

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 57. OUTSIDE COUNSEL CONTRACTS

1 TAC §57.4, §57.5

The Office of the Attorney General (OAG) adopts amendments to 1 TAC Chapter 57, §57.4 and §57.5, relating to OAG process regarding the approval of outside counsel contracts and review of invoices. The amendments are adopted with changes to the proposed text as published in the January 24, 2014, issue of the *Texas Register* (39 TexReg 337).

The purpose of the amendments to §57.4 and §57.5 is to provide a formalized process for the disclosure of potential conflicts of interest by selected outside counsel.

Summary of Comments and Agency Response

Comments pertaining to §57.4 and §57.5 were received from seven individuals. Some of the comments were duplicative and will be addressed together.

One commenter requested that the Agency be required to provide prospective outside counsel with a list of the boards, agencies, commissions, universities, and elected and appointed officials for which an adverse matter must be disclosed. The OAG declines to put that burden on the Agency. A list of state entities and their respective elected or appointed officials can be accessed through State of Texas official locations on the web. Texas.gov has a link to a list of all state agencies, <http://www.texas.gov/en/Discover/Pages/agency-finder.aspx> as well as a link to a list of public institutions of higher education, <http://www.collegefortexans.com/index.cfm?ObjectID=D57D0AC5-AB2D-EFB0-FC201080B528442A&CFID=6678391&CFTOKEN=32084244>. Use of these combined listings will be considered sufficient to comply with this rule.

Some commenters suggested that the conflict-of-interest check to be performed for disclosure under the rule should be only against the state agency seeking representation. The OAG intends that the disclosure reflect the results of a conflict check against the State of Texas as a whole rather than against the one proposed client agency. While the boards, agencies, commissions, and universities of the State are distinct entities in many respects, they share common interests in that each of them is an arm of the State of Texas and each of them owes their existence and authority to the constitution and laws of the State. Accordingly, the OAG is charged by law not with deciding whether the hiring of outside legal counsel is appropriate merely for the

Agency in question but whether the hiring of such counsel is "in the best interest of the State." General Appropriations Act, Article IX, §16.01(a)(3) and Texas Government Code §402.0212. The conflict check and conflict disclosure must be comprehensive in order for the Agency and the OAG to determine whether the hiring of outside counsel is in the best interests of the State of Texas as a whole. The conflict check and disclosure must provide complete, statewide information to allow the OAG to consider the impact of possible conflicts on the interests of the State as a whole.

Some commenters suggested the proposed rules are unnecessary because outside counsel already have for themselves conflict-of-interest policies in place as well as a continuing duty to disclose any conflicts. The OAG considers the proposed rules necessary, despite the internal processes of outside counsel, to provide a formalized process for the disclosure of potential conflicts by the outside counsel to the Agency and the OAG. The comments received suggest that law firms generally run conflict checks with respect to the single state agency seeking outside counsel rather than with respect to all agencies of the State of Texas. Thus, reliance on law firms' current internal procedures would not achieve the purpose of this rule, which is to inform the OAG and the hiring Agency of conflicts a potential outside counsel may have with the State of Texas. Moreover, the OAG has an affirmative legal duty to ensure that the hiring of outside counsel is in the best interests of the State. In the OAG's view, that duty is not adequately discharged by uninformed reliance on law firms' internal conflict-check procedures. The OAG considers the disclosure required by this rule to be necessary to make the required determination of the best interest of the State.

The OAG wishes to make very clear that disclosure of a conflict does not necessarily mean that potential outside counsel will not be selected. The rules are intended to facilitate disclosure as an initial step in the hiring process, not render ineligible outside counsel before they are considered. To that end, the rules are changing to streamline the actions taken by the OAG and the agency once it has considered the disclosures. Some commenters suggested that the term "adverse" could be over inclusive depending upon its meaning. Some commenters also suggested that the term "adverse" was more encompassing than the standards contained in the Disciplinary Rule 1.06 of the Rules of Conduct. The OAG is responding to these comments by changing the term "adverse" to "directly adverse."

Some commenters requested that the term "adverse" be limited to matters in which a formal complaint has been made in the public record, such as in litigation. The OAG agrees and is changing the rule to require disclosure for litigation matters publicly filed in state or federal court.

Some commenters requested certain litigation matters be expressly excluded from the disclosure requirement, such as tax

refund cases, pro bono cases, or cases seeking compensation for exercise of eminent domain authority or reimbursement of costs of litigation and attorney's fees. The OAG declines to make any changes to the rules in response to these comments. Again, the purpose of the rules is disclosure of information. It is the OAG's expectation that the added disclosure requirements of these rules will only rarely result in ineligibility of counsel. Nevertheless, the OAG considers full disclosure of all directly adverse litigation matters in state or federal court to be necessary to allow the OAG and the Agency to make an informed decision about the best interest of the State. Some commenters suggested that requiring disclosures of conflicts could unnecessarily narrow the choices of outside counsel available to agencies. As stated above, the purpose of these rules is to require disclosure of conflicts, and the disclosure of conflicts will not necessarily result in ineligibility of potential outside counsel. If the disclosure of a conflict results in a decision by the Agency not to hire the outside counsel or a decision by the OAG that the hiring would not be in the best interest of the State, the OAG disagrees that this result unnecessarily narrows the potential choices of outside counsel or harms the Agency or the State in any way.

Likewise, some commenters suggested that the disclosure of some conflicts of interest may violate Disciplinary Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct. However, given the changes to the proposed rule, the OAG cannot envision a scenario in which the disclosure of publicly filed litigation matters—which are already in the public domain—would run afoul of the Disciplinary Rules. The OAG does not intend with these rules to require any attorney to violate ethical standards or rules of conduct for the profession. If an attorney has a good faith belief that application of these rules requires such a violation, he or she should contact the OAG or the relevant Agency.

Some commenters suggested the express limitations of the use of appropriated funds in the General Appropriations Act, Section 16.01(a)(4) and Section 16.01(j) of the General Provisions (sometimes referred to as Article IX), Pages IX-61-62 are sufficient to protect the state's interests. The OAG does not consider these limitations on spending appropriated funds to be the sole consideration in determining whether hiring outside counsel is in the best interests of the State. The OAG's duty to determine whether outside counsel is in the best interests of the State exists separately and in addition to these express limitations. Compare id. §§16.01(a)(4) and 16.01(j) with id. §(a)(3). Likewise, the disclosure requirements contained in these rules are not intended solely as a means of implementing those express limitations. The spending limitations referenced in the General Appropriations Act will continue to be addressed at the time of contracting and are set out in the specific outside counsel contractual agreements.

A public hearing on the proposed rules was held on March 6, 2014. Members of the public attended and provided comments that restated the written comments.

The new rules are adopted in accordance with Texas Government Code §402.0212, which requires the OAG to set procedures for approving outside counsel contracts, reviewing outside counsel invoices and charging an administrative fee to outside counsel.

No other code, article or statute is affected by this adoption.

§57.4. *Request for Qualification Process.*

(a) An Agency seeking to obtain legal services from Outside Counsel must publish a Request for Qualifications for Outside Counsel in the Texas State Business Daily for thirty (30) days.

(b) The Request for Qualifications for Outside Counsel publication must contain:

(1) a description of the legal services that the Outside Counsel will provide;

(2) the name and contact information for an Agency employee who should be contacted by an attorney or law firm that intends to submit their qualifications;

(3) the closing date for the receipt of qualifications;

(4) the procedure by which the Agency will make a selection of Outside Counsel;

(5) notice that the selection of and contracting with, Outside Counsel is subject to the approval of the Office of the Attorney General; and

(6) any other information the Agency deems necessary.

(c) After the closing date for the receipt of qualifications, the Agency may select an Outside Counsel. The Agency may only select an Outside Counsel that complied with the Request for Qualifications for Outside Counsel. The Agency shall make the selection of Outside Counsel:

(1) on the basis of demonstrated competence and qualifications to perform the legal services; and

(2) for a fair and reasonable price, which includes, but is not limited to, the hourly rates or fixed fee basis or fee schedule and expenses for legal services.

(d) Conflict of Interest.

(1) After selecting the Outside Counsel, the Agency shall require the law firm to submit a written disclosure statement identifying every matter in which the firm represents, or has represented, within the past calendar year, any entity or individual in any litigation matter in which the entity or individual is directly adverse to the State of Texas or any of its boards, agencies, commissions, universities, or elected or appointed state agency officials in connection with their official job duties and responsibilities. "Litigation" means the matter has been filed in the public record in either state or federal court.

(2) If a disclosure statement is submitted, it must include a short description of the nature of the matter and the relief requested or obtained in each matter and any identifying cause or case number.

(e) The Agency shall determine given the disclosure statement whether to continue with its choice of Outside Counsel.

§57.5. *Outside Counsel Contract.*

(a) Except as authorized by law, an Outside Counsel Contract or any amendment to an Outside Counsel Contract must be approved by the Office of the Attorney General to be valid and enforceable.

(b) When entering into an Outside Counsel Contract, an Agency and Outside Counsel must use the Outside Counsel Contract template promulgated by the Office of the Attorney General. The contract template and instructions on submitting it are available on the Office of the Attorney General's official website or upon request from the General Counsel Division of the Office of the Attorney General.

(c) In the event of an inconsistency between this chapter and an executed Outside Counsel Contract, the contract shall prevail.

(d) Once an Agency selects an Outside Counsel, the Agency shall submit one copy of its proposed Outside Counsel Contract to the Office of the Attorney General for approval pursuant to this chapter. The Outside Counsel Contract must be signed by an authorized representative of the Outside Counsel and the chief administrator of the Agency, or authorized designee.

(e) Agency shall submit to the OAG the disclosure statement previously submitted by the selected Outside Counsel to the Agency. If the Agency is satisfied in its choice of Outside Counsel selected, the Agency shall submit to the OAG an affirmative statement that it is satisfied in its choice of selected Outside Counsel notwithstanding the information contained in the disclosure statement.

(f) Upon receipt of a proposed Outside Counsel Contract, the Office of the Attorney General will review the contract and either approve or reject it based upon the best interest of the State and compliance with state law.

(g) If the Office of the Attorney General approves a proposed Outside Counsel Contract, an authorized representative of the Office of the Attorney General will indicate that approval on the contract and return the signed copy to the Agency.

(h) If the Office of the Attorney General rejects a proposed Outside Counsel Contract, it will contact the submitting Agency to discuss the basis for the rejection and to explore whether revisions to the proposed contract could rectify the basis for the rejection. In the event the proposed contract is rejected and rectifying amendments are not acceptable or possible, the Office of the Attorney General will contact the submitting Agency to discuss alternatives to representation by the selected Outside Counsel.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 936-1180



PART 7. STATE OFFICE OF ADMINISTRATIVE HEARINGS

CHAPTER 169. PROCEDURES FOR ADVANCING SECURITY FOR COSTS AND ASSIGNING RESPONSIBILITY FOR COSTS IN HEARINGS FOR THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION REGARDING MEDICAID PAYMENT HOLDS AND RECOUPMENT

1 TAC §§169.1, 169.3, 169.5, 169.7

The State Office of Administrative Hearings (SOAH) adopts new Chapter 169, §§169.1, 169.3, 169.5, and 169.7, concerning Pro-

cedures for Advancing Security for Costs and Assigning Responsibility for Costs in Hearings for the Texas Health and Human Services Commission Regarding Medicaid Payment Holds and Recoupment. The new chapter is adopted without changes to the proposed text as published in the March 28, 2014, issue of the *Texas Register* (39 TexReg 2229) and will not be republished.

The new chapter is adopted pursuant to the 83rd Legislative Session, Senate Bill 1803, which states that SOAH and the commissioner of the Texas Health and Human Services Commission (HHSC) shall jointly adopt rules regarding security for costs that a provider must advance when the provider requests an expedited payment hold administrative hearing or elects an administrative hearing at SOAH concerning an overpayment recoupment claim.

New §169.1 sets forth the statement of purpose and scope for the new chapter. New §169.3 sets forth the definition of words and terms used in the new chapter. New §169.5 provides the section of the Texas Administrative Code that shall govern the procedures for a provider to advance security for costs related to an expedited administrative hearing conducted pursuant to Texas Government Code §531.102, and for administrative hearings conducted pursuant to Texas Government Code §531.1201. New §169.7 sets forth the responsibilities for costs for expedited administrative hearings conducted pursuant to Texas Government Code §531.102 and for administrative hearings conducted pursuant to Texas Government Code §531.1201.

No comments regarding the new chapter were received during the 30 day comment period.

The new chapter is adopted under Texas Government Code, Chapter 2003, §2003.050, which authorize SOAH to establish procedural rules for its hearings, and Texas Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The new chapter affects Texas Government Code, Chapters 531, 2001 and 2003.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 14, 2014.

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PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 251. 9-1-1 SERVICE STANDARDS

1 TAC §§251.2, 251.7, 251.10, 251.13

The Commission on State Emergency Communications (CSEC) adopts amendments to §§251.2, 251.7, and 251.13 without changes to the proposed text as published in the February 28,