

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

Senate Bill 851

By Senator Trump

[Introduced February 19, 2024; referred
to the Committee on the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §7-28-1, §7-28-2, §7-28-3, §7-28-4, §7-28-5, §7-28-6, §7-28-7, §7-28-8, and
 3 §7-28-9; and to amend said code by adding thereto a new article, designated §8-40-1, §8-
 4 40-2, §8-40-3, §8-40-4, §8-40-5, §8-40-6, §8-40-7, §8-40-8, and §8-40-9, all relating to
 5 contingency fee arrangements between political subdivisions and private attorneys;
 6 defining terms, permitting contingency fee agreements in certain circumstances;
 7 exempting certain legal work performed for political subdivision; providing process and
 8 factors considered for political subdivision award of contingency fee agreement to private
 9 attorney; limiting aggregate fees for contingency fee agreement; providing requirements
 10 for contingency fee agreement; providing contingency fee agreement void in certain
 11 circumstances; setting forth exemption from West Virginia Freedom of Information Act; and
 12 providing effective dates.

Be it enacted by the Legislature of West Virginia:

CHAPTER 7. COUNTY COMMISSIONS AND OFFICERS

**ARTICLE 28. USE OF CONTIGENCY FEE AGREEMENTS BY POLITICAL
SUBDIVISIONS.**

§7-28-1. Definitions.

As used in this article,

"Contingency fee agreement" means any legal fee arrangement or contract that provides
for a private attorney to be paid a percentage of any recovery associated with any claims brought
by the private attorney on behalf of a political subdivision of the state or to be paid through a court-
approved award of attorney's fees.

"Political subdivision" means any county commission and municipality; any separate
corporation or instrumentality established by one or more counties or municipalities, as permitted
by law; any instrumentality supported in most part by municipalities; and any public body charged

9 by law with the performance of a government function and whose jurisdiction is coextensive with
10 one or more counties, cities, or towns.

11 "Private attorney" means any attorney who is not a full-time employee of the state, state
12 agency, state constitutional office, or political subdivision and includes private law firms.

13 "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.

§7-28-2. When contingency fee agreement permitted.

1 (a) A political subdivision may enter into a contingency fee agreement only if:

2 (1) The necessary legal services cannot be adequately performed by the attorneys and
3 supporting staff of the political subdivision given the time and labor required, or the novelty,
4 complexity, or difficulty of the legal issues involved;

5 (2) The legal services cannot be reasonably provided by attorneys in private practice under
6 a contract providing for the payment of hourly attorneys fees or a flat legal rate, or the type of legal
7 issue or case requiring the retention of a private attorney is a matter traditionally subject to a
8 contingency fee agreement;

9 (3) The contingency fee agreement or contract is executed after the competitive bidding
10 process set forth in subsection (c) of this section; and

11 (4) The contingency fee agreement is approved in an open meeting that complies with the
12 requirements of §6-9A-3 of this code.

13 (b) This article shall not apply to any legal work being performed for a political subdivision
14 on an hourly basis including, but not limited to, the following:

15 (1) Real estate transactions;

16 (2) Employment litigation;

17 (3) Administrative proceedings;

18 (4) State or federal law compliance issues;

- 19 (5) State or federal law compliance training;
- 20 (6) Transactional services, including but not limited, to bond and other debt instrument
- 21 issuances;
- 22 (7) The defense of tort claims against the political subdivision;
- 23 (8) Any claim on behalf of the political subdivision where the good faith estimate of the
- 24 political subdivision's anticipated gross recovery of damages is less than \$150,000;
- 25 (9) Breach of contract claims;
- 26 (10) Commercial litigation; and
- 27 (11) Claims against the political subdivision subject to potential indemnification pursuant to
- 28 an insurance policy issued by the West Virginia Board of Risk Management or any other insurer
- 29 who may have a duty to indemnify the political subdivision.

30 (c) Where the requirements of subsection (a) have been satisfied, the political subdivision
31 shall request proposals from private attorneys for a contingency fee agreement to represent the
32 political subdivision. Proposal requests shall be posted in a manner consisted with the political
33 subdivision's postings for other requests for proposals issued by the political subdivision. The
34 request for proposal may also be posted to the political subdivision's website or any other forum
35 reasonably calculated to reach attorneys capable of submitting contingency fee agreement
36 proposals. The time period for which the proposal is open shall be clearly stated in all proposal
37 requests. Proposal requests submitted by private attorneys shall address the factors contained in
38 section §7-28-3 of this code.

§7-28-3. Determining award of contingency fee agreement.

- 1 (a) Political subdivisions shall consider the following factors when determining the most
- 2 competitive proposal for legal services prior to entering into contingency fee agreement:
- 3 (1) Whether the private attorneys possess the requisite skills and expertise needed to
- 4 handle the legal matters in question;
- 5 (2) Whether the private attorneys possess requisite staffing and support to handle the

6 scope of the litigation or matter;

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

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

11 (5) The estimated fees, costs, and expenses of the private attorneys to perform the legal
12 services.

§7-28-4. Limitations on aggregate fees in contingency fee agreement.

1 (a) A political subdivision may not enter into any contingency fee agreement that provides
2 for the private attorney to receive an aggregate fee in excess of:

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

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

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

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

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

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

13 (c) To the extent that any private attorneys retained pursuant to the provisions of this article
14 are to be paid through a court-approved award of attorney's fees, their representation of the
15 political subdivision is contingent upon the acceptance of the fee limitations set forth in this
16 section. To the extent that any award of attorney fees is subject to judicial discretion, the private
17 attorneys appointed pursuant to this section may not accept an award of attorney fees greater than
18 the fee limitations outlined in this subsection.

§7-28-5. Requirements of contingency fee legal arrangement.

1 (a) A contingency fee agreement with a political subdivision shall be contain, but not be
2 limited to, the following provisions:

3 (1) The political subdivision or its designated employee shall retain management and
4 supervisory authority over the private attorney;

5 (2) The political subdivision, or its designated employee, shall participate in settlement
6 conferences whenever possible; and

7 (3) Decisions regarding settlement of the case are reserved exclusively to the discretion of
8 the political subdivision or its designated employee;

9 (4) At the conclusion of the matter, the attorney or law firm will provide the political
10 subdivision with a complete written statement that describes the outcome of the matter, states the
11 amount of any recovery, shows the contracting attorney's or law firm's computation of the amount
12 of the contingency fee, and contains a summation of expenses.

13 (b) The political subdivision may use the provisions of the standard addendum to private
14 attorney contracts used by the West Virginia Attorney General's office as described in §5-3-3a(i) of
15 this code.

§7-28-6. Rights, Limitations, Waivers, and Obligations.

1 (a) Nothing in this article shall be construed to limit a political subdivision's ability to recover
2 fees and expenses from opposing parties under any law.

3 (b) Compliance with the provisions set forth in this article does not relieve a private attorney
4 of an obligation or responsibility under any other law or rule including, but not limited to, the West
5 Virginia Rules of Professional Conduct.

6 (c) Neither a political subdivision, nor any of its officers, employees, elected officials, or
7 agents may waived the requirements of this article.

8 (d) Nothing in this article shall be construed as a waiver of any immunity afforded the
9 political subdivision.

§7-28-7. Contingency Fee Agreement Void.

1 A contingency fee agreement that violates the terms of this article shall be void as against
2 the public policy of the State of West Virginia.

§7-28-8. Exemption from the West Virginia Freedom of Information Act.

1 Any contingency fee agreement entered into under the authority provided by this article is
2 confidential, not a public record, and shall not be available for release pursuant to any request
3 made under the West Virginia Freedom of Information Act, W.Va. Code §29B-1-1 et seq.

§7-28-9. Effective date.

1 This article shall be effective on July 1, 2025. The requirements and procedures
2 established in this article are inapplicable to and shall not impair any contingency fee legal
3 arrangement or contract awarded prior to the effective date of this article.

CHAPTER 8. MUNICIPAL CORPORATIONS

ARTICLE 28. USE OF CONTIGENCY FEE AGREEMENTS BY POLITICAL SUBDIVISIONS.

§8-40-1. Definitions.

1 As used in this article,

2 "Contingency fee agreement" means any legal fee arrangement or contract that provides
3 for a private attorney to be paid a percentage of any recovery associated with any claims brought
4 by the private attorney on behalf of a political subdivision of the state or to be paid through a court-
5 approved award of attorney's fees.

6 "Political subdivision" means any county commission and municipality; any separate
7 corporation or instrumentality established by one or more counties or municipalities, as permitted
8 by law; any instrumentality supported in most part by municipalities; and any public body charged
9 by law with the performance of a government function and whose jurisdiction is coextensive with
10 one or more counties, cities or towns.

11 "Private attorney" means any attorney who is not a full-time employee of the state, state
12 agency, state constitutional office, or political subdivision and includes a private law firm.

13 "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.

§8-40-2. When contingency fee agreement permitted.

1 (a) A political subdivision may enter into a contingency fee agreement only if:

2 (1) The necessary legal services cannot be adequately performed by the attorneys and
3 supporting staff of the political subdivision given the time and labor required, or the novelty,
4 complexity, or difficulty of the legal issues involved;

5 (2) The legal services cannot be reasonably provided by attorneys in private practice under
6 a contract providing for the payment of hourly attorneys fees or a flat legal rate, or the type of legal
7 issue or case requiring the retention of a private attorney is a matter traditionally subject to a
8 contingency fee agreement;

9 (3) The contingency fee agreement or contract is executed after the competitive bidding
10 process set forth in subsection (c) of this section; and

11 (4) The contingency fee agreement is approved in an open meeting that complies with the
12 requirements of §6-9A-3 of this code.

13 (b) This article shall not apply to any legal work being performed for a political subdivision
14 on an hourly basis including, but not limited to, the following:

15 (1) Real estate transactions;

16 (2) Employment litigation;

17 (3) Administrative proceedings;

18 (4) State or federal law compliance issues;

19 (5) State or federal law compliance training;

20 (6) Transactional services, including but not limited, to bond and other debt instrument

21 issuances;

22 (7) The defense of tort claims against the political subdivision;

23 (8) Any claim on behalf of the political subdivision where the good faith estimate of the
24 political subdivision's anticipated gross recovery of damages is less than \$150,000;

25 (9) Breach of contract claims;

26 (10) Commercial litigation; and

27 (11) Claims against the political subdivision subject to potential indemnification pursuant to
28 an insurance policy issued by the West Virginia Board of Risk Management or any other insurer
29 who may have a duty to indemnify the political subdivision.

30 (c) Where the requirements of subsection (a) have been satisfied, the political subdivision
31 shall request proposals from private attorneys for a contingency fee agreement to represent the
32 political subdivision. Proposal requests shall be posted in a manner consisted with the political
33 subdivision's postings for other requests for proposals issued by the political subdivision. The
34 request for proposal may also be posted to the political subdivision's website or any other forum
35 reasonably calculated to reach attorneys capable of submitting contingency fee agreement
36 proposals. The time period for which the proposal is open shall be clearly stated in all proposal
37 requests. Proposal requests submitted by private attorneys shall address the factors contained in
38 section §8-40-3 of this code.

§8-40-3. Determining award of contingency fee agreement.

1 (a) Political subdivisions shall consider the following factors when determining the most
2 competitive proposal for legal services prior to entering into contingency fee agreement:

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

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

7 (3) Whether the private attorneys, or any members of the private attorneys' law firm, have

8 been subject to reprimand by the West Virginia State Bar, or other entities, for unethical conduct;

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

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

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

14 (7) Whether the private attorneys are in compliance with all applicable laws of the State of
15 West Virginia; and

16 (8) Any potential conflicts of interest between the private attorneys and the political
17 subdivision.

18 (b) If, after soliciting proposals for legal services rendered pursuant to a contingent fee
19 agreement, the political subdivision or its designated employee determines that the proposals
20 received are insufficient based on an application of the factors set forth in subsection (a) of this
21 section, additional proposals may be solicited.

§8-40-4. Limitations on aggregate fees in contingency fee agreement.

1 (a) A political subdivision may not enter into any contingency fee agreement that provides
2 for the private attorney to receive an aggregate fee in excess of:

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

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

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

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

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

8 (b) In no event shall the aggregate fee for any legal matter exceed \$50 million for any
9 matters arising from a single event or occurrence, exclusive of reasonable costs and expenses,
10 and irrespective of the number of lawsuits filed or the number of private attorneys retained to
11 achieve the recovery. Any legal fees shall not be based on penalties or fines awarded or any

12 amounts attributable to penalties or fines.

13 (c) To the extent that any private attorneys retained pursuant to the provisions of this article
14 are to be paid through a court-approved award of attorney's fees, their representation of the
15 political subdivision is contingent upon the acceptance of the fee limitations set forth in this
16 section. To the extent that any award of attorney fees is subject to judicial discretion, the private
17 attorneys appointed pursuant to this section may not accept an award of attorney fees greater than
18 the fee limitations outlined in this subsection.

§8-40-5. Requirements of contingency fee legal arrangement.

1 (a) A contingency fee agreement with a political subdivision shall be contain, but not be
2 limited to, the following provisions:

3 (1) The political subdivision or its designated employee shall retain management and
4 supervisory authority over the private attorney;

5 (2) The political subdivision, or its designated employee, shall participate in settlement
6 conferences whenever possible; and

7 (3) Decisions regarding settlement of the case are reserved exclusively to the discretion of
8 the political subdivision or its designated employee;

9 (4) At the conclusion of the matter, the attorney or law firm will provide the political
10 subdivision with a complete written statement that describes the outcome of the matter, states the
11 amount of any recovery, shows the contracting attorney's or law firm's computation of the amount
12 of the contingency fee, and contains a summation of expenses.

13 (b) The political subdivision may use the provisions of the standard addendum to private
14 attorney contracts used by the West Virginia Attorney General's office as described in §5-3-3a(i) of
15 this code.

§8-40-6. Rights, Limitations, Waivers, and Obligations.

1 (a) Nothing in this article shall be construed to limit a political subdivision's ability to recover
2 fees and expenses from opposing parties under any law.

3 (b) Compliance with the provisions set forth in this article does not relieve a private attorney
 4 of an obligation or responsibility under any other law or rule including, but not limited to, the West
 5 Virginia Rules of Professional Conduct.

6 (c) Neither a political subdivision, nor any of its officers, employees, elected officials, or
 7 agents may waived the requirements of this article.

8 (d) Nothing in this article shall be construed as a waiver of any immunity afforded the
 9 political subdivision.

§8-40-7. Contingency Fee Agreement Void.

1 A contingency fee agreement that violates the terms of this article shall be void as against
 2 the public policy of the State of West Virginia.

§8-40-8. Exemption from the West Virginia Freedom of Information Act.

1 Any contingency fee agreement entered into under the authority provided by this article is
 2 confidential, not a public record, and shall not be available for release pursuant to any request
 3 made under the West Virginia Freedom of Information Act, W.Va. Code §29B-1-1 et seq.

§8-40-9. Effective date.

1 This article shall be effective on July 1, 2025. The requirements and procedures
 2 established in this article are inapplicable to and shall not impair any contingency fee legal
 3 arrangement or contract awarded prior to the effective date of this article.

NOTE: The purpose of this bill is to establish requirements for contingency fee arrangements between political subdivisions and 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.