

# **WEST VIRGINIA LEGISLATURE**

## **2024 REGULAR SESSION**

### **Committee Substitute**

**for**

### **Senate Bill 851**

By Senator Trump

[Originating in the Committee on the Judiciary;

reported February 22, 2024]

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, and §7-28-8;  
3 and to amend said code by adding thereto a new article, designated §8-40-1, §8-40-2, §8-  
4 40-3, §8-40-4, §8-40-5, §8-40-6, §8-40-7, and §8-40-8 all relating to contingency fee  
5 arrangements between political subdivisions and private attorneys; defining terms,  
6 permitting contingency fee agreements in certain circumstances; exempting certain legal  
7 work performed for political subdivision; setting forth the requirements for a proposal  
8 request; providing process and factors considered for political subdivision award of  
9 contingency fee agreement to private attorney; limiting aggregate fees for contingency fee  
10 agreement; providing requirements for contingency fee agreement; providing contingency  
11 fee agreement void in certain circumstances; and providing rights, limitations, waivers,  
12 obligations, and effective dates.

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

## **CHAPTER 7. COUNTY COMMISSIONS AND OFFICERS.**

### **ARTICLE 28. USE OF CONTINGENCY FEE AGREEMENTS BY POLITICAL SUBDIVISIONS.**

#### **§7-28-1. 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 or 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 or part-time employee of the  
12 state, state agency, state constitutional office, or political subdivision, and includes a private law  
13 firm.

14 "State" means the State of West Virginia, including state officers, departments, boards,  
15 commissions, divisions, bureaus, councils, and units of organization, however designated, of the  
16 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 due to the time and labor required, or the novelty,  
4 complexity, or difficulty of the legal issues involved;

5 (2) The legal services cannot reasonably be provided by attorneys in private practice under  
6 a contract providing for the payment of hourly attorneys fees or a flat legal rate; and

7 (3) The litigation or legal matters requiring the retention of a private attorney are matters  
8 traditionally subject to a contingency fee agreement.

9 (b) A political subdivision shall only enter into a contingency fee agreement after  
10 compliance with the competitive bidding process set forth in subsection (e) of this section and the  
11 contingency fee agreement is approved in an open meeting of the political subdivision that  
12 complies with the requirements of §6-9A-3 of this code.

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

15 (1) Real estate transactions including, but not limited to, title searches;

16 (2) Employment litigation;

17 (3) Infrastructure projects or grants;

- 18           (4) Administrative proceedings;  
19           (5) State or federal law compliance issues;  
20           (6) State or federal law compliance training;  
21           (7) State or federal grant programs;  
22           (8) Transactional services including, but not limited to, bond and other debt instrument  
23 issuances and purchasing contracts;  
24           (9) The defense of tort claims against the political subdivision;  
25           (10) Breach of contract claims;  
26           (11) Commercial litigation; and  
27           (12) 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           (d) This article shall not apply to a contingency fee agreement between a political  
31 subdivision and a private attorney where the good faith estimate of the aggregate value of the  
32 claim or claims being brought on behalf of the political subdivision is less than \$500,000: *Provided,*  
33 That this exemption shall not apply to any cases referred to the West Virginia Mass Litigation  
34 Panel.  
35           (e) Where the requirements of subsection (a) have been satisfied, the political subdivision  
36 shall request proposals from private attorneys for a contingency fee agreement to represent the  
37 political subdivision. Proposal requests shall be posted in a manner consistent with the political  
38 subdivision's postings for other requests for proposals issued by the political subdivision. The  
39 request for proposal may also be posted to the political subdivision's website or any other forum  
40 reasonably calculated to reach attorneys capable of submitting contingency fee agreement  
41 proposals. The time period for which the proposal is open shall be clearly stated in all proposal  
42 requests. Proposal requests submitted by private attorneys shall address the factors contained in  
43 §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 a 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 the West Virginia Rules of Professional Conduct; 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, the political subdivision may solicit additional proposals.

**§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;
- 5           plus
- 6           (3) Fifteen percent of any portion of the recovery between \$15 million and \$20 million;
- 7           plus
- 8           (4) Ten percent of any portion of the recovery between \$20 million and \$25 million; plus
- 9           (5) Five percent of any portion of the recovery exceeding \$25 million.

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

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

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

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

3           (1) That the political subdivision, or its designee, shall retain management and supervisory  
4 authority over the private attorney;

5           (2) That the political subdivision, or its designee, shall participate in settlement  
6 conferences whenever possible; and

7           (3) That decisions regarding settlement of the case are reserved exclusively to the  
8 discretion of the political subdivision or its designee.

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

**§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) A political subdivision, or any of its officers, employees, elected officials, or agents may  
7 not waive the requirements of this article.

8 (d) Nothing in this article shall be construed as a waiver of any immunity afforded to 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. 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 agreement  
3 or contract awarded prior to the effective date of this article.

**CHAPTER 8. MUNICIPAL CORPORATIONS.**

**ARTICLE 40. USE OF CONTINGENCY 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 or 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 or part-time employee of the  
12 state, state agency, state constitutional office, or political subdivision and includes a private law  
13 firm.

14 "State" means the State of West Virginia, including state officers, departments, boards,  
15 commissions, divisions, bureaus, councils, and units of organization, however designated, of the  
16 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 due to the time and labor required, or the novelty,  
4 complexity, or difficulty of the legal issues involved;

5 (2) The legal services cannot reasonably be provided by attorneys in private practice under  
6 a contract providing for the payment of hourly attorneys fees or a flat legal rate; and

7 (3) The litigation or legal matters requiring the retention of a private attorney are matters  
8 traditionally subject to a contingency fee agreement.

9 (b) A political subdivision shall only enter into a contingency fee agreement after

10 compliance with the competitive bidding process set forth in subsection (e) of this section and the  
11 contingency fee agreement is approved in an open meeting of the political subdivision that  
12 complies with the requirements of §6-9A-3 of this code.

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

15 (1) Real estate transactions including, but not limited to, title searches;

16 (2) Employment litigation;

17 (3) Infrastructure projects or grants;

18 (4) Administrative proceedings;

19 (5) State or federal law compliance issues;

20 (6) State or federal law compliance training;

21 (7) State or federal grant programs;

22 (8) Transactional services, including but not limited to, bond and other debt instrument  
23 issuances and purchasing contracts;

24 (9) The defense of tort claims against the political subdivision;

25 (10) Breach of contract claims;

26 (11) Commercial litigation; and

27 (12) 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 (d) This article shall not apply to a contingency fee agreement between a political  
31 subdivision and a private attorney where the good faith estimate of the aggregate value of the  
32 claim or claims being brought on behalf of the political subdivision is less than \$500,000: *Provided,*  
33 That this exemption shall not apply to any cases referred to the West Virginia Mass Litigation  
34 Panel.

35

36 (e) Where the requirements of subsection (a) have been satisfied, the political subdivision  
37 shall request proposals from private attorneys for a contingency fee agreement to represent the  
38 political subdivision. Proposal requests shall be posted in a manner consistent with the political  
39 subdivision's postings for other requests for proposals issued by the political subdivision. The  
40 request for proposal may also be posted to the political subdivision's website or any other forum  
41 reasonably calculated to reach attorneys capable of submitting contingency fee agreement  
42 proposals. The time period for which the proposal is open shall be clearly stated in all proposal  
43 requests. Proposal requests submitted by private attorneys shall address the factors contained in  
44 §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 a 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 the West Virginia Rules of Professional Conduct; 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, the political subdivision may solicit additional proposals.

**§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 section.

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

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

3 (1) That the political subdivision, or its designee, shall retain management and supervisory  
4 authority over the private attorney;

5 (2) That the political subdivision, or its designee, shall participate in settlement  
6 conferences whenever possible; and

7 (3) That decisions regarding settlement of the case are reserved exclusively to the  
8 discretion of the political subdivision or its designee.

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

**§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) A political subdivision, or any of its officers, employees, elected officials, or agents may  
7 not waive the requirements of this article.

8 (d) Nothing in this article shall be construed as a waiver of any immunity afforded to 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. 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 agreement  
3 or contract awarded prior to the effective date of this article.