State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0410

# OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL
# OUTSIDE COUNSEL POLICY

## I. Purpose

The purpose of this policy is to establish procedures and guidelines for the appointment of outside counsel to represent the State.

## II. Overview

Given past questions surrounding the appointment of outside counsel by the West Virginia Attorney General's Office, it shall be the policy of this Office to use the competitive bidding process set forth herein for outside counsel hirings in order to maximize the value and benefit of providing legal counsel for state issues. Pursuant to the Attorney General's common law, constitutional and statutory authority, it shall be the policy of this Office to provide transparency and accountability in the appointment of all outside counsel hirings by emphasizing disclosure throughout the outside counsel hiring process. In advancing this policy, it is not the intent of the Office of the Attorney General to preclude the provision of essential legal services. As such, any situation not contemplated by the policies and procedures set forth herein may be handled as appropriate by the Attorney General.

## III. Policy

A. Appointment of Deputy & Assistant Attorneys General: The Attorney General may appoint such deputy or assistant attorneys general as may be necessary to properly perform the duties of the Office. 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 required of them.

B. Competitive Bidding Required for Appointment of Special Assistant Attorneys General: When circumstances require the Attorney General to appoint special assistant attorneys general (alternatively referenced herein as "outside counsel" or "private attorneys") to represent the state, any such contracts for legal services shall be competitively bid in accordance with the provisions of this policy.

C. Written Determination Required for Appointment of Special Assistant Attorneys General: The Attorney General may not enter into any legal arrangement or contract with a private attorney unless the Attorney General makes a written determination prior to entering into such

a contract that the legal representation is both cost-effective and in the 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 legal 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.
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.

D. Requests for Proposal: If the Attorney General makes the determination described in Section C, the Attorney General shall request proposals from private attorneys to represent the State accordingly on the basis of a fee arrangement as set forth in Section I of this policy, or any other basis, unless the Attorney General 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 the 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.
3. The legal services will be most effectively handled by pre-approved attorneys who have already completed the bidding process referenced in Section G.
4. The legal services are to be provided on a *pro bono* basis, and therefore will not benefit from a competitive bidding process.

Any Requests for Proposal shall be posted to the web site of the Office of the Attorney General. The time period under which the proposal is open should be clearly stated. Notice of the Request for Proposal may also be given to the West Virginia State Bar for broad distribution, or disseminated through other reasonable methods. The purpose of the Request for Proposal process is to ensure broad inclusion in the bidding process for a wide array of qualified firms.

E. Factors to be Considered During Competitive Bidding Process: When soliciting proposals from private attorneys to represent the State on a fee arrangement as set forth in Section I of this policy, or any other basis, the Attorney General 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 reprimand 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 conflicts of interest between the private attorneys and the State;
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.

F. Solicitation of New Proposal Allowed: If, after soliciting proposals for legal services, the Attorney General determines that proposals received are insufficient based on an application of the factors set forth in Section E, the Attorney General may solicit additional proposals by issuing a new request for proposal pursuant to Sections C, D, and E.

G. Pre-Bidding Process for Appointment of Special Assistant Attorneys General: Understanding that time sensitive or emergency legal matters may arise that require the use of outside counsel, but do not allow sufficient time for completion of the competitive bidding process set forth herein, the Office of the Attorney General may institute a pre-bidding process for approving lawyers or law firms to perform legal work on behalf of the State in accordance with the following factors:

1. Private attorneys may be pre-approved to perform outside counsel work in specific areas of law provided that they have gone through a request for proposal and competitive bidding process as set forth in Sections D and E of this policy.
2. In instances in which more than one lawyer or law firm has been pre-approved for the provision of outside counsel legal services in an area of law, the Office of the Attorney General shall perform an expedited, case-specific analysis using the factors set forth in Section E to determine which lawyer or law firm would be better suited to represent the State on a particular legal matter.
3. The Office shall list any pre-approved attorneys by practice area on the Attorney General's web site.
4. Attorneys may be added to or deleted from the pre-approved list pursuant to subsequent Request for Proposals, provided that the Attorney General's Office regularly re-evaluates the outside counsel relationships at least every two years pursuant to the factors set forth herein.

The Attorney General may not appoint a pre-approved attorney or law firm to perform outside counsel work unless the Attorney General makes a written determination prior to any such appointment explaining both the circumstances requiring resort to the pre-bid list and the reasons for selecting the pre-approved attorney or law firm.

H. Supervision & Control of Outside Counsel: The Office of the Attorney General shall not enter into a contract for private legal services unless the following requirements are met throughout the contract period and any extensions thereof:

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

2. The Attorney General, or his designated employee(s) with supervisory authority, shall be personally involved in overseeing the litigation.
3. The Attorney General, or his designated employee(s) involved in the case, shall retain veto power over any decisions made by outside counsel.
4. Decisions regarding settlement of the case shall be reserved exclusively to the discretion of the Attorney General, his designated employee(s) and the State or other client entity, and an appropriate representative of the Attorney General's Office shall attend settlement conferences whenever possible.

I. Fee Arrangements & Limitations for Special Assistant Attorney General Contracts: The Office of the Attorney General may not enter into any fee arrangement that provides for a special assistant attorney general 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 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 special assistant attorneys general are to be paid through a court-approved award of attorney's fees, their appointment to represent the State is contingent upon the acceptance of the fee limitations set forth herein. To the extent that any award of attorney's fees is subject to judicial discretion, the Office of the Attorney General shall request that outside counsel performing work for the State are paid in accordance with the terms outlined above.

J. Standard Addendum for Outside Counsel Contracts: The Attorney General shall develop a standard addendum to every contract for outside counsel 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 (H)(1)-(4), inclusive.

K. Posting of Outside Counsel Determinations to Web Site: Subject to the provisions of Section M, 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 15 business days after the date the contract is executed and shall remain posted on the website for the duration of the contract, including any extensions or amendments thereto. Any and all written determinations made pursuant to Section C or Section G of this policy shall also be posted on the Attorney General's website for public inspection within 15 business days after the issuance of the written determination. Any payment of fees as set forth in Section I of this policy shall be posted on the Attorney General's website within 30 calendar days after the payment of such fees to the private attorney and shall remain posted on the website for at least 365 calendar days thereafter.

L. Document Retention and Time Record Requirements for Outside Counsel: Any private attorney under contract to provide legal services for the Attorney General 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, WV Code § 29B-1-1, et seq. In addition, the private attorney shall maintain detailed contemporaneous time records for the attorneys and paralegals working on the matter for a period of at least four years after the contract expires or is terminated, and shall promptly provide these records to the Attorney General upon request.

M. Confidentiality & Attorney Client Privilege: In establishing new policies and procedures for the appointment of outside counsel, it is not the intent of the Attorney General's Office to put at risk any element of the attorney-client privilege or jeopardize confidential work product that allows attorneys to perform sensitive legal services on behalf of the State and the Office's clients. As such, the Attorney General retains the right to temporarily waive the disclosure requirements set forth in Section K 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 outside counsel, or any other sensitive information, could compromise the initiation, handling, or conclusion of any investigation or case matter handled by the Office of the Attorney General.

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

N. Application of Competitive Bidding Process to State Agencies: In recognition of the different needs, hiring procedures, and statutory authority of the various state agencies, it is the intent of the Attorney General's Office to implement these policies in an efficient and effective manner that does not impede the current legal representation of any state agencies. The Attorney General's Office will work accordingly with state agencies on a rolling basis in furtherance of the principles advanced herein until such time as the competitive bidding process can be implemented on a statewide basis.

O. Application of Competitive Bidding Process When Conflicts of Interest Occur: If the Attorney General's Office must recuse itself from any legal matter as a result of an apparent conflict of interest, and thus cannot implement in good faith the competitive bidding process as a result of the conflict, then the competitive bidding process set forth herein should be implemented, as best as possible, by the client State entity needing representation.

P. Coordination with Other States: It is not the intent of the Office of the Attorney General to adversely impact the State's legal interests by prohibiting or otherwise impairing the ability of the State or its entities to coordinate with other states or state entities. Accordingly, the

Attorney General may agree to the use of counsel, absent the use of the competitive bidding process set forth in Sections D & E, when it is in the best interest of the State or its entities to join or participate with a group of states or state entities and the retention of separate legal counsel for the State or its entities would inhibit the ability to join or participate in that matter. However, in such circumstances all other provisions of this policy relating to disclosure and transparency, supervision and control, and fee arrangements and contract limitations shall still apply.

IV. **Effective Date:** This policy is effective as of July 16, 2013. Any changes to the policy must be published on the Attorney General's website within 15 business days of said changes, with the appropriate acknowledgement that the policy has been updated.

V. **Policy Number:** WVAGO-004

Approved and Issued By:

PATRICK MORRISEY
Attorney General of West Virginia

Date Signed: July 16, 2013