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EARL RAY TOMBLIN
GOVERNOR

February 17, 2016

VIA HAND DELIVERY

The Honorable Tim Armstead
Speaker, West Virginia House of Delegates
Room 228M, Building 1
State Capitol Complex
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

Re: Enrolled Committee Substitute for House Bill 4007

Dear Speaker Armstead:

Pursuant to the provisions of section fourteen, article VII of the Constitution of West Virginia, I hereby disapprove and return the Enrolled Committee Substitute for House Bill 4007.

The general aim of this bill—establishing competitive bidding and qualification procedures for the hiring of private legal counsel by the Attorney General in cases in which the state and its agencies are plaintiffs—is commendable. I support wholeheartedly including procedures in the West Virginia Code to ensure that the state and its offices and agencies receive competent counsel at competitive rates.

My issue with the bill is the extent to which it permits, perhaps inadvertently, the Attorney General to ignore a state office or agency client's authority, decisions, and directives in a case, in contravention of the Rules of Professional Conduct governing West Virginia lawyers. For example, the following broad language appears in the bill's § 5-3-3(b): "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." *See* p. 2, lines 11-13. This statement disregards that there are circumstances where special assistant attorneys general are appointed for state offices and agencies, including the Governor's Office, because the Attorney General's Office has a conflict or has taken a contrary position in a case. In such circumstances, the special assistant attorneys general serve at the will and pleasure of their client state offices and agencies, not the Attorney General. As drafted and passed by the Legislature, § 5-3-3(b) is overbroad and could occasion conflicts of interest.

Furthermore, Enrolled Committee Substitute for House Bill 4007 provides that "[t]he Attorney General, or the deputy or assistant Attorney General involved in the case, shall retain control over the course and conduct of the case." *See* § 5-3-3a(g)(1), p. 5, lines 76-77. The bill also states that "[t]he Attorney General, or the deputy or assistant Attorney General involved in the case, retains veto power over any decisions made by any appointed private attorneys." *Id.* at § 5-3-3a(g)(3), p. 5, lines 80-81.

The Rules of Professional Conduct, however, make it clear that "a lawyer [whether it be the Attorney General, his assistant, or outside private counsel] *shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.*" *See* Rule 1.2(a), Rules of Professional Conduct (emphasis added). Rule 1.2(a) thus "confers upon *the client* the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." *Id.* at Comment [1] (emphasis added).

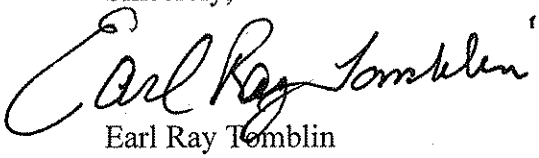
In other words, it is the state office or agency client—not the Attorney General—"who retains control over the course and conduct of the case," and who "retains veto power over any decision made by any appointed private attorneys," subject, of course, to the law and applicable ethical obligations. *See* § 5-3-3(a)(g)(1) and (3), p. 5, lines 76-81.

Enrolled Committee Substitute for House Bill 4007 is problematic because it appears to cede state office and agency decision-making authority to the Attorney General. This problem is exacerbated because West Virginia Code § 5-3-3(c), which is implicated in the bill, expressly provides that the bill's language trumps all other laws that are inconsistent with its provisions, such as the Rules of Professional Responsibility. *See* § 5-3-3(c), p. 2, lines 14-15 ("All laws or parts of laws inconsistent with the provisions hereof are hereby amended to be in harmony with the provisions of this section.").

Finally, the bill contains a technical issue because it is silent as to its impact on existing private counsel contracts. The bill should contain a provision explicitly stating that it does not impair those contracts. *See* W. Va. Const. Art. 3, § 4 (prohibiting the passage of laws impairing contractual obligations).

In sum, I believe Enrolled Committee Substitute for House Bill 4007 contains overly-general language that fails to account for those scenarios where special assistant attorneys general cannot—for practical and ethical reasons—serve at the will and pleasure of the Attorney General. The bill also infringes on state office and agency client decisions and directives and is at odds with the Rules of Professional Conduct adopted by our Supreme Court of Appeals. Lastly, the bill is flawed technically because it could be read to impair existing contracts. For these reasons, I must disapprove the bill and return it. However, I welcome the Legislature to repair the issues I have addressed herein and then return the bill to my desk for signature.

Sincerely,



Earl Ray Tomblin
Governor

cc: The Hon. William P. Cole III
President of the Senate

The Hon. Natalie E. Tennant
Secretary of State