

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1025 (Dixon)
Version: February 15, 2023
Hearing Date: July 6, 2023
Fiscal: Yes
Urgency: No
ME

SUBJECT

County government: contract legal counsel: elected treasurer-tax collector

DIGEST

In any case where the county counsel or the district attorney would have a conflict of interest in representing the treasurer-tax collector, this bill requires, that upon request of the county treasurer-tax collector, the county board of supervisors must contract with and employ legal counsel to assist the treasurer-tax collector in the performance of their duties. The law currently requires the county board of supervisors to contract with and employ legal counsel to assist the assessor, auditor-controller, or the sheriff when such a conflict arises.

EXECUTIVE SUMMARY

This bill would require the county board of supervisors to provide the treasurer-tax collector with legal counsel when there is a conflict of interest that precludes the district attorney or county counsel from representing them. A process currently exists in the law to provide the county assessor, auditor-controller, or the sheriff with legal counsel when a conflict exists. The court is involved in the process when the county board of supervisors does not agree to provide conflict counsel. The court determines whether it is appropriate for county counsel to erect an ethical wall or more appropriate to require the county board of supervisors to provide independent counsel.

This bill is sponsored by the California Association of County Treasurers and Tax Collectors and supported by the California State Association of County Auditors, Sierra County Auditor-Controller/Treasurer Tax Collector Office, and the State Association of County Auditors. There is no known opposition to the bill. This bill passed out of the Senate Governance and Finance Committee on a vote of 8 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that, except as otherwise provided, the county officers to be elected by the people are the treasurer, county clerk, auditor, sheriff, tax collector, district attorney, recorder, assessor, public administrator, and coroner. (Gov. Code § 24009.)
- 2) Specifies that, except the board of supervisors, sheriff, district attorney, and assessor, any county office that is required to be elective may become an appointive office. In order to change an office from elective to appointive, a proposal shall be presented to the voters of the county and approved by a majority of the votes cast on the proposition. Any county office changed from elective to appointive may be changed back from appointive to elective in the same manner. (Gov. Code § 24009.)
- 3) Provides that, by ordinance, the board of supervisors may consolidate the duties of certain of the county offices in one or more combination, including treasurer and tax collector, treasurer and recorder, treasurer and assessor, and treasurer, and public administrator. (Gov. Code § 24300.).
- 4) Specifies that, in addition to 3) above, the board of supervisors may consolidate the office of auditor, controller, treasurer, tax collector, and director of finance. (Gov. Code § 24300.5)
- 5) Provides that upon request of the assessor, auditor-controller, or the sheriff of the county, the board of supervisors shall contract with and employ legal counsel to assist the assessor, auditor-controller, or the sheriff in the performance of their duties in any case where the county counsel or the district attorney would have a conflict of interest in representing the assessor, auditor-controller, or the sheriff. (Gov. Code § 31000.6 (a).)
- 6) Specifies that in the event that the board of supervisors does not concur with the assessor, auditor-controller, or the sheriff that a conflict of interest exists, the assessor, auditor-controller, or the sheriff, after giving notice to the county counsel or the district attorney, may initiate an ex parte proceeding before the presiding judge of the superior court. The county counsel or district attorney may file an affidavit in the proceeding in opposition to, or in support of, the assessor's, auditor-controller's, or the sheriff's position. (Gov. Code § 31000.6 (b).)
- 7) Provides that the presiding superior court judge that determines in any ex parte proceeding that a conflict actually exists, must, if requested by one of the parties, also rule whether representation by the county counsel or district attorney through the creation of an "ethical wall" is appropriate. (Gov. Code § 31000.6 (c).)
- 8) Specifies that the factors the presiding judge must consider in determining whether an ethical wall should be created are: (1) equal representation, (2) level of support,

- (3) access to resources, (4) zealous representation, or (5) any other consideration that relates to proper representation. (Gov. Code § 31000.6 (c).)
- 9) Provides that if a court determines that the action brought by the assessor, auditor-controller, or sheriff is frivolous and in bad faith, as defined, the assessor's office, auditor-controller's office, or sheriff's office shall pay their own legal costs and all costs incurred in the action by the opposing party. (Gov. Code § 31000.6 (d).)
- 10) Provides that 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, the board of supervisors shall immediately employ legal counsel selected by the presiding judge to assist the assessor, the auditor-controller, or the sheriff. (Gov. Code § 31000.6 (e).)
- 11) Provides that the assessor, the auditor-controller, or the sheriff may recommend specific legal counsel for selection by the presiding judge and that the board of supervisors may also separately recommend specific legal counsel for selection by the presiding judge. (Gov. Code § 31000.6 (e).)
- 12) Requires the presiding judge to consider the counsel compensation rates prevailing in the county for similar work when selecting the counsel. (Gov. Code § 31000.6 (e).)
- 13) Defines, "conflict of interest" as 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. (Gov. Code § 31000.6 (f).)
- 14) Provides that these 5)-13) above also apply to any matter brought after an assessor, auditor-controller, or sheriff leaves office if the matter giving rise to the need for independent legal counsel was within the scope of the duties of the assessor, auditor-controller, or sheriff while in office, and the assessor, auditor-controller, or sheriff would have been authorized under this section to request the appointment of independent legal counsel. (Gov. Code § 31000.6 (g).)

This bill adds a county's treasurer-tax collector to the code section, described in paragraphs 5) through 14) above, that currently enables an assessor, auditor-controller, or sheriff to obtain legal counsel if the county counsel or the district attorney would have a conflict of interest in representing the treasurer-tax collector.

COMMENTS

1. Stated need for this bill

According to the author:

Treasurer-Tax Collectors do not have authorization through Government Code to request outside legal counsel when a conflict of interest exists in

representation. This exclusion leaves those elected officeholders in the position of facing enormous personal financial burden if they need to hire an attorney to represent them when County Counsel cannot provide representation due to a conflict. Historically, Treasurer-tax Collectors have either had to hire outside counsel or had to represent themselves (and were not attorneys) because they did not have outside counsel. Rare conflicts do arise. Should the Legislature wait until the next conflict before acting, it could be too late for the affected individual elected official. AB 1025 will authorize outside legal representation to be approved by the Board of Supervisors to assist the Treasurer-Tax Collector in the performance of their duties in any case where the County Counsel/County Attorney or District Attorney would have a conflict of interest in representing the Treasurer-Tax Collector.

2. Role of the elected treasurer-tax collector

The California Constitution divides the state into counties and tasks the Legislature with developing uniform procedures for their formation, consolidation, and boundary changes. It also requires the Legislature to establish general laws providing for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county. State law provides that each general law county is governed by a five-member board of supervisors. Counties that adopt their own charters may increase the number of supervisors on the board, create additional officers, and assign different powers to those officers.

The board of supervisors controls the exercise of the county's powers and the conduct of its officers. Under state law, 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 also 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 additionally vested with the constitutional authority to provide for the number, compensation, tenure, and appointment of employees (Cal. Const., Article XI, Section One).

As described in the Senate Committee on Governance and Finance analysis of this bill:

California law assigns to county tax collectors the duty to collect all taxes, including real and personal property taxes, school and special district taxes, and taxes on business licenses. As part of these duties, tax collectors administer the billing and collections process for property taxes, determining delinquency and default, and administering the sale of tax-defaulted property.

Most treasurers and tax collectors are elected officials, although some are appointed by the board of supervisors. County supervisors have the authority to combine all of the following offices: treasurer and tax collector, treasurer and recorder, treasurer and assessor, and treasurer and public administrator. [...]

State law creates additional county officers, including a county auditor, and, if appointed by the board of supervisors, a county counsel. The county counsel is the chief legal advisor to the county and is appointed by the board of supervisors for a four-year term. 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.

[A] county counsel must represent the interests of the entire county, and state law specifically requires 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. [. . .] [T]he county counsel is bound by its duty to act as the legal advisor to the board of supervisors.

The Government Code provides a process for the assessor, auditor-controller, or the sheriff to follow in order to gain legal representation when a conflict arises that would preclude the county counsel or district attorney from representing them in a legal matter that arises from the performance of their duties. Under Government Codes section 31000.6, upon request of the assessor, auditor-controller, or the sheriff of the county, the board of supervisors must contract with and employ legal counsel to assist the assessor, auditor-controller, or the sheriff in the performance of their duties in any case where the county counsel or the district attorney would have a conflict of interest in representing the assessor, auditor-controller, or the sheriff. If the supervisors do not agree that a conflict of interest exists, the assessor, auditor-controller, or the sheriff, after giving notice to the county counsel or the district attorney, may initiate an ex parte proceeding before the presiding judge of the superior court. The county counsel or district attorney may file an affidavit in the proceeding in opposition to, or in support of, the assessor's, auditor-controller's, or the sheriff's position. The presiding superior court judge that determines that a conflict actually exists, must, if requested by one of the parties, also rule whether representation by the county counsel or district attorney through the creation of an "ethical wall" is appropriate. If a court determines that the action brought by the assessor, auditor-controller, or sheriff is frivolous and in bad faith, the assessor's office, auditor-controller's office, or sheriff's office shall pay their own legal costs and all costs incurred in the action by the opposing party. 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, the board of supervisors shall immediately employ legal counsel selected by the presiding judge to assist the assessor, the auditor-controller, or the sheriff. The assessor, the auditor-controller, or the sheriff may recommend specific legal counsel for selection by the presiding judge. The board of supervisors may also separately recommend specific legal counsel for selection by the presiding judge. The presiding judge must also consider the counsel compensation rates prevailing in the county for similar work when selecting the counsel.

This Committee unanimously passed AB 3068 (Daly, 2018) to add auditor-controller to the list of county officials who could avail themselves of conflict counsel pursuant to

Government Code section 31000.6. Prior to the enactment of AB 3068 only the sheriff and assessor could obtain legal counsel through Government Code section 31000.6.

The California Association of County Treasurer-Tax Collectors, sponsors of this bill, argue that treasurer-tax collectors should also be covered by Government Code section 31000.6. They write:

The need for this protection only exists in the rare circumstance that County Counsel faces a conflict of interest in representing that county-wide elected official. This is because County Counsel is accountable directly to the Board of Supervisors, not to any county department head or county-wide elected official.

[. . .]

In rare circumstances, such as with regard to County Pool participants which include schools and some special districts, the County Treasurer-Tax Collector must represent all pool participants, and not just the County's own funds. If there were legal challenges associated with a pool management issue, a conflict will arise. Another example is when a Board of Supervisors differs from the Tax Collector on a tax sale matter in potential litigation; the County Counsel may not be able to represent both the Board and the Tax Collector in such situations. Ensuring the Treasurer-Tax Collectors can make prudent and fair decisions in their administration of the tax collection and treasury management duties, without fear of personal financial hardship due to the need to avail themselves of outside counsel at their own expense, legislation is needed to ensure a process is in place for the Board to concur there is a conflict and make administrative and budgeting arrangements in order to secure outside counsel for the Treasurer-Tax Collector. Of note, the protection being proposed in AB 1025 only covers the need for outside counsel in the case of a conflict when the Treasurer-Tax Collector has been acting to administer their statutory duties; in no event would this protection apply to cases where a Treasurer-Tax Collector has acted illegally or criminally in the course of the work.

It is important to note that the vast majority of the time when counsel is needed, County Treasurer-Tax Collectors concur that County Counsel is more than capable of providing this critical legal service to their office. In fact, there is no current known circumstance where a Treasurer-Tax Collector is incurring personal expense to represent themselves in a legal proceeding regarding their administration of duties. However, when a conflict of interest arises, it is a matter of fairness and equity that, when appropriate, a County Board can hire outside counsel to mitigate a conflict of interest under Rule 1.7 of the State Bar of California.

In support, the State Association of County Auditors writes:

Current law specifically states that the county counsel is the legal advisor of the board of supervisors, the county sheriff, and the county auditor, yet the county treasurer may not hire outside counsel without the consent of the board of supervisors. This creates a conflict of interest when it is the board of supervisors presenting an illegal charge or claim to the county treasurer.

AB 1025 fixes this conflict of interest by allowing a county treasurer to obtain legal counsel for matters and actions falling within the duties of his or her office. [. . .] These conflicts are infrequent, but it is critical to ensure the integrity of the process by providing independent counsel.

The examples highlighted by the author and sponsor arguably provide justification for adding the treasurer-tax collector to Government Code section 31000.6. Ultimately the determination of whether a conflict exists and whether to provide conflict counsel to the treasurer-tax collector and at what rate would rest with the court.

SUPPORT

California Association of County Treasurers and Tax Collectors (sponsor)
California State Association of County Auditors
Sierra County Auditor-Controller/Treasurer Tax Collector Office
State Association of County Auditors

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 3068 (Daly, Ch. 307, Stats. 2018) required county boards of supervisors to obtain independent legal counsel to assist a county auditor-controller if a county counsel or district attorney would have a conflict of interest in representing the auditor-controller.

SB 292 (Bates, 2017) was substantially similar to AB 3068. The bill died in the Assembly Committee on Appropriations.

AB 1579 (Kehoe, Ch. 41, Stats. 2001), required each county board of supervisors to provide the county sheriff with independent legal counsel when a conflict of interest arises with county counsel or the district attorney.

PRIOR VOTES:

Senate Governance and Finance Committee (Ayes 8, Noes 0)

Assembly Floor (Ayes 79, Noes 0)

Assembly Appropriations Committee (Ayes 15, Noes 0)

Assembly Local Government Committee (Ayes 8, Noes 0)
