

Jason Williams

From: [REDACTED]@wvchamber.com>
Sent: Wednesday, January 22, 2014 1:05 PM
To: Tim Miley; Tim Miley
Subject: draft bill on AG broad powers..
Attachments: 303990_1.docx

Follow Up Flag: Follow up
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Tim— Last summer at the Business Summit, you expressed concern over WV S. Ct. decision on the broad and undefined common law powers of the AG. Attached is a draft bill for your consideration. It prohibits AG from doing amicus for personal or political agendas and reigns in powers to infringe on authority over regulatory boards. As you stated, clearly defined parameters would be a good thing because of the uncertainty from the S CT decision.

Thanks.. wanted to meet commitments that were made to you.

[REDACTED]

5-3-1 Chief Legal Office, Counsel to the Executive Department and Legislature

(a) The Attorney General shall serve as the chief legal officer of the state and shall, upon request by the Executive Department or any member of the Department, including the Governor, Secretary of State, Auditor, Treasurer, or Commissioner of Agriculture or any agency, board, commission or division of the Department (the "Executive Department). In the discharge of his duties hereunder, he shall:

(1) Provide written opinions and advice on questions of law that may posed by the Executive Department; and

(2) Provide legal representation in connection with:

A. the defense of any civil claims brought against any member of the Executive Department based upon alleged acts or omissions undertaken in his official capacity whether brought in the courts of this state, the federal courts, or any administrative agency, provided, however, that if the Governor shall determine, or in his absence, the President of the Senate, that the state has an interest in the matter contrary to the officer against whom the claim is pending, the Attorney General shall appear on behalf of the state, and

B. the enforcement of such laws and regulations by the members of the Executive Department or their agencies, boards, commissions or divisions of the Department to whom the duty to enforcement has been specifically delegated by the Legislature.

(3) Request to intervene in or file *amicus curiae* papers in any proceeding, whether in the courts of the state of West Virginia, the courts of the United States, or any agency or tribunal wherein the Governor, or in his absence, the President of the Senate, so requests based upon a determination by them that the public interest of the state is at risk and such action is otherwise warranted, determinations as to when such interests are at risk and the assets of the State should be expended in the defense thereof being solely within the province of the Governor unless otherwise delegated by the Legislature.

(b) The Attorney General shall serve a legal counsel to the Legislature and shall, upon request of the President of the Senate and/or Speaker of the House of Delegates:

(1) Render written opinions or advice upon questions of law submitted to him by them or both of them; and

(2) Provide legal representation to the Legislature in the defense of all suits brought against challenging the validity of actions taken by it in the discharge of its duties under the Constitution of West Virginia.

5-3-2 Civil Actions in the Name of the State, Investigative Subpoenas

(a) The Attorney General shall enforce, in the name of the state, those statutes wherein he has been expressly delegated the plenary power to do so by the Legislature and, in connection therewith, shall take such actions and seek such remedies as are expressly authorized by those statutes.

(1) In any matter where the Attorney General has reasonable cause to believe that a violation of a statute enforceable by the Attorney General has occurred, he shall, prior to initiating any enforcement action, conduct an investigation to determine if there are sufficient facts to support a claimed violation. Where necessary to make that determination, the Attorney General may convene an administrative hearing in the county where the violation is alleged, and incident to said hearing, administer oaths or affirmation to persons called to testify, issue investigative subpoenas compelling the attendance of witnesses and the production of documents at said hearing, and adduce such evidence the Attorney General deems relevant to that determination. Upon the failure of any person without lawful excuse to obey an investigative subpoena requiring his appearance at such hearing, to produce documents or provide testimony, the Attorney General may, after due notice to all persons affected, apply to the circuit court of the county in which the administrative hearing is conducted for an order compelling with the same.

(2) Where, following an investigation conducted in accordance with the paragraph (a)(1) above, the Attorney General is satisfied that sufficient facts exist to support a claim that a statute of a statute enforceable by him has occurred, he shall, prior to instituting an enforcement action, undertake to resolve that violation by means of a consent decree entered into by and between the offending party and the state of West Virginia, which decree may include penalties as authorized by statute and an agreement as to how the offending party will order its affairs going forward so as to prevent additional, future violations.

(b) The Attorney General shall not institute proceedings, whether in the name of the state or otherwise, seeking to enforce any statute or regulation where the plenary power to do so has been delegated by the Legislature to another member of the Executive Department or any of its agencies, boards, commissions or divisions unless requested to do so by said member, agency, board, commission or division. The power to enforce such statutes as well as the power to investigate and determine whether violations have occurred rests solely within the discretion of those to whom such power has been delegated by the Legislature. In all such cases, the Attorney General shall act solely in his capacity as legal advisor to such member, agency, board, commission or divisions, providing written opinions and advice concerning the legal questions relating to the statute and legal representation relating to its enforcement when requested. To the extent any implied common law powers have heretofore been deemed to authorize the Attorney General to initiate enforcement actions with respect to such statutes, either in his name or the name of the state, in lieu of the member, agency board, commission or division to whom such power is delegation, that authority is hereby revoked and rescinded.

(c) When advising and/or representing members of the Executive Department or any of its agencies, boards, commissions or divisions, all communications, whether written or verbal, between and among the Attorney General and said members, agencies, boards, commissions or

divisions shall be treated as confidential and protected by the attorney/client privilege as applied by the Courts of West Virginia.

5-3-8 Assistants and Special Assistants to the Attorney General.

(a) The Attorney General may appoint such Assistant Attorneys General as he may deem necessary to the proper performance of the duties of his office. The total compensation for all such assistants shall be within the limits of the amounts appropriated by the Legislature for personal services.

(b) The Attorney General may, from time to time, appoint Special Assistant Attorneys General to assist with the prosecution or defense of matters requiring legal expertise beyond that normally required of his office. The selection of such Special Assistant Attorneys General shall be based upon objective criteria established and published by the Attorney General and shall occur only after public notice of such position is provided through the West Virginia State Bar and reasonable time allowed for the submission of written applications by those seeking appointment to that position.

- (1) All applicants for position of Special Assistant Attorney General shall be, among other things, current members in good standing of the West Virginia State Bar and, not subject to any unresolved ethics complaints and possess the necessary legal qualifications to provide the specialized legal services sought by the Attorney General.
- (2) All applicants for position of Special Assistant Attorney General shall demonstrate through their application that they possess the specialized legal expertise sought by the Attorney General in creating that position.
- (3) No attorney who is currently employed or, within the twenty-four months immediately preceding notice of such position, was employed by the Attorney General may apply for or be considered for appointment as a Special Assistant Attorney General.

(c) The Attorney General may compensate Special Assistant Attorneys Generals in such manner as he deems fair, just and reasonable when compared to compensation paid attorneys of similar experience and expertise for comparable services. The terms of such compensation shall be agreed upon prior to appointment and shall be subject to review and inspection under the Open Records Act. The Attorney General may utilize the proceeds of any monetary recovery achieved by a Special Assistant Attorney General to pay such compensation provided, however, such compensation so used shall not exceed twenty (20%) of the total recovery and the final amount is approved by a court having jurisdiction over the matter after reasonable public notice has been given and an opportunity to object thereto afforded all interested members of the public.

(d) The Attorney General shall have the duty to maintain control all litigation initiated in his name or the name of the state which duty shall include the duty to assess and reassess the merits of such litigation, the duty to direct litigation strategy, and the duty to determine when and if a negotiated resolution of such case is warranted and, if such, under what specific terms.

(e) All Assistant Attorneys General and Special Assistant Attorneys General shall serve at the will and pleasure of the Attorney General and shall perform such duties as he may require of them consistent with the position in which they serve.

Joe Altizer

From: [REDACTED] <[REDACTED]@wvchamber.com>
Sent: Wednesday, January 22, 2014 5:44 PM
To: Joe Altizer
Subject: Common law AG powers
Attachments: Doc2.docx; ATT00001.htm

Sent from my iPad

We might also consider incorporating the attached regarding recusal of the Attorney General where a conflict of interest exists. It provides that in such instance, the AG reports the conflict to the Governor, Senate President and Speaker and then recuses himself. They, in turn, appoint a Special Attorney General to step into his shoes and exercise the powers he would.

(d) The Attorney General shall maintain control over all litigation initiated in his name or the name of the state, which control shall, among other things, include the assessments and reassessments of the merits of such litigation, the development and direction of litigation strategy, and the determination of when and if a negotiated resolution of such litigation is warranted and, if so, under what specific terms.

- (1) In the event the Attorney General determines that he has a conflict of interest that precludes him from fairly and impartially exercising the requisite control over existing or anticipated litigation, he shall immediately advise the Governor, President of the Senate, and Speaker of the House of that conflict and thereafter recuse himself from further participation in any aspect of that litigation.
- (2) Upon being advised of such a conflict, the Governor, in consultation with the President of the Senate and the Speaker of the House, shall appoint a member in good standing of the State Bar to serve as Special Attorney General for purposes of controlling and directing said litigation. In that capacity, the Special Attorney General is authorized to exercise all powers and duties of the Attorney General as set forth herein including the power to continue the prosecution or defense of that litigation as well as the power to settle or resolve the underlying dispute on such terms and conditions as he determines, based upon the exercise of his professional judgment, are fair and just under the circumstances.
- (3) A Special Attorney General shall have full access to the resources of the Office of the Attorney General in connection with the prosecution or defense of such litigation, including use of the services of all Assistant and Special Assistant Attorneys General and members of the staff of the Attorney General's office that he may reasonably require in his management of that litigation.
- (4) In order to maintain the integrity of the Office of Attorney General as well as the public trust in that Office, in all matters from which the Attorney General has recused himself and a Special Attorney General has been appointed, the Attorney General shall not be entitled to nor shall he receive any information from the Special Attorney General or any person employed within the Office of Attorney General regarding the status of such matters of whatsoever kind or nature. Any violation of this subsection shall immediately be reported to the State Bar's Ethics Committee for handling.
- (5) The Attorney General shall have no authority to direct the actions of a Special Attorney General or any Assistant Attorney General, Special Assistant Attorney General or other member of the Attorney General's staff with respect to their work on matters from which he has recused himself.
- (6) A Special Attorney General shall be compensated for his services out of the State Treasury on an hourly basis for work performed at a rate equal to the salary of the Attorney General divided by 1,800, that being the total annual hours customarily worked based upon a 40 hour workweek over a period of 50 weeks. He shall also

be entitled to the immunities and protections afforded the Attorney General in the discharge of his official duties.