

**Senate Bill No. 291**

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

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[Introduced January 23, 2015; referred to the Committee on the Judiciary.]  
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9 A BILL to amend and reenact §5-3-3 and §5-3-4 of the Code of West Virginia, 1931, as amended,  
10 all relating to clarifying powers of the Attorney General to enter into contracts for legal  
11 services with attorneys outside the Attorney General’s Office.

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

13 That §5-3-3 and §5-3-4 of the Code of West Virginia, 1931, as amended, be amended and  
14 reenacted, all to read as follows:

15 **ARTICLE 3. ATTORNEY GENERAL.**

16 **§5-3-3. Assistants to Attorney General.**

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

19 (1) "Deputy or Assistant Attorney General" means an attorney employed by the state as a staff  
20 attorney in the Attorney General's Office.

21 (2) "Private attorney" means any attorney who is neither a full-time Assistant Attorney

1 General on the Attorney General's staff nor a full-time employee of another state agency.

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

5 (b) The Attorney General may appoint such deputy or assistant attorneys general as may be  
6 necessary to properly perform the duties of his the office. The total compensation of all such deputies  
7 or assistants shall be within the limits of the amounts appropriated by the Legislature for personal  
8 services. All deputy or assistant attorneys general so appointed shall serve at the will and the  
9 pleasure of the Attorney General and shall perform such duties as he may require required of them.

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

12 (c) The state may not enter into any legal arrangement or contract with a private attorney  
13 unless the Attorney General makes a written determination prior to entering into such a contract that  
14 the legal representation is both cost-effective and in the best interest of the public. Any written  
15 determination shall include specific findings for each of the following factors:

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

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

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

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

3           (d) If the Attorney General makes the determination described in subsection (c) of this  
4 section, the Attorney General shall request proposals from private attorneys to represent the state  
5 accordingly on the basis of a fee arrangement as set forth in subsection (j) of this section, or any  
6 other basis, unless the Attorney General makes a written determination that one of the following  
7 factors applies:

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

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

14           (3) The legal services will be most effectively handled by preapproved attorneys who have  
15 already completed the bidding process referenced in subsection (h) of this section.

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

18           (e) Any Requests for Proposal shall be posted to the web site of the Office of the Attorney  
19 General. The time period under which the proposal is open should be clearly stated.

20           (f) When soliciting proposals from private attorneys to represent the state on the basis of a  
21 fee arrangement as set forth in subsection (j) of this section, or any other basis, the Attorney General

1 shall consider the following factors when determining the most competitive proposal for legal  
2 services, and make a written determination as to the application of these factors, prior to entering  
3 into any contract for outside legal services:

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

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

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

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

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

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

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

17 (8) Any potential conflicts of interest between the private attorneys and the state;

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

20 (10) Any such other relevant factors as may be identified by the Attorney General.

21 (g) If, after soliciting proposals for legal services, the Attorney General determines that the

1 proposals received are insufficient based on an application of the factors set forth in subsection (f)  
2 of this section, the Attorney General may solicit additional proposals pursuant to subsections (c), (d)  
3 and (f) of this section.

4 (h) In order to address time sensitive or emergency legal matters that require the use of  
5 outside counsel, but do not allow sufficient time for completion of the competitive bidding process  
6 set forth in subsections (c), (d) and (f) of this section, the Office of the Attorney General may  
7 institute a prebidding process for approving lawyers or law firms to perform legal work on behalf  
8 of the state in accordance with the following factors:

9 (1) Private attorneys may be preapproved to perform outside counsel work in specific areas  
10 of law provided that they have gone through a request for proposal and competitive bidding process  
11 as set forth in subsections (c) and (d) of this section.

12 (2) In instances in which more than one lawyer or law firm has been preapproved for the  
13 provision of outside counsel legal services in an area of law, the Office of Attorney General shall  
14 perform an expedited, case-specific analysis using the factors set forth in subsection (f) of this  
15 section to determine which lawyer or law firm would be better suited to represent the state on a  
16 particular legal matter.

17 (3) The office shall list any preapproved attorneys by practice area on the Attorney General's  
18 website.

19 Attorneys may be added to or deleted from the preapproved list pursuant to subsequent  
20 Request for Proposals, provided that the Attorney General's Office regularly reevaluates the outside  
21 counsel relationships at least every two years pursuant to the factors set forth herein.

1       The Attorney General may not appoint a preapproved attorney or law firm to perform outside  
2 counsel work unless the Attorney General makes a written determination prior to any such  
3 appointment explaining both the circumstances requiring resort to the prebid list and the reasons for  
4 selecting the preapproved attorney or law firm.

5       (I) The state shall not enter into a contract for private legal services unless the following  
6 requirements are met throughout the contract period and any extensions thereof:

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

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

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

13       (4) Decisions regarding settlement of the case are reserved exclusively to the discretion of  
14 the Attorney General, his or her designated employee(s) and the state or other client entity and an  
15 appropriate representative of the Attorney General's Office shall attend settlement conferences  
16 whenever possible.

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

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

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

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

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

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

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

8 To the extent that any special assistant attorneys general are to be paid through a  
9 court-approved award of attorney's fees, their appointment to represent the state is contingent upon  
10 the acceptance of the fee limitations set forth herein. To the extent that any award of attorney's fees  
11 is subject to judicial discretion, the Office of the Attorney General shall request that outside counsel  
12 performing work for the state are paid in accordance with the terms outlined above.

13 (k) The Attorney General shall develop a standard addendum to every contract for outside  
14 counsel attorney services that shall be used in all cases, describing in detail what is expected of both  
15 the contracted private attorney and the Attorney General's Office, including, without limitation, the  
16 requirements listed in subsection (I) of this section.

17 (l) Subject to the provisions of subsection (n) of this section, the Attorney General's written  
18 determination to enter into any legal arrangement or contract with a private attorney shall be posted  
19 on the Attorney General's website for public inspection within 15 business days after the selection  
20 of outside counsel and shall remain posted on the website for the duration of the contract for legal  
21 services, including any extensions or amendments thereto. Any and all written determinations made

1 pursuant to subsection (c), (d), or (h) of this section shall also be posted on the Attorney General's  
2 website for public inspection within fifteen business days after the issuance of the written  
3 determination. Any payment of fees as set forth in subsection (j) of this section shall be posted on  
4 the Attorney General's website within thirty calendar days after the payment of such fees to the  
5 private attorney and shall remain posted on the website for at least three hundred sixty-five calendar  
6 days thereafter.

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

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

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

21 (2) Immediate disclosure of the existence of outside counsel, or any other sensitive



1 information, could compromise the initiation, handling, or conclusion of any investigation or case  
2 matter handled by the Office of Attorney General.

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

7 (o) If the Attorney General's Office must recuse itself from any legal matter as a result of an  
8 apparent conflict of interest, and thus cannot implement in good faith the competitive bidding  
9 process as a result of the conflict, then the competitive bidding process set forth in this section shall  
10 be implemented by the client state entity needing representation, with the assistance of the  
11 Department of Administration if necessary.

12 (p) Nothing in this section expands the authority of any state agency or state agent to enter  
13 into contracts where no such authority previously existed.

14 **§5-3-4. Annual report to Governor, President of the Senate and Speaker of the House.**

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

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

19 (2) The use of any fee arrangements as provided in subsection (j) of section three of this  
20 chapter with private attorneys in the preceding year. At a minimum, the report shall:

21 (A) Identify all new fee arrangements entered into during the year and all previously executed

1 fee arrangements that remain current during any part of the year, and for each contract describe:

2 (I) The name of the private attorney with whom the state has contracted, including the name  
3 of the attorney's law firm;

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

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

6 (iv) The amount of the recovery; and

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

8 (B) Include copies of any written determinations made pursuant to section three of this article  
9 during the year.

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

NOTE: The purpose of this bill is to clarify the powers of the Attorney General to enter into contracts for legal services with attorneys outside the Attorney General's office.

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