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## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

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**2013 Assembly Bill 27**

**Assembly Amendment 4**

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*Contact:* Jessica Karls-Ruplinger, Senior Staff Attorney (266-2230)

### **ASSEMBLY BILL 27**

Assembly Bill 27 provides that a state agency may not contract for legal services on a contingent fee basis, unless the Governor makes a written determination that contracting for legal services for the state on a contingent fee basis is cost-effective and in the public interest and the other requirements in the bill, described below, are satisfied.

### **Written Determination**

Under the bill, the prohibition on contracting for legal services for the state on a contingent fee basis does not apply if the Governor makes a written determination that such contracting is cost-effective and in the public interest. In the written determination, the Governor must include all of the following: (1) a finding that there are sufficient and appropriate legal and financial resources in the Attorney General's office to contract for the legal services; (2) the amount of time and labor required to perform the legal services, including the novelty, complexity, and difficulty of the legal issues involved and the required skill; (3) the geographic area where the legal services are to be provided; and (4) the amount of experience with similar legal issues or cases needed for the particular type of legal services to be provided.

### **Submission of Proposals**

Under the bill, if the Governor makes a written determination that contracting for legal services for the state on a contingent fee basis is cost-effective and in the public interest, the Governor must invite proposals to be submitted, unless the Governor determines that inviting proposals is not feasible and the Governor sets forth the basis for this determination in writing.

### **Limits on Contingency Fees**

The bill places limits on contingency fees that can be provided under a contingency fee contract. Specifically, no contract may provide an aggregate contingency fee that is more than any of the following:

- If the recovery is less than \$10 million, 25% of the recovery.
- If the recovery is at least \$10 million but less than \$15 million, 20% of the recovery.
- If the recovery is at least \$15 million but less than \$20 million, 15% of the recovery.
- If the recovery is at least \$20 million but less than \$25 million, 10% of the recovery.
- If the recovery is at least \$25 million, 5% of the recovery.

Further, the aggregate contingency fee for one action may not exceed \$30 million, excluding reasonable costs and expenses, without regard to the number of attorneys retained or the number of lawsuits filed. A contingency fee may not be based on penalties or fines or any amounts attributable to penalties or fines.

### **Standard Contract Language**

Under the bill, every contingency fee contract must contain standard language that is developed by the Governor. The standard language must outline all the requirements related to attorney records, described below, and provide for all of the following during the period of the contract and during any extension of the contract:

- The attorneys for the Governor and the Attorney General to retain control over the course and conduct of the case.
- An attorney employed by the state who has supervisory authority to be personally involved in overseeing the case.
- The attorneys employed by the state to have the power to reject any decisions made by any attorney retained under the contract.
- Any defendant in the case to be able to contact the lead attorney employed by the state without having to confer with an attorney retained under the contract.
- An attorney employed by the state with supervisory authority to attend all settlement conferences.
- An attorney employed by the state to have exclusive discretion regarding settlement decisions.

### **Information Posted on the Internet**

The bill requires that the following items be available to the public on the Internet site of the Office of the Governor: (1) a copy of any contingency fee contract and the corresponding written determination, described above, during the period beginning five days after the contract is entered into and ending when the contract and all of its extensions expire or are terminated; and (2) notice of the amount of any contingency fees paid under the contract during the period beginning 15 days after payment is made and ending 365 days after the payment is made.

### **Attorney Records**

Under the bill, an attorney who is party to a contingency fee contract must, during the period beginning from the date the contract is entered into until four years after the contract and all of its extensions expire or are terminated, do all of the following: (1) maintain records, including documentation of all expenses, disbursements, charges, credits, receipts and invoices, and other financial transactions that relate to the provision of legal services under the contract; (2) make all records available, upon request, for inspection and copying as provided under the state Open Records Law; and (3) maintain current records detailing the time, in increments no greater than 1/10<sup>th</sup> of an hour, that attorneys and paralegals spent working under the contract and provide the record, as soon as practically possible, to the Governor upon request.

### **Governor's Report to Legislature**

The bill requires the Governor to annually, no later than February 1, submit a report to the Legislature that describes the use of contingency fee contracts. The report must include all contracts for contingency fees entered into, and all contracts that were active, in the year prior to the submittal of the report. For each contract, the report must include the name of the attorney and the attorney's law firm with which the agency has contracted; the nature and status of the legal matter under contract; the name of the parties to the legal matter; the amount of any recovery; and the amount of any contingency fee paid. Lastly, the report must include copies of the Governor's written determinations, described above.

### **ASSEMBLY AMENDMENT 4**

Assembly Amendment 4 provides that the bill only applies to executive branch agencies, and not to the Legislature or judiciary, and the amendment also makes changes regarding the Governor's written determination, submission of proposals, limits on contingency fees, standard contract language, and information posted on the Internet.

### **Written Determination**

The amendment modifies the required contents of the Governor's written determination that contracting for legal services for the state on a contingent fee basis is cost-effective and in the public interest. As a result, under the amendment, the Governor must include all of the following in the written determination: (1) a finding that the Attorney General's office lacks sufficient and appropriate legal and financial resources, which necessitates the need to contract for the legal services; (2) the estimated

amount of time and labor required to perform the legal services, including the novelty, complexity, and difficulty of the legal issues involved and the required skill; (3) the venue in which the litigation would likely occur; and (4) the amount of experience with similar legal issues or cases needed for the particular type of legal services to be provided.

### **Submission of Proposals**

The amendment involves the Department of Administration (DOA) and its bidding process. Specifically, if the Governor makes a written determination that contracting for legal services for the state on a contingent fee basis is cost-effective and in the public interest, the amendment requires the Governor to request DOA to invite bids to be submitted. DOA must invite bids and ensure that the notice of the bidding process contains any pertinent requirements in the bill. Following the bidding process, the DOA Secretary must recommend a responsible bidder to the Governor, who must make the final determination. The Governor may determine that inviting bids is not feasible, and, if the Governor makes such determination, the Governor must set forth the basis for this determination in writing.

### **Limits on Contingency Fees**

The amendment changes the limits on contingency fees that can be provided under a contingency fee contract. Under the amendment, no contract may provide an aggregate contingency fee that is more than any of the following:

- If the recovery is less than \$10 million, 25% of the recovery.
- If the recovery is at least \$10 million but less than \$15 million, the sum of \$2,500,000 and 20% of the amount by which the recovery exceeds \$10 million.
- If the recovery is at least \$15 million but less than \$20 million, the sum of \$3,500,000 and 15% of the amount by which the recovery exceeds \$15 million.
- If the recovery is at least \$20 million but less than \$25 million, the sum of \$4,250,000 and 10% of the amount by which the recovery exceeds \$20 million.
- If the recovery is at least \$25 million, the sum of \$4,750,000 and 5% of the amount by which the recovery exceeds \$25 million.

The amendment also provides that the limits on contingency fees exclude reasonable costs and expenses, as determined by the court with jurisdiction over the action.

### **Standard Contract Language**

The amendment deletes the provisions relating to the standard contract language.

**Information Posted on the Internet**

Under the amendment, the Governor must post the required information on the Internet site maintained by the Government Accountability Board under s. 16.753, Stats., rather than on the Internet site of the Office of the Governor.

**LEGISLATIVE HISTORY**

Assembly Amendment 4 was introduced by Representative Kuglitsch. On April 4, 2013, the Assembly Committee on Judiciary recommended adoption of the amendment on a vote of Ayes, 8; Noes, 0. On that same date, the committee recommended passage of Assembly Bill 27, as amended, on a vote of Ayes, 5; Noes, 3.

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