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SENATE BILL NO. 926

Offered January 19, 2018

A BILL to amend and reenact §§ 2.2-507, 2.2-510, and 2.2-510.1 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-510.3, relating to employment of special counsel by the Attorney General or Governor.

Patrons—Obenshain and Black

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-507, 2.2-510, and 2.2-510.1 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-510.3 as follows:

§ 2.2-507. Legal service in civil matters.

A. All legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge, including the conduct of all civil litigation in which any of them are interested, shall be rendered and performed by the Attorney General, except as provided in this chapter and except for any litigation concerning a justice or judge initiated by the Judicial Inquiry and Review Commission. No regular counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity, or official. The Attorney General may represent personally or through one or more of his assistants any number of state departments, institutions, divisions, commissions, boards, bureaus, agencies, entities, officials, courts, or judges that are parties to the same transaction or that are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, institution, division, commission, board, bureau, agency, or entity. The soil and water conservation district directors or districts may request legal advice from local, public, or private sources; however, upon request of the soil and water conservation district directors or districts, the Attorney General shall provide legal service in civil matters for such district directors or districts.

B. The Attorney General may represent personally or through one of his assistants any of the following persons who are made defendant in any civil action for damages arising out of any matter connected with their official duties:

1. Members, agents, or employees of the Virginia Alcoholic Beverage Control Authority;
2. Agents inspecting or investigators appointed by the State Corporation Commission;
3. Agents, investigators, or auditors employed by the Department of Taxation;
4. Members, agents, or employees of the State Board of Behavioral Health and Developmental Services, the Department of Behavioral Health and Developmental Services, the State Board of Health, the State Department of Health, the Department of General Services, the State Board of Social Services, the Department of Social Services, the State Board of Corrections, the Department of Corrections, the State Board of Juvenile Justice, the Department of Juvenile Justice, the Virginia Parole Board, or the Department of Agriculture and Consumer Services;
5. Persons employed by the Commonwealth Transportation Board, the Department of Transportation, or the Department of Rail and Public Transportation;
6. Persons employed by the Commissioner of Motor Vehicles;
7. Persons appointed by the Commissioner of Marine Resources;
8. Police officers appointed by the Superintendent of State Police;
9. Conservation police officers appointed by the Department of Game and Inland Fisheries;
10. Hearing officers appointed to hear a teacher's grievance pursuant to § 22.1-311;
11. Staff members or volunteers participating in a court-appointed special advocate program pursuant to Article 5 (§ 9.1-151 et seq.) of Chapter 1 of Title 9.1;
12. Any emergency medical services agency that is a licensee of the Department of Health in any civil matter and any guardian ad litem appointed by a court in a civil matter brought against him for alleged errors or omissions in the discharge of his court-appointed duties;
13. Conservation officers of the Department of Conservation and Recreation; or
14. A person appointed by written order of a circuit court judge to run an existing corporation or company as the judge's representative, when that person is acting in execution of a lawful order of the court and the order specifically refers to this section and appoints such person to serve as an agent of the Commonwealth.

Upon request of the affected individual, the Attorney General may represent personally or through one of his assistants any basic or advanced emergency medical care attendant or technician possessing a

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59 valid certificate issued by authority of the State Board of Health in any civil matter in which a defense
60 of immunity from liability is raised pursuant to § 8.01-225.

61 C. If, in the opinion of the Attorney General, it is impracticable or uneconomical for such legal
62 service to be rendered by him or one of his assistants, he may, *pursuant to § 2.2-510*, employ special
63 counsel for this purpose, whose compensation shall be fixed by the Attorney General. The compensation
64 for such special counsel shall be paid out of the funds appropriated for the administration of the board,
65 commission, division, or department being represented or whose members, officers, inspectors,
66 investigators, or other employees are being represented pursuant to this section. Notwithstanding any
67 provision of this section to the contrary, the Supreme Court may employ its own counsel in any matter
68 arising out of its official duties in which it, or any justice, is a party.

69 D. Nothing herein shall limit the powers granted in § 16.1-88.03.

70 **§ 2.2-510. Employment of special counsel generally.**

71 A. No special counsel shall be employed for or by the Governor or any state department, institution,
72 division, commission, board, bureau, agency, entity, official, justice of the Supreme Court, or judge of
73 any circuit court or district court except, *subject to subsection B*, in the following cases:

74 1. When the Governor determines that, because of the nature of the legal service to be performed,
75 the Attorney General's office is unable to render such service, then the Governor shall issue an
76 exemption order stating with particularity the facts and reasons leading to the conclusion that the
77 Attorney General's office is unable to render such service. The Governor may then employ special
78 counsel to render such service as he may deem necessary and proper. The compensation for such special
79 counsel shall be paid out of the funds appropriated for the administration of the board, commission,
80 division, or department to be represented or whose members, officers, inspectors, investigators, or other
81 employees are to be represented pursuant to this section.

82 2. In cases of legal services in civil matters to be performed for the Commonwealth, where it is
83 impracticable or uneconomical for the Attorney General to render such service, he may employ special
84 counsel whose compensation shall be paid out of the appropriation for the Attorney General's office.

85 3. In cases of legal services in civil matters to be performed for any state department, institution,
86 division, commission, board, bureau, agency, entity, official, justice of the Supreme Court, or judge of
87 any circuit court or district court where it is impracticable or uneconomical for the Attorney General's
88 office to render such service, special counsel may be employed but only as set forth in subsection C of
89 § 2.2-507, upon the written recommendation of the Attorney General, who shall approve all requisitions
90 drawn upon the Comptroller for warrants as compensation for such special counsel before the
91 Comptroller shall have authority to issue such warrants.

92 4. In cases where the Attorney General certifies to the Governor that he is unable to render certain
93 legal services, the Governor may employ special counsel or other assistance to render such services as
94 may be necessary.

95 *B. The Attorney General shall not employ special counsel under any of the circumstances listed in*
96 *subdivision A 2, 3, or 4 unless he makes a written determination prior to entering into such contract*
97 *that such representation is both cost-effective and in the public interest. Any written determination shall*
98 *include specific findings for each of the following factors:*

99 1. *There do not exist sufficient and appropriate legal and financial resources within the Attorney*
100 *General's office to handle the matter;*

101 2. *An estimate of the time and labor required; the novelty, complexity, and difficulty of the questions*
102 *involved; and the skill requisite to perform the legal services properly;*

103 3. *If applicable, the geographical area where the legal services are to be provided; and*

104 4. *The amount of experience desired for the particular kind of legal services to be provided and the*
105 *nature of special counsel's experience with similar issues or cases.*

106 C. *Copies of any executed contract, with privileged information redacted, entered into by the*
107 *Governor or Attorney General and the written determination made pursuant to subsection B shall be*
108 *posted on the website of the Governor or Attorney General, as applicable, for public inspection within*
109 *five business days after the date the contract is executed and shall remain posted on the website for the*
110 *duration of the contract, including any extensions or amendments thereto. Any payment of fees shall be*
111 *posted on the respective website of the Governor or Attorney General, as applicable, within 15 days*
112 *after the payment of such fees to special counsel and shall remain posted on the website for at least one*
113 *year thereafter. The agency responsible for payment of fees to special counsel shall notify the Attorney*
114 *General within seven days of payment of such fees, provided that, notwithstanding the provisions of this*
115 *subsection and subsection D, the Attorney General may temporarily not disclose information set forth in*
116 *this subsection and subsection D upon making a written determination that (i) such action is necessary*
117 *to protect attorney-client or otherwise privileged information or (ii) immediate disclosure of the*
118 *existence of special counsel, or any other sensitive information, could compromise the initiation,*
119 *handling, or conclusion of any investigation or case matter handled by the Office of the Attorney*
120 *General or special counsel and might put the Commonwealth and its citizens at a disadvantage.*

However, once a case is filed in the matter, the disclosure provisions of this subsection and subsection D shall apply.

D. The Governor and Attorney General shall each submit an annual report and an executive summary to the General Assembly describing the use of special counsel no later than the first day of each regular session of the General Assembly. The executive summaries shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website. The reports shall:

1. Identify all new contracts for special counsel entered into during the year and all previous contracts for special counsel that remain current during any part of the year and for each contract describe: the name of the special counsel with whom the Governor or Attorney General has a contract, including the name of the attorney's law firm; the general nature and status of the legal matter; the amount of any recovery; and the amount of any fee paid. Once a case is filed in which representation is being provided by special counsel, such report shall also contain the specific nature of the legal matter and the parties to the case; and

2. Once a case is filed in which representation is being provided by special counsel, such report shall include copies of any written determinations made under subsection B during the year.

§ 2.2-510.1. Open negotiation for employment of special counsel.

A. No state agency or state agent shall enter into a contingency fee contract for legal services in which contingency fees and expenses are reasonably anticipated to exceed \$100,000 until an open and competitive negotiation process has been undertaken in accordance with the provisions of the Public Procurement Act (§ 2.2-4300 et seq.), applied mutatis mutandis. The contract shall be awarded to the attorney or firm that submits the most competitive proposal to provide such services considering the cost of the services, the qualifications of the attorney or firm to provide the services, the experience of the attorney or firm with similar legal matters, legal expertise generally, and such other relevant factors as may be identified by the Attorney General.

B. No state agency or state agent shall enter into a contingency fee contract that provides for special counsel to receive a contingency fee, exclusive of reasonable costs and expenses, in excess of:

1. Twenty-five percent of any recovery that does not exceed \$10 million; plus
2. Twenty percent of any portion of such recovery that exceeds \$10 million but that does not exceed \$15 million; plus
3. Fifteen percent of any portion of such recovery that exceeds \$15 million but that does not exceed \$20 million; plus
4. Ten percent of any portion of such recovery that exceeds \$20 million but that does not exceed \$25 million; plus
5. Five percent of any portion of such recovery that exceeds \$25 million.

The dollar figures contained in subdivisions 1 through 5 refer to the Commonwealth's proportionate share of the recovery in any contingency fee case. In no event shall the Commonwealth's proportionate share of a contingency fee payable in such a case exceed \$50 million, exclusive of reasonable costs and expenses and irrespective of the number of lawsuits filed or the number of special counsel retained to achieve the recovery.

A contingency fee shall not be based on penalties or civil fines awarded or any amounts attributable to penalties or civil fines.

C. The provisions of this section shall not apply to any contracts for legal fees entered into pursuant to § 2.2-507 for the purpose of implementing the Virginia Debt Collection Act (§ 2.2-4800 et seq.).

§ 2.2-510.3. Attorney General to retain control over special counsel.

A. Neither the Governor nor the Attorney General shall enter into a contract with special counsel unless the following requirements are met throughout the contract period and any extensions thereof:

1. The Attorney General or his representative shall retain control over the course and conduct of the case;
2. Subject to the Code of Professional Responsibility for attorneys, the Attorney General or his representative shall be personally involved in overseeing the litigation;
3. Subject to the Code of Professional Responsibility for attorneys, the Attorney General or his representative shall retain the authority to reject any decisions made by special counsel;
4. Subject to the Code of Professional Responsibility for attorneys, the Attorney General or his representative shall provide guidance to special counsel regarding, and shall be kept informed by special counsel regarding the results of, all settlement conferences; and

5. Subject to the Code of Professional Responsibility for attorneys, decisions regarding settlement of the case shall be reserved exclusively to the discretion of the Attorney General, his representative, or the appropriate agency as prescribed by law.

B. For cases in which the Attorney General has a conflict of interest pursuant to § 2.2-510.2, counsel to the Governor shall retain control over special counsel.