WEST VIRGINIA CODE CHAPTER 5 ARTICLE 3

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§5-3-1. Written opinions and advice and other legal services; expenditures by state officers, boards and commissions for legal services prohibited.

The Attorney General shall give written opinions and advice upon questions of law, and shall prosecute and defend suits, actions, and other legal proceedings, and generally render and perform all other legal services, whenever required to do so, in writing, by the Governor, the Secretary of State, the Auditor, the state superintendent of free schools, the treasurer, the commissioner of agriculture, the board of public works, the Tax Commissioner, the state archivist and historian, the commissioner of banking, the Adjutant General, the director of the Division of Environmental Protection, the superintendent of public safety, the state commissioner of public institutions, the commissioner of the Division of Highways, the commissioner of the Bureau of Employment Programs, the Public Service Commission, or any other state officer, board or commission, or the head of any state educational, correctional, penal or eleemosynary institution; and it is unlawful from and after the time this section becomes effective for any of the public officers, commissions, or other persons above mentioned to expend any public funds of the State of West Virginia for the purpose of paying any person, firm, or corporation for the performance of any legal services: Provided, That nothing contained in this section impairs or affects any existing valid contracts of employment for the performance of legal services heretofore made.

It is also the duty of the Attorney General to render to the President of the Senate and/or the Speaker of the House of Delegates a written opinion or advice upon any questions submitted to the Attorney General by them or either of them whenever he or she is requested in writing so to do.

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

The Attorney General shall appear as counsel for the state in all causes pending in the Supreme Court of Appeals, or in any federal court, in which the state is interested; he shall appear in any cause in which the state is interested that is pending in any other court in the state, on the written request of the Governor, and when such appearance is entered he shall take charge of and have control of such cause; he shall defend all actions and proceedings against any state officer in his official capacity in any of the courts of this state or any of the federal courts when the state is not interested in such cause against such officer, but should the state be interested against such officer, he shall appear for the state; he shall institute and prosecute all civil actions and proceedings in favor of or for the use of the state which may be necessary in the execution of the official duties of any state officer, board or commission on the written request of such officer, board or commission; he shall, when requested by the prosecuting attorney of a county wherein a state institution of correction is located, provide attorneys for appointment as special prosecuting attorneys to assist the prosecuting attorney of said county in the prosecution of criminal proceedings when, in the opinion of the circuit judge of said county, or a justice of the West Virginia Supreme Court of Appeals, extraordinary circumstances exist at said institution which render the financial resources of the office of the prosecuting attorney inadequate to prosecute said cases; he may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office, and may require a written report from them of the state and condition of the several causes, in which the state is a party, pending in the courts of their respective counties; he may require the several prosecuting attorneys to perform, within the respective counties in which they are elected, any of the legal duties required to be performed by the Attorney General which are not inconsistent with the duties of the prosecuting attorneys as the legal representatives of their respective counties; when the performance of any such duties by the prosecuting attorney conflicts with his duties as the legal representative of his county, or for any reason any prosecuting attorney is disqualified from performing such duties, the Attorney General may require the prosecuting attorney of any other county to perform such duties in any county other than that in which such prosecuting attorney is elected and for the performance of which duties outside of the county in which he is elected the prosecuting attorney shall be paid his actual traveling and other expenses out of the appropriation for contingent expenses for the department for which such services are rendered; the Attorney General shall keep in proper books, a register of all causes prosecuted or defended by him in behalf of the state or its officers and of the proceedings had in relation thereto, and deliver the same to his successor in office; and he shall preserve in his office all his official opinions and publish the same in his biennial report.

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

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§5-3-2a. Consent judgments in actions against an agency of government; notice of proposed consent judgment.

(a) It is hereby established as the policy of this state to consent to a proposed judgment in an action against an agency of government or its officers or employees only after or on condition that an opportunity is afforded persons (natural or corporate) who are not named as parties to the action to comment on the proposed judgment prior to its entry by the court.

(1) For the purposes of this section, "agency of government" means:

(A) A department, division, bureau, board, commission or other agency or instrumentality within the executive branch of state government which may sue or be sued; or

(B) A political subdivision of this state or any board, department, commission, district or special district, council or other agency or instrumentality thereof whose liability or potential liability arises from a claim which is covered by property or liability insurance provided by the state Board of Risk and Insurance Management of West Virginia pursuant to the provisions of article twelve, chapter twenty-nine of this code.

(2) For the purposes of this section, "action" means a civil proceeding initiated in a court of general jurisdiction and shall not mean a proceeding initiated in or before, or an appeal taken to, an administrative agency, board or commission and shall not mean an appeal taken to a court from such an administrative proceeding or appeal.

(3) For the purposes of this section, "judgment" means a judgment, order or decree of a court the entry of which would require or otherwise mandate:

(A) An expansion of, increase in, or addition to the services, duties or responsibilities of an agency of government;

(B) An increase in the expenditures of an agency of government above the level of expenditures approved or authorized before the entry of the proposed judgment;

(C) The employment or other hiring of, or the contracting with, personnel or other entities by an agency of government in addition to the personnel or other entities employed or otherwise hired by, or contracted with or by the agency of government; or

(D) Payment of a claim based upon tort or contract by an agency of government as defined in paragraph (B), subdivision (1) of this subsection.

(b) To effectuate this policy, each proposed judgment which is within the scope of paragraph (a) of this section shall be lodged with the court as early as feasible but at least sixty days before the judgment is entered by the court, and true copies of the proposed order shall be served upon the Attorney General of the state, the president of the West Virginia Senate and the speaker of the West Virginia House of Delegates. When an agency of government proposes to consent to a judgment, it shall file with the Secretary of State, for publication in

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the state register, a notice of the proposed order and include therein a request for comment on the proposed order. The notice shall fix a date, time and place for the receipt of written statements and documents bearing on the appropriateness, propriety or adequacy of the proposed consent order. At the time of filing the notice of its action, the agency of government shall also file with the Secretary of State a true copy of the proposed order. If alternative draft proposals are being considered, the full text of the additional draft proposals shall also be filed with the Secretary of State. The agency of government proposing to consent to the entry of judgment shall also file with the Secretary of State an estimate of the cost of implementing the proposed judgment as the cost relates to this state and to persons affected by the proposed judgment.

(c) Prior to entry of the judgment, or some earlier specified date, the Attorney General will receive and consider and file with the court any written comments, views or allegations relating to the proposed judgment.

(d) The Attorney General shall reserve the right (1) to withdraw or withhold his or her consent to the proposed judgment if the comments, views and allegations received concerning the proposed judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper or inadequate or (2) to support or oppose an attempt by any person to intervene in the action. If action which could be taken by the Attorney General pursuant to the provisions of this subsection may be materially adverse to the interests of an agency of government or an officer or employee thereof whom the Attorney General has previously represented in the same or a substantially related matter, the Attorney General shall not proceed to act without the written consent of the agency of government or the affected officer or employee. In the absence of such consent, the Attorney General shall provide for an independent special assistant Attorney General to be retained to consider the comments, views and allegations received concerning the proposed judgment, and to pursue such action as may be deemed appropriate, in accordance with the provisions of this subsection.

(e) The Attorney General may establish procedures for implementing the policy established by this section. Where it is clear that the public interest in the policy hereby established is not compromised, the Attorney General may permit an exception to this policy in a specific case where extraordinary circumstances require a period shorter than sixty days or a procedure other than stated herein.

(f) Any agency of government which agrees to a consent judgment after June 30, 1995, shall thereafter file an annual report, on or before November 1, setting forth the status of the action, the fiscal impact of the consent judgment upon the resources of the state, and the manner in which any cost to the state is met or will be met by appropriations authorized in the state budget. Such report shall be filed with the president of the West Virginia Senate and the speaker of the West Virginia House of Delegates.

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

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

(b) The Attorney General may appoint such special assistant attorneys general as may be necessary to properly perform the duties of his or her office: Provided, That if the appointment relates to a contingency fee legal arrangement or contract as defined in W. Va. Code §5-3-3a(a)(1), then the appointment must be in accordance with the procedures and compensation set forth in W.Va. Code §5-3-3a. All special assistant attorneys general appointed shall serve at the will and pleasure of the Attorney General and shall perform such duties as the Attorney General may require of them: Provided, That the appointment of a special assistant Attorney General under this section shall not be construed to alter, inhibit or expand the attorney-client relationship set forth in this article between the Attorney General and the state in the control or conduct of a cause of action.

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

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§5-3-3a. Competitive bidding required for private attorneys, special assistant attorneys general.

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

(1) “Contingency fee legal arrangement or contract” means any legal fee arrangement that provides for a private attorney or special assistant Attorney General to be paid a percentage of any recovery associated with any claims brought by the private attorney or special assistant Attorney General on behalf of the state or to be paid through a court-approved award of attorney’s fees.

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

(3) "Private attorney" means any attorney who is neither an assistant Attorney General on the Attorney General's staff nor an employee of another state agency.

(4) “Special assistant Attorney General” means an attorney that has been retained or appointed by the Attorney General to assist in the legal representation of the state.

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

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

(1) Whether sufficient and appropriate legal and financial resources exist within the Attorney General’s office to handle the matter;

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

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

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

(c) If the Attorney General, or his or her designee, makes the written determination described in subsection (b) of this section, the Attorney General shall request proposals from private attorneys to represent the state accordingly on the basis of a fee arrangement as set

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forth in subsection (h) of this section, unless the Attorney General, or his or her designee, makes a written determination that one of the following factors applies:

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

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

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

(d) Any requests for proposal shall be posted to the website of the Office of the Attorney General. The time period under which the proposal is open should be clearly stated.

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) The Attorney General, or the deputy or assistant Attorney General involved in the case, shall retain management and supervisory authority over the private attorney;

(2) The Attorney General, or the deputy or assistant Attorney General with supervisory authority, is personally involved in overseeing the litigation;

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

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

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

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

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

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

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

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

To the extent that any private attorneys are to be paid through a court-approved award of attorney's fees, their appointment to represent the state is contingent upon the acceptance

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of the fee limitations set forth herein. To the extent that any award of attorney fees is subject to judicial discretion, the private attorneys appointed pursuant to this section may not accept an award of attorney fees greater than the fee limitations outlined in this subsection.

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

(j) Subject to the provisions of subsection (l) of this section, the Attorney General's written determination to enter into any legal arrangement or contract with a private attorney shall be posted on the Attorney General's website for public inspection within ten business days after the selection of a private attorney and shall remain posted on the website for the duration of the contract for legal services, including any extensions or amendments thereto. Any and all written determinations made pursuant to subsection (b) or (c) of this section shall also be posted on the Attorney General's website for public inspection within ten business days after the issuance of the written determination. Any payment of fees as set forth in subsection (h) of this section shall be posted on the Attorney General's website within thirty calendar days after the payment of such fees to the private attorney and shall remain posted on the website for at least three hundred sixty-five calendar days thereafter.

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

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

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

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

Once any risks to the attorney-client privilege or confidential work product are no longer present, the office of Attorney General shall make any and all suspended disclosures as soon

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as possible and all subsequent disclosures in accordance with the time frame and manner set forth by subsection (j) of this section.

(m) Once a private attorney is appointed pursuant to this section, he or she may thereafter be designated as a special assistant Attorney General, and, upon such appointment, shall provide representation subject to the terms contained in subsection (g) of this section.

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

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

(p) The requirements and procedures established in this section are inapplicable to and shall not impair any contingency fee legal arrangement or contract awarded prior to the effective date of this section.

(q) The appointment of a special assistant Attorney General under this section shall not be construed to alter, inhibit or expand the attorney-client relationship set forth in this article between the Attorney General and the state in the control or conduct of a cause of action.

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

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

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

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

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

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

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

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

(iv) The amount of the recovery; and

(v) The amount of any legal fees paid.

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

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

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

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§5-3-5. Fees to be paid into State Treasury.

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

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§5-3-6. Attorney General's investigators authority to carry concealed weapon.

(a) The Attorney General may allow, consistent with the provisions of this section, an investigator to carry a concealed firearm while performing his or her official duties.

(b) An investigator employed by the Attorney General may carry a concealed firearm approved by the Attorney General solely for purposes of defense of self or others if the investigator has:

(1) Obtained the written authorization by the Attorney General;

(2) Been determined not to be prohibited from possessing a firearm under state or federal law;

(3) Obtained and maintains a concealed handgun license pursuant to §61-7-1 et seq. of this code; and

(4) Successfully completed a firearms training and certification program equivalent to that provided to officers attending the entry level law-enforcement certification course provided at the West Virginia State Police Academy. The investigator must thereafter successfully complete an annual firearms qualification counsel equivalent to that required of certified law-enforcement officers as established by legislative rule. The Attorney General may reimburse the investigator for the cost of the training and requalification.

(c) Neither the state, a political subdivision, an agency nor an employee of the state acting in an official capacity, may be held personally liable for an act of an investigator employed by the Attorney General if the act or omission was done in good faith while the investigator was performing official duties or responsibilities under the office of the Attorney General.

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