

COMMITTEE SUBSTITUTE

FOR

**Senate Bill No. 291**

(By Senators Ferns, D. Hall,  
Karnes and Leonhardt)

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[Originating in the  
Committee on the Judiciary;  
reported February 24, 2015]

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A BILL to amend and reenact §5-3-3 and §5-3-4 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §5-3-3a, all relating generally to appointment of assistants to the Attorney General; establishing competitive bidding process for the use of private attorneys in certain matters by the Attorney General; requiring reports on certain legal causes and matters to the Governor, President of the Senate and Speaker of the House; outlining contents of those reports; and defining terms.

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

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

**ARTICLE 3. ATTORNEY GENERAL.**

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

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

[COM. SUB. FOR S. B. NO. 291]

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

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

6 **§5-3-3a. Competitive bidding required for private attorneys.**

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

9 (1) "Deputy or assistant attorney general" means an attorney employed by the state as a staff  
10 attorney in the Attorney General's office.

11 (2) "Private attorney" means any attorney who is neither a full-time assistant attorney general  
12 on the Attorney General's staff nor a full-time employee of another state agency.

13 (3) "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 (4) "Contingency fee legal arrangement or contract" means any court-approved award of fees  
17 or any other legal fee arrangement that provides for a private attorney or special assistant attorney  
18 general to be paid a percentage of any recovery associated with any claims brought by the private  
19 attorney or special assistant attorney general on behalf of the state.

20 (b) The state may not enter into any contingency fee legal arrangement or contract with a  
21 private attorney unless the Attorney General, or his or her designee, makes a written determination  
22 prior to entering into such a contract that the legal representation is both cost-effective and in the best

[COM. SUB. FOR S. B. NO. 291]

1 interest of the public. Any written determination shall include specific findings for each of the  
2 following factors:

3 (1) Whether sufficient and appropriate legal and financial resources exist within the Attorney  
4 General's office to handle the matter.

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

7 (3) The geographic area where the attorney services are to be provided, as well as any  
8 potential costs associated with providing legal services in that geographic area.

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

11 © If the Attorney General, or his or her designee, makes the written determination described  
12 in subsection (b) of this section, the Attorney General shall request proposals from private attorneys  
13 to represent the state accordingly on the basis of a fee arrangement as set forth in subsection (h) of  
14 this section unless the Attorney General, or his or her designee, makes a written determination that  
15 one of the following factors applies:

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

19 (2) An appointment, or the continuation of an appointment, is necessary to avoid disruption  
20 in pending legal matters by allowing previously appointed outside counsel to continue providing  
21 legal representation.

22 (3) The legal services are to be provided on a *pro bono* basis, and therefore will not benefit

[COM. SUB. FOR S. B. NO. 291]

1 from a competitive bidding process.

2 (d) Any requests for proposal shall be posted to the web site of the office of the Attorney  
3 General. The time period under which the proposal is open should be clearly stated.

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

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

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

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

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

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

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

20 (7) Whether the private attorneys are in compliance with all applicable laws of the state of  
21 West Virginia;

22 (8) Any potential disqualifying conflicts of interest between the private attorneys and the

[COM. SUB. FOR S. B. NO. 291]

1 state;

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

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

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

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

13 (1) The Attorney General, or his or her designated employee(s) involved in the case, shall  
14 retain control over the course and conduct of the case.

15 (2) The Attorney General, or his or her designated employee(s) with supervisory authority,  
16 is personally involved in overseeing the litigation.

17 (3) The Attorney General, or his or her designated employee(s) involved in the case, retains  
18 veto power over any decisions made by outside counsel.

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

22 (h) The state may not enter into any fee arrangement that provides for the private attorney to

[COM. SUB. FOR S. B. NO. 291]

1 receive an aggregate fee in excess of:

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

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

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

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

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

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

12 To the extent that any private attorneys are to be paid through a court-approved award of  
13 attorney's fees, their appointment to represent the state is contingent upon the acceptance of the fee  
14 limitations set forth herein. To the extent that any award of attorney's fees is subject to judicial  
15 discretion, the office of the Attorney General shall request that the private attorneys performing work  
16 for the state are paid in accordance with the terms outlined above.

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

21 (j) Subject to the provisions of subsection (I) of this section, the Attorney General's written  
22 determination to enter into any legal arrangement or contract with a private attorney shall be posted

[COM. SUB. FOR S. B. NO. 291]

1 on the Attorney General’s website for public inspection within fifteen business days after the  
2 selection of a private attorney and shall remain posted on the website for the duration of the contract  
3 for legal services, including any extensions or amendments thereto. Any and all written  
4 determinations made pursuant to subsection (b) or (c) of this section shall also be posted on the  
5 Attorney General’s website for public inspection within fifteen business days after the issuance of  
6 the written determination. Any payment of fees as set forth in subsection (h) of this section shall be  
7 posted on the Attorney General’s website within thirty calendar days after the payment of such fees  
8 to the private attorney and shall remain posted on the website for at least three hundred sixty-five  
9 calendar days thereafter.

10 (k) Any private attorney under contract to provide services to the state shall, from the  
11 inception of the contract until at least four years after the contract expires or is terminated, maintain  
12 detailed current records, including documentation of all expenses, disbursements, charges, credits,  
13 underlying receipts and invoices, and other financial transactions that concern the provision of such  
14 legal services. In conjunction with the Attorney General’s office, the private attorney shall make all  
15 such records that are not covered by the attorney-client privilege or otherwise confidential in nature  
16 available for inspection and copying upon request in accordance with the West Virginia Freedom  
17 of Information Act, sections one through seven, inclusive, article one, chapter twenty-nine-b of this  
18 code. In addition, the private attorney shall maintain detailed contemporaneous time records for the  
19 attorneys, other professionals and paraprofessionals working on the matter for a period of at least  
20 four years and shall promptly provide these records to the Attorney General upon request.

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

[COM. SUB. FOR S. B. NO. 291]

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

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

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

9 (m) If the Attorney General's office chooses to not be involved in a legal matter as a result  
10 of an apparent conflict of interest, and thus cannot implement in good faith the provisions of this  
11 section as a result of the conflict, then the process set forth herein shall be implemented by the client  
12 state entity needing representation, with the assistance of the Department of Administration if  
13 necessary.

14 (n) Nothing in this section expands the authority of any state agency or state agent to enter  
15 into contracts nor shall it be deemed to change any existing law that addresses whether a state agency  
16 or state agent may employ its own counsel or enter into contracts for legal services.

17 **§5-3-4. Annual report to Governor, President of the Senate and Speaker of the House.**

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

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

22 (2) The use of any fee arrangements as provided in subsection (h), section three-a of this



[COM. SUB. FOR S. B. NO. 291]

1 article with private attorneys in the preceding year. At a minimum, the report shall:

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

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

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

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

8 (iv) The amount of the recovery; and

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

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

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

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