, the Attorney General's written
107 determination to enter into any legal arrangement or contract with a private attorney shall be posted
108 on the Attorney General's website for public inspection within ten business days after the selection of
109 a private attorney and shall remain posted on the website for the duration of the contract for legal
110 services, including any extensions or amendments thereto. Any and all written determinations made
111 pursuant to subsection (b) or (c) of this section shall also be posted on the Attorney General's website
112 for public inspection within ten business days after the issuance of the written determination. Any
113 payment of fees as set forth in subsection (h) of this section shall be posted on the Attorney General's
114 website within thirty calendar days after the payment of such fees to the private attorney and shall
115 remain posted on the website for at least three hundred sixty-five calendar days thereafter.

116 (k) Any private attorney under contract to provide services to the state shall, from the
117 inception of the contract until at least four years after the contract expires or is terminated,

118 maintain detailed current records, including documentation of all expenses, disbursements,
119 charges, credits, underlying receipts and invoices, and other financial transactions that concern
120 the provision of such legal services. In conjunction with the Attorney General's office, the private
121 attorney shall make all such records that are not covered by the attorney-client privilege or
122 otherwise confidential in nature available for inspection and copying upon request in accordance
123 with the West Virginia Freedom of Information Act, sections one through seven, inclusive, article
124 one, chapter twenty-nine-b of this code. In addition, the private attorney shall maintain detailed
125 contemporaneous time records for the attorneys, other professionals and paraprofessionals
126 working on the matter for a period of at least four years and shall promptly provide these records
127 to the Attorney General upon request.

128 (l) The Attorney General retains the right to temporarily waive the disclosure requirements
129 set forth in subsection (j) of this section upon making a written determination that:

130 (1) A waiver is necessary to protect attorney-client or privileged information; or

131 (2) Immediate disclosure of the existence of an arrangement or contract with a private
132 attorney, or any other sensitive information, could compromise the initiation, handling or
133 conclusion of any investigation or case matter handled by the office of Attorney General.

134 Once any risks to the attorney-client privilege or confidential work product are no longer
135 present, the office of Attorney General shall make any and all suspended disclosures as soon as
136 possible and all subsequent disclosures in accordance with the time frame and manner set forth
137 by subsection (j) of this section.

138 (m) Once a private attorney is appointed pursuant to this section, he or she may thereafter
139 be designated as a special assistant Attorney General, and, upon such appointment, shall provide
140 representation subject to the terms contained in subsection (g) of this section.

141 (n) If the Attorney General's office chooses to not be involved in a legal matter as a result
142 of a conflict of interest, and thus cannot implement in good faith the provisions of this section as
143 a result of the conflict, then the process set forth herein shall be implemented by the client state

144 entity needing representation, with the assistance of the Department of Administration if
 145 necessary.

146 (o) No members of a private law firm, or members of their staff, which is under contract to
 147 provide legal services to the state pursuant to this section, after the effective date of this section,
 148 may contribute to the election campaign for the office of Attorney General during the pendency of
 149 the contract or for any election for said office occurring the term of the contract.

150 (p) Nothing in this section expands the authority of any state agency or state agent to enter
 151 into contracts nor shall it be deemed to change any existing law that authorizes a state agency or
 152 state agent to employ its own counsel or enter into contracts for legal services.

§5-3-4. Annual report to Governor, President of the Senate and Speaker of the House.

1 (a) The Attorney General shall annually, on or before November 1, deliver to the Governor,
 2 President of the Senate and Speaker of the House a report of detailing:

3 (1) The state and condition of the several causes, in which the state is a party, pending in
 4 courts mentioned in section two of this article.

5 (2) The use of any fee arrangements as provided in subsection (h), section three-a of this
 6 article with private attorneys in the preceding year. At a minimum, the report shall:

7 (A) Identify all new fee arrangements entered into during the year and all previously executed
 8 fee arrangements that remain current during any part of the year and for each contract describe:

9 (i) The name of the private attorney with whom the state has contracted, including the
 10 name of the attorney's law firm;

11 (ii) The nature and status of the legal matter;

12 (iii) The name of the parties to the legal matter;

13 (iv) The amount of the recovery; and

14 (v) The amount of any legal fees paid.

15 (B) Include copies of any written determinations made pursuant to section three-a of this
 16 article during the year.

17 (b) The Attorney General's annual report shall be posted on the Attorney General's
18 website within thirty days of submitting the report to the Governor, President of the Senate and
19 Speaker of the House, and shall remain posted on the website for at least two years thereafter.

20 (c) Nothing in this section shall be considered to require the Attorney General to report or
21 disclose any information protected by the attorney-client or other privilege.

NOTE: The purpose of this bill is to clarify the powers of the Attorney General to enter into contingency fee legal arrangements or contracts with private attorneys outside the Attorney General's office. The bill sets forth fee limitations and additional terms for such private attorneys and requires the Attorney General to utilize a competitive bidding process for the selection of private attorneys.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.