

1 COMMITTEE SUBSTITUTE

2 for

3 **H. B. 4490**

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

7 (Originating in the Committee on the Judiciary.)

8 [February 18, 2014]

9
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; to
13 amend said code by adding thereto a new section, designated
14 §5-3-6; and to amend and reenact §5A-3-13 of said code, all
15 relating to management of legal proceedings of the state and
16 its political subdivisions; qualifying Attorney General's
17 authority to file *amicus curae* briefs; specifying the manner
18 in which the Attorney General contracts for legal services;
19 establishing ethical limitations and requiring withdrawal by
20 the Attorney General from certain proceedings and actions when
21 a conflict of interest may or does exist; limiting the
22 Attorney General's common law authority; providing that court
23 rules supercede statutes in certain circumstances; authorizing
24 hiring of special assistant attorneys general when a conflict
25 exists; providing requirements for special assistant attorneys
26 general contracts; providing requirements for certain requests

1 for proposals; requiring certain reports to be prepared for
2 the Governor and the Joint Committee on Government and Finance
3 regarding certain contracts for legal services with the
4 Attorney General; limiting the amount of fees payable for
5 legal services for the Attorney General; providing for the
6 disposition of funds or assets recovered in a legal action or
7 settlement by or on behalf of the general public, the state or
8 its officers, agencies or political subdivisions; establishing
9 the Attorney General's litigation support fund; providing for
10 the deposit of certain money into the fund; providing for the
11 deposit of certain money into the General Revenue Fund of the
12 state and exceptions thereto; requiring certification, records
13 and reports of certain moneys recovered and prescribing the
14 use thereof; requiring certain disposition of funds to be held
15 in trust; limiting certain powers to administrate certain
16 funds; requiring legislative appropriation of certain funds;
17 requiring certain advice be given to courts; prohibiting
18 agreements to settle contrary to law; and requiring that
19 contracts proposed by the Attorney General be approved as to
20 form by the Secretary of State.

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

22 That the Code of West Virginia, 1931, as amended, be amended
23 by adding thereto a new section, designated §5-3-1a; that §5-3-2,
24 §5-3-3, §5-3-4 and §5-3-5 of said code be amended and reenacted;
25 that said code be amended by adding thereto a new section,

1 designated §5-3-6; and that §5A-3-13 of said code be amended and
2 acted, all to read as follows:

3 **CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE GOVERNOR,**
4 **SECRETARY OF STATE AND ATTORNEY GENERAL; BOARD**
5 **OF PUBLIC WORKS; MISCELLANEOUS AGENCIES, COMMISSIONS,**
6 **OFFICES, PROGRAMS, ETC.**

7 **ARTICLE 3. ATTORNEY GENERAL.**

8 §5-3-1a. General authority of Attorney General; recusal when
9 conflict or perceived conflict of interest; and
10 common law abrogation.

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

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

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

24 (3) A withdraw from a cause by the Attorney General pursuant

1 to subdivision (2) is applicable to all assistant Attorneys General
2 and all other employees of the Office of the Attorney General and
3 consequently, no assistant Attorney General or other employee of
4 the Office of the Attorney General may advise or otherwise
5 participate in any cause from which the Attorney General has
6 withdrawn.

7 (b) For purposes of this section, a conflict of interest
8 exists when:

9 (1) The Attorney General has previously accepted any monetary
10 campaign contributions from a party to any cause under the
11 jurisdiction of his or her office;

12 (2) The Attorney General or any immediate family member of the
13 Attorney General has been employed, under contract or otherwise
14 received economic compensation from a party to any cause under the
15 jurisdiction of his or her office;

16 (3) The Attorney General asserts any legal position or takes
17 any action in a legal proceeding or other representation that is
18 inconsistent with the legal position taken by the state officer,
19 board, agency or other political subdivision whom his or her office
20 is representing; or

21 (4) Representation is precluded by the West Virginia Rules of
22 Professional Conduct.

23 (c) Disqualification of assistant or special assistant.
24 Neither the Attorney General nor the Office of the Attorney General
25 is necessarily deemed disqualified from a cause in which any

1 assistant Attorney General or special assistant Attorney General is
2 disqualified, however, the Attorney General must ensure that the
3 disqualified assistant or special assistant does not participate,
4 in any manner whatsoever, in the cause from which they are
5 disqualified.

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

9 (e) Amicus curae - The Attorney General, upon request of the
10 Governor, or by joint request by the Speaker of the House and
11 President of the State Senate, may file an amicus curae brief,
12 papers or otherwise appear in the courts of the state of West
13 Virginia, the courts of the United States, or before any agency or
14 tribunal thereof, wherein the state, officer, board or agency is
15 not otherwise a party, for the purpose of expressing the public
16 policy interest of the State of West Virginia. The determination
17 as to whether such interest exists is solely within the province
18 and pursuant to the directive of the Governor or the designated
19 legislative leaders. The Attorney General may not otherwise file
20 an amicus curae brief, papers or otherwise appear or participate in
21 any such case.

22 (f) "Cause" defined. As used in this article, the term "cause"
23 includes any judicial or other proceeding, application, request for
24 a ruling or other determination, contract, claim, controversy,
25 investigation, charge, accusation, or other particular matter

1 involving a specific party or parties.

2 **§5-3-2. Act as counsel for state; duties and powers as to**
3 **prosecuting attorneys; defense of National Guardsmen.**

4 (a) The Attorney General shall:

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

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

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

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

25 (5) When requested by the prosecuting attorney of a county

1 wherein a state institution of correction is located, provide
2 attorneys for appointment as special prosecuting attorneys to
3 assist the prosecuting attorney of said county in the prosecution
4 of criminal proceedings when, in the opinion of the circuit judge
5 of said county, or a justice of the West Virginia Supreme Court of
6 Appeals, extraordinary circumstances exist at said institution
7 which render the financial resources of the office of the
8 prosecuting attorney inadequate to prosecute said cases~~r.~~

9 (b) he The Attorney General may:

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

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

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

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

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

20 **§5-3-3. Assistants to Attorney General; appointment of special**
21 **assistants to the Attorney General.**

22 (a) The Attorney General may appoint such assistant attorneys
23 general as may be necessary to properly perform the duties of his
24 or her office. The total compensation of all such assistants shall
25 be within the limits of the amounts appropriated by the Legislature

1 for personal services. All assistant attorneys general so appointed
2 shall serve at the pleasure of the Attorney General and shall
3 perform such duties as he or she may require of them.

4 (b) If the Attorney General seeks to enter into a contract for
5 legal services with an private attorney or firm, whether or not
6 such private attorney or firm is designated at any time as an
7 assistant or special assistant attorney general, the Attorney
8 General shall comply with the general purchasing requirements under
9 article three, chapter five-a of this code.

10 (1) A contract for legal services shall include the following:

11 (A) A statement of the reimbursement rate for expenses that
12 may be incurred by the contractor, including, but not limited to,
13 items such as travel, telephone and copying;

14 (B) Certification by the contractor of the hourly rate or fee
15 he or she will charge under the contract and an agreement to the
16 reimbursement rate for expenses set forth by the Attorney General;

17 (C) Certification by the contractor that he or she will agree
18 to any relevant statutory confidentiality requirements;

19 (D) Certification by the contractor that he or she will submit
20 an annual budget of fees and expenses to be incurred for any matter
21 that may extend for more than six months; and

22 (E) Certification by the contractor that neither he or she,
23 nor any person in practice with the contractor, represents nor may
24 represent during the pendency of the contract, a person who has a
25 claim or putative claim involving any matter for which the

1 applicant or any person in practice with the applicant has been
2 retained by the Attorney General.

3 (2) Consistent with the general purchasing requirements, the
4 Attorney General shall submit a request for proposal when he or she
5 seeks to obtain these legal services, and the request for proposal
6 shall include the following elements:

7 (A) A statement by the Attorney General as to why the matter
8 cannot be handled by the regular full-time staff of the Office of
9 the Attorney General;

10 (B) A statement of the particular experience and expertise
11 required of the person or persons being sought under the contract;
12 and

13 (C) The estimated total amount of time and fees to be expended
14 by the persons under the contract.

15 (c) Nothing in this section creates or expands any rights of
16 the Attorney General that do not otherwise authorized by this code.

17 All laws or parts of laws inconsistent with the provisions hereof
18 are hereby amended to be in harmony with the provisions of this
19 section.

20 **§5-3-4. Annual report to Governor.**

21 (a) The Attorney General shall ~~annually~~ biennially, on or
22 before May 1 and November 1, deliver to the Governor a report of
23 the state and condition of the several causes, in which the state
24 or the Attorney General is a party, pending in courts mentioned in
25 section two of this article, or in any other chapter of this code,

1 as of December 30 and June 30, immediately preceding May 1 and
2 November 1, or closed or concluded during the preceding six month
3 period.

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

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

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

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

18 (c) The report required by this section shall also include
19 copies of the report provided in the preceding six months under
20 subsection (d) of this section.

21 (d) Whenever the Attorney General contracts for legal services
22 for a person other than as a full-time member of his or her staff,
23 in accordance with section three of this article, he or she shall
24 immediately deliver to the Governor and to the Joint Committee on
25 Government and Finance:

- 1 (1) A copy of the contract;
2 (2) The names of the persons with whom he or she entered in to
3 a contract;
4 (3) A list of all persons who responded to the proposal and
5 copies of all communication in response to the proposal; and
6 (4) A review of the current and prior relationship of the
7 Attorney General and his or her deputies with the persons to whom
8 he or she has been awarded a contract.

9 ~~§5-3-5. Fees to be paid into State Treasury. Attorney General's~~
10 Litigation Support Fund.

11 ~~On the final determination of any cause in any of the courts~~
12 ~~mentioned in the second section of this article, in which the~~
13 ~~Attorney General appeared for the state, the clerk thereof shall~~
14 ~~certify to the Auditor the fee of the Attorney General which was~~
15 ~~taxed in the bill of costs against the defendant, and when such fee~~
16 ~~shall be collected it shall be paid into the state Treasury and~~
17 ~~placed to the credit of the state fund.~~

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

20 (b) (1) The fund shall consist of any and all attorney fees,
21 expenses and costs awarded to the Attorney General in any cause.

22 (2) Attorney fees, expenses and costs awarded to the Attorney
23 General shall be deposited in he fund and shall be available for
24 expenditure by the Attorney General only upon appropriation by the
25 Legislature in accordance with the provisions of West Virginia

1 Constitution, article six, section fifty-one.

2 (b) From any moneys collected or recovered by the Attorney
3 General, pursuant to any civil litigation, or any administrative
4 proceedings, or in settlement of any claim asserted by or against
5 the people of West Virginia, the State of West Virginia, or any of
6 its departments, agencies, institutions, officers, employees, or
7 political subdivisions thereof, the Attorney General shall deduct
8 and deposit into the Attorney General's Litigation Support Fund the
9 net actual expenses of the office as more particularly described in
10 subdivision (2) of subsection (a), if any such amounts were made
11 available by court order, and shall deposit the balance of any
12 fees, expenses, fines, restitution, forfeitures, penalties, costs,
13 interest, judgments or settlements received by the Office of the
14 Attorney General on behalf of the people of West Virginia, the
15 State of West Virginia, or any of its departments, agencies,
16 institutions, officers, employees, or political subdivisions
17 thereof that are in excess of the actual expenses of the Office of
18 the Attorney General pursuant to the litigation or the issue
19 settled in the treasury of the state to the credit of the state
20 fund, general revenue, unless:

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

1 (B) The recovery or a portion thereof was on behalf of or
2 required to be held in a trust fund, in which event those moneys
3 shall be deposited in a special fund established in the State
4 Treasury to be held in trust;

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

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

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

24 (3) The actual expenses of the Office of the Attorney General
25 pursuant to litigation or the issue settled shall be certified by

1 the Attorney General to the Governor, the Secretary of the
2 Department of Administration, the President of the Senate and the
3 Speaker of the House of Delegates.

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

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

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

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

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

1 (g) The Attorney General shall keep detailed permanent
2 records of all expenditures and disbursements from the fund.

3 (h) On or before the fifteenth day of January, April, July and
4 October, the Attorney General shall cause to be filed with the
5 Governor, with copies to the secretary of the Department of
6 Administration, the President of the Senate and the Speaker of the
7 House of Delegates, a full and complete account of the receipts and
8 disbursements from the fund in the previous calendar quarter.

9 **§5-3-6. Public accountability for funds or assets recovered by the**
10 **Attorney General and other officer or agencies of the**
11 **state through judgment or settlement; applicability of**
12 **open records and open meetings laws; administration and**
13 **disbursement of state judgment or settlement proceeds.**

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

15 (1) Public accountability for funds or other assets recovered
16 in a legal action or settlement by or on behalf of the general
17 public, the state or its officers, agencies or political
18 subdivisions is appropriate and required, whether the character of
19 the assets or funds recovered is public or private;

20 (2) Accountability for assets or funds recovered by the
21 Attorney General or other officer or agency of the state is
22 essential to the public trust, and is even more critical when the
23 Attorney General or other officer of the state was a party to the
24 action that resulted in the recovery by virtue of the public office

1 he or she holds;

2 (3) Public accountability demands the applicability of the
3 freedom of information law, article one, chapter twenty-nine-b of
4 this code, and the open governmental proceedings law, article
5 nine-a, chapter six of this code, so that the actions of
6 individuals or agencies who are charged with the administration of
7 funds or other assets are conducted in full view, and are open to
8 public scrutiny;

9 (4) While it may be important that, in certain circumstances,
10 funds or assets received retain their character, identity, and
11 purpose, it is also important that the process by which funds are
12 administered be open to public scrutiny and be accountable to the
13 public; and

14 (5) The power to appropriate funds for public purposes is
15 solely within the purview of the legislative branch of government,
16 and the Legislature, as a steward of the budgetary process, shall
17 take steps to assure that settlements are handled in a manner that
18 assures maximum accountability to the citizens of the state and
19 their duly elected legislative representatives.

20 (b) Therefore, any other provision of the common law or
21 statutory law to the contrary notwithstanding:

22 (1) Whenever the Attorney General or other officer or agency
23 of the state is a party to or has entered an appearance in any
24 cause, and the disposition of the action results in the recovery of
25 funds or assets that are to be held in trust by the state for

1 charitable, eleemosynary, benevolent, educational, or similar
2 public purposes, those funds shall be deposited in a special
3 revenue account or trust fund established in the State Treasury.

4 (2) The Attorney General or other officer or agency of the
5 state or a person, organization, or entity created by the Attorney
6 General or other officer or agency of the state is prohibited from
7 administering trust funds or assets for charitable, eleemosynary,
8 benevolent, educational, or similar public purposes except as is
9 hereinafter provided by law;

10 (3) Except as otherwise provided in this section, any funds or
11 assets not for charitable, eleemosynary, benevolent, educational,
12 or similar public purposes, of any kind or nature whatsoever,
13 including, but not limited to, public or private funds, or public
14 or private assets, when recovered by judgment or settlement of any
15 cause, shall be deemed public funds, and shall be deposited in the
16 in the general revenue of the state; and

17 (4) No funds to which this subsection applies when deposited
18 in an account in the State Treasury shall be disbursed without a
19 specific legislative appropriation of the deposited funds by the
20 Legislature.

21 (c) The common law, including the common law authority of any
22 duly elected statewide constitutional officer or other officer of
23 the state, is specifically abrogated to the extent it is
24 inconsistent with the provisions of this section.

25 (d) The provisions of this section do not apply to actions by

1 or on behalf of the state or its duly elected statewide
2 constitutional officers or any other state official or agency, if
3 the recovery sought and received is for a specific individual or
4 individuals identified as parties to the action either by
5 individual social security number, other individual identifying
6 number, or by the individual's proper name.

7 (e) Prior to the entry of a judgment order that will result in
8 the recovery of funds or assets by the state, the Attorney General
9 or other officer or agency of the state who is a party to or has
10 entered an appearance in any cause, shall advise the court of the
11 provisions of this section.

12 (f) The Attorney General or other officer or agency of the
13 state acting on behalf of the State, may not agree to the
14 disbursement of the proceeds of any cause that is contrary to the
15 provisions of this section.

16 **CHAPTER 5A. DEPARTMENT OF ADMINISTRATION.**

17 **ARTICLE 3. PURCHASING DIVISION.**

18 **§5A-3-13. Contracts to be approved as to form; filing.**

19 Contracts shall be approved as to form by the Attorney
20 General, except that a contract proposed by the Attorney General
21 shall be approved as to form by the Secretary of State. A contract
22 that requires more than six months for its fulfillment shall be
23 filed with the State Auditor.