

Date of Hearing: June 28, 2017

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

SB 292 (Bates) – As Amended April 5, 2017

SENATE VOTE: 40-0

SUBJECT: Counties: contract legal counsel: auditor-controller.

SUMMARY: Requires county boards of supervisors to obtain independent legal counsel to assist a county auditor-controller who requests such assistance, if a county counsel or district attorney would have a conflict of interest in representing the auditor-controller. Specifically, **this bill:**

- 1) Expands existing law that governs instances in which a county counsel or district attorney would have a conflict of interest in representing a county assessor or a county sheriff, by requiring, upon request of a county auditor-controller, a board of supervisors to contract with and employ legal counsel to assist the auditor-controller in the performance of his or her duties in any case where the county counsel or the district attorney would have a conflict of interest in representing the auditor-controller.
- 2) Allows a county auditor-controller to initiate an ex parte proceeding before the presiding judge of the superior court, after giving notice to the county counsel or the district attorney, in the event that the board of supervisors does not concur with the auditor-controller that a conflict of interest exists. The county counsel or district attorney may file an affidavit in the proceeding in opposition to, or in support of, the auditor-controller's position.
- 3) Requires a presiding superior court judge that determines in any ex parte proceeding that a conflict actually exists to also rule whether representation by the county counsel or district attorney through the creation of an "ethical wall" is appropriate, if requested by one of the parties. The factors to be considered in this determination of whether an "ethical wall" should be created are: equal representation; level of support; access to resources; zealous representation; or, any other consideration that relates to proper representation.
- 4) Requires the auditor-controller's office to pay its own legal costs and all costs incurred in the action by the opposing party if a court determines that the action brought by the auditor-controller is frivolous and in bad faith, as specified.
- 5) Requires a board of supervisors to immediately employ legal counsel to assist the auditor-controller if the presiding judge determines that a conflict of interest does exist, and that representation by the county counsel or district attorney through the creation of an ethical wall is inappropriate.
- 6) Defines "conflict of interest" to mean a conflict of interest as defined in Rule 3-310 of the Rules of Professional Conduct of the State Bar of California, as construed for public attorneys.
- 7) Provides that these provisions also apply to any matter brought after an auditor-controller leaves office if the matter giving rise to the need for independent legal counsel was within the

scope of the duties of the auditor-controller while in office, and the auditor-controller would have been authorized under this bill to request the appointment of independent legal counsel.

- 8) Provides that, if the Commission on State Mandates determines that this bill contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to current law governing state mandated local costs

EXISTING LAW requires a county board of supervisors, at the request of the county assessor or county sheriff, to obtain outside counsel if the county counsel or the district attorney would have a conflict of interest in representing the sheriff or assessor, pursuant to the provisions that this bill would extend to such situations with auditor-controllers.

FISCAL EFFECT: According to the Senate Appropriations Committee, "Unknown, potentially significant reimbursable costs (local funds/General Fund) to counties to provide outside counsel to the auditor-controller to the extent that the Commission on State Mandates determines that this measure imposes a state-mandated local program. The extent to which this requirement would be triggered is unknown, but the costs for one instance could surpass \$50,000 depending on the complexity of the issue, the length of the services required, and if the matter includes litigation."

COMMENTS:

- 1) **Bill Summary.** This bill requires county boards of supervisors to obtain independent legal counsel to assist a county auditor-controller who requests such assistance, if a county counsel or district attorney would have a conflict of interest in representing the auditor-controller. This bill is sponsored by Orange County Auditor-Controller Eric Woolery.
- 2) **Author's Statement.** According to the author, "There have been instances in recent years where conflicts have arisen between auditor-controllers and the board of supervisors of their respective counties regarding questionable payments the board requests the auditor-controller (to) execute.

"The Orange County Auditor-Controller, the sponsor of SB 292, has experienced two major instances where he questioned whether payments requested by his board were legal. The first questionable payment requested of Mr. Woolery occurred when a member of the Orange County Board of Supervisors who had previously signed an agreement not to take a pension requested the county make his pension payments retroactively. When Mr. Woolery questioned the legality of the payments, the county counsel, who had been appointed by the board of supervisors, recommended that Mr. Woolery make the payments or face criminal charges. Under current law, Mr. Woolery had no way to seek outside legal counsel for an opinion as to whether a payment for which he could be held liable was in fact legal.

"On a second occasion, Mr. Woolery discovered multiple members of the Board of Supervisors had spent hundreds of thousands of dollars of county money on mass mailers that appeared political in nature. The mailers featured individual supervisors and appeared to violate mass mailing law. Mr. Woolery once again did not have access to an outside legal opinion on whether making the payment for the seemingly illegal campaign material was legal.

"These instances demonstrate the need for legislation that will allow auditor-controllers to have access to outside legal counsel in limited circumstances where county counsel has been

deemed to have a conflict of interest. SB 292 attempts to solve this problem by adding auditor-controllers to an existing list of county officials that may seek the advice of outside counsel if an authorizing body deems there to be a legitimate conflict of interest."

- 3) **Background.** Existing law provides for county powers and governance, including an elected county board of supervisors, an elected county sheriff, an elected district attorney, and an elected assessor. The powers of a county can only be exercised by the board of supervisors or through officers acting under the authority of the board or authority conferred by law. The board supervises the official conduct of all county officers, particularly as their activities pertain to the management and disbursement of public funds. The board of supervisors is also vested with the constitutional authority to provide for the number, compensation, tenure, and appointment of employees.

State law creates additional county officers, including a county auditor and a county counsel. The county auditor can be elected or appointed. The county counsel is appointed by the board of supervisors and is the chief legal advisor to the county. A county counsel may only be removed by a grand jury or the board of supervisors for cause, such as for misconduct, malfeasance, or failing to perform his or her duty.

Under the State Bar of California's Rules of Professional Conduct, a county counsel must represent the interests of the entire county, and state law specifically requires a county counsel to prosecute or defend any action brought by or against the auditor-controller contesting the validity of a payment if the interest of the county is not adverse. If a county counsel has a conflict of interest because he or she cannot ethically represent both sides in a disagreement between the board and county officers that have authority to act independently of the board, the county counsel acts as the legal advisor to the board of supervisors.

In addition, existing law specifically requires a board of supervisors, at the request of its sheriff or assessor, to hire outside counsel when the county counsel or district attorney would have a conflict representing the sheriff or the assessor. The board may ask a court to rule on: (1) if a conflict actually exists, (2) if an "ethical wall" may instead be established, and (3) if the request by the sheriff or assessor was brought frivolously. If the request was frivolous, the sheriff or assessor must pay their own legal costs.

- 4) **Illegal charges.** Existing law penalizes a government official who pays an illegal claim in violation of the law by holding that officer personally liable to the person damaged by that illegal action. Existing law also penalizes an officer of the state or local government or any other person charged with overseeing public moneys with imprisonment in state prison, and disqualifies that person from holding any public office if he or she makes fraudulent charges, embezzles public funds, or willfully refuses or omits to pay over or transfer public money, among other prohibited activities.
- 5) **Office of County Auditor-Controller.** County auditors serve as the chief accounting officers for counties, allocating property tax revenues and performing audits on county departments, special districts, and joint powers authorities. Counties may also create the office of county controller, who is responsible for the county's bookkeeping and check writing. Absent a designation to the contrary, the office of county controller is held by the county auditor. State law permits counties to consolidate the two offices into the office of the county auditor-controller. County auditor-controllers must perform specified audits under state law, and county boards of supervisors can also request other audits.

Most county auditor-controllers are elected officials, but county supervisors can convert the position to an appointed one with majority voter approval. The county auditor-controller is appointed in 11 counties. General law counties may consolidate the auditor-controller's duties with those of the tax collector and treasurer, within the elective or appointive office of the director of finance. Charter counties have constitutional authority to assign the auditor-controller's statutory duties to other officers or structures.

- 6) **Orange County Auditor-Controller.** Orange County's auditor-controller is elected. The combined auditor-controller office came into being in 1982, when the board of supervisors consolidated the formerly independent functions into a single Office of Auditor-Controller. Today, the county's Auditor-Controller is responsible for conducting independent audits of county departments, as well as basic bookkeeping and check writing.

In 1994, Orange County became the largest municipality in U.S. history to file for bankruptcy as a result of the mismanagement of county investments. In the wake of the bankruptcy, investigators concluded that county auditors were too close to their colleagues at the county Treasurer-Tax Collector's office, and had failed to oversee the latter's questionable investments.

In recent years, press reports have documented disputes between the Orange County Auditor-Controller and the board of supervisors, including:

- a) Whether internal audits should be assigned to the Auditor-Controller or the county's Internal Audit Department;
- b) A decision by the Auditor-Controller to withhold pension payments for a county supervisor that the Auditor-Controller deemed illegal; and,
- c) A 2016 decision by the Auditor-Controller to halt payment for mailers that the Auditor-Controller deemed in violation of Fair Political Practices Commission rules.

Existing law requires a county board of supervisors, upon request of the county assessor or sheriff, to contract with legal counsel to assist the assessor or sheriff with duties for which the district attorney or county counsel would have a conflict of interest in representing the assessor or sheriff. Existing law provides for the county assessor or sheriff to initiate an ex parte proceeding before the presiding judge of the superior court in the event the board of supervisors does not concur with the assessor or sheriff that a conflict of interests exists. This bill would expand these provisions to apply to the county auditor-controller.

- 7) **Previous Legislation.** AB 783 (Daly) of 2015 would have given responsibility for internal audits in Orange County to the auditor-controller rather than the board of supervisors. AB 783 was held on the Senate Floor.
- 8) **State Mandate.** This bill is keyed a state mandate, which means the state could be required to reimburse local agencies and school districts for implementing the bill's provisions if the Commission on State Mandates determines that the bill contains costs mandated by the state.

- 9) **Arguments in Support.** Orange County Auditor-Controller Eric Woolery, sponsor of this bill, writes, "Under current law, if a county auditor-controller is presented with an illegal charge or claim from another government agency or elected official, the county auditor-controller is subject to criminal liability if he or she refuses to pay the illegal charge or claim. If the county auditor-controller pays the illegal charge or claim, the county auditor-controller is then personally liable.

"Existing law explicitly declares the county counsel to be the legal advisor of the board of supervisors, but the county auditor-controller cannot retain outside counsel without approval of the board of supervisors. This produces an inherent conflict of interest when the board of supervisors presents a potentially illegal charge or claim to the county auditor-controller. SB 292 resolves this conflict of interest by allowing the county auditor-controller to utilize the existing process that county assessors and county sheriffs use to seek independent counsel."

- 10) **Arguments in Opposition.** None on file.

REGISTERED SUPPORT / OPPOSITION:

Support

Orange County Auditor-Controller [SPONSOR]

State Association of County Auditors

Auditor-Controllers of the following counties:

Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, El Dorado, Fresno, Glenn, Humboldt, Imperial, Kern, Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Riverside, San Benito, San Luis Obispo, San Mateo, Santa Barbara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Ventura, Yolo, and Yuba

Opposition

None on file

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