

1 **RETENTION OF OUTSIDE COUNSEL, EXPERT**
2 **WITNESSES, AND LITIGATION SUPPORT SERVICES BY**
3 **THE ATTORNEY GENERAL'S OFFICE**

4 2012 GENERAL SESSION

5 STATE OF UTAH

6 **Chief Sponsor: J. Stuart Adams**

7 House Sponsor: _____

8
9 **LONG TITLE**

10 **General Description:**

11 This bill enacts provisions relating to the retention of outside counsel, expert witnesses,
12 and litigation support services by the attorney general's office.

13 **Highlighted Provisions:**

14 This bill:

- 15 ▶ defines terms;
- 16 ▶ establishes requirements relating to procurement by the attorney general's office of
17 outside counsel, an expert witness, or litigation support services;
- 18 ▶ establishes limitations and requirements on the ability of the attorney general's
19 office to enter into a contingent fee contract with outside counsel;
- 20 ▶ establishes requirements for the protection, retention, and disclosure of contracts
21 and other information relating to contracts described in this bill; and
- 22 ▶ requires the attorney general's office to produce an annual report on the use of
23 contingent fee contracts for outside counsel.

24 **Money Appropriated in this Bill:**

25 None

26 **Other Special Clauses:**

27 None



28 **Utah Code Sections Affected:**

29 ENACTS:

30 **67-5-30**, Utah Code Annotated 1953



32 *Be it enacted by the Legislature of the state of Utah:*

33 Section 1. Section **67-5-30** is enacted to read:

34 **67-5-30. Retention of outside counsel, expert witnesses, and litigation support**
35 **services -- Contingent fee agreements -- Report on contingent fee agreements.**

36 (1) As used in this section:

37 (a) "Expert witness" means a person whose knowledge, skill, experience, training, or
38 education in a scientific, technical, or other specialized area would enable the person to give
39 testimony under Rule 702 of the Utah Rules of Evidence.

40 (b) "Litigation support services" means services that the attorney general determines
41 are needed for the purpose of fulfilling the duties imposed on the attorney general by the Utah
42 Constitution or the Utah Code.

43 (c) "Outside counsel" means an attorney, group of attorneys, or a law firm, that are not
44 employees of the attorney general's office.

45 (d) "Procurement process" means an invitation for bids, a request for proposals,
46 obtaining quotes, or another procurement process.

47 (2) The attorney general's office may use a request for proposals or any other type of
48 procurement process, or an exception to using a procurement process that is permitted under
49 Title 63G, Chapter 6, Utah Procurement Code, to retain outside counsel, an expert witness, or
50 litigation support services.

51 (3) The attorney general's office may not enter into a contingent fee contract with
52 outside counsel, unless, subject to Subsection (4), before entering into the contract, the attorney
53 general's office makes a written determination to enter into a contingent fee contract, that
54 includes:

55 (a) a finding:

56 (i) that the contingent fee contract is cost-effective and in the public interest;

57 (ii) regarding whether the attorney general's office has the financial and legal resources
58 to handle the matter without entering into a contingent fee contract;

59 (iii) regarding the time and labor that would be required if the attorney general's office
60 were to handle the matter internally;

61 (iv) regarding the novelty, complexity, and difficulty of the matter; and

62 (v) regarding the requisite skills and skill level required to handle the matter;

63 (b) a description of the geographic location where the outside attorney's services will
64 be provided; and

65 (c) a description of the outside attorney's qualifications to handle the matter.

66 (4) The attorney general's office may not enter into a contingent fee contract using a
67 sole source procurement.

68 (5) (a) Within five days after the day on which the attorney general's office enters into a
69 contingent fee contract, the attorney general's office shall post on the attorney general's office
70 website a copy of the contract and the determination described in Subsection (3).

71 (b) A contract and determination posted under Subsection (5)(a) shall remain posted
72 until the later of:

73 (i) the day on which the contract, and any extensions of the contract, come to an end; or

74 (ii) the period described in Subsection (5)(d).

75 (c) The attorney general's office shall, within 15 days after the day on which the
76 payment is made, post on the attorney general's office website information relating to any
77 payment made on a contingent fee contract, including:

78 (i) the name of the payee;

79 (ii) the amount of the payment; and

80 (iii) a copy of the contract under which the payment is made.

81 (d) The information described in Subsection (5)(c) shall remain posted on the website
82 until one year after the day on which the payment is made.

83 (6) Subsection (5) does not apply to a contract awarded under Subsection (7)(b).

84 (7) The attorney general may retain outside counsel, an expert witness, or litigation
85 support services without engaging in a procurement process, if:

86 (a) the health, safety, or welfare of the state, citizens of the state, or a state agency is, or
87 will be, at risk and, due to time constraints or other matters, engaging in a procurement process
88 will inhibit prevention or mitigation of the risk; or

89 (b) public disclosure of, or relating to, the procurement would:

90 (i) hinder or impair legal strategies or tactics;
91 (ii) cause harm to a party or potential party to a proceeding, a third party, the state, or a
92 state agency; or

93 (iii) compromise a need to maintain the confidentiality of a matter.

94 (8) Before retaining outside counsel, an expert witness, or litigation support services
95 under Subsection (7), the attorney general's office shall make a written determination to retain
96 outside counsel, an expert witness, or litigation support services without engaging in a
97 procurement process that:

98 (a) describes the grounds, described in Subsection (7), upon which the action is taken;
99 and

100 (b) states the facts upon which the determination is based.

101 (9) When retaining outside counsel, an expert witness, or litigation support services
102 under Subsection (7), the attorney general's office shall take measures to, if possible and to the
103 extent practicable, ensure competition in the process of retaining outside counsel, an expert
104 witness, or litigation support services.

105 (10) (a) A contract described in Subsection (7)(a) and the written determination
106 relating to the contract, described in Subsection (8), are public documents, unless the
107 provisions of Subsection (7)(b) apply to the contract.

108 (b) A contract described in Subsection (7)(b) and the written determination relating to
109 the contract, described in Subsection (8), are protected documents for purposes of Title 63G,
110 Chapter 2, Government Records Access and Management Act, and may not be released until
111 the need for prohibiting public disclosure, described in Subsection (7)(b), has passed, at which
112 time the attorney general's office shall post the contract, and the written determination relating
113 to the contract, described in Subsection (8), on the attorney general's office website.

114 (c) Documents posted on the attorney general's office website under Subsection (10)(b)
115 shall remain on the website for at least one year after the day on which the documents are first
116 posted.

117 (11) The attorney general shall retain a contract described in this section, the written
118 determination relating to the contract, described in Subsection (3) or (8), and all financial
119 records relating to the contract, for the later of:

120 (a) four years after the day on which the contract, and any extension of the contract,

121 ends; or

122 (b) four years after the day on which the contract, any extension of the contract, and the
123 written determination are made public.

124 (12) A contract awarded by the attorney general's office to outside counsel shall require
125 that the outside counsel provide to the attorney general's office detailed time records, in
126 increments of no greater than one-tenth of an hour, of the billable time of each attorney or
127 paralegal who works on the matter to which the contract relates.

128 (13) Before January 31 of each year the attorney general's office shall provide a written
129 report to the president of the Senate and the speaker of the House of Representatives relating to
130 the award of contingent fee contracts, by the attorney general's office, that:

131 (a) identifies all current contingent fee contracts and all contingent fee contracts
132 entered into during the preceding calendar year, other than a contract described in Subsection
133 (7)(b) that has not been publicly disclosed;

134 (b) identifies all contingent fee contracts described in Subsection (7)(b) that were
135 disclosed to the public under Subsection (10)(b) during the preceding calendar year;

136 (c) includes copies of the written determinations, described in Subsection (3) or (8),
137 that relate to the contracts described in Subsection (13)(a) or (b);

138 (d) describes for each of the contracts identified in the report:

139 (i) the name of the outside counsel and the outside counsel's law firm;

140 (ii) the nature and status of the representation; and

141 (iii) the parties involved in the legal matter;

142 (e) describes all amounts received by the attorney general's office during the preceding
143 calendar year as a result of a contingent fee contract; and

144 (f) describes all contingent fees paid by the attorney general's office during the
145 preceding calendar year.

146 (14) The attorney general's office shall post and maintain on its website, on an ongoing
147 basis, the most recent written report described in Subsection (13).

Legislative Review Note
as of 2-13-12 10:30 AM

Office of Legislative Research and General Counsel