

**2014 Legislative Policy Statement
9th Annual CSA Legislative Summit**

**DISCRETIONARY APPOINTMENT OF COUNTY COUNSEL
BY COUNTY BOARD OF SUPERVISORS
Proposed By: LA PAZ COUNTY**

A. What is the legislative proposal?

It is proposed that legislation be presented that amends A.R.S. §11-531 through §11-539 to reflect that a County Board of Supervisors is empowered to hire and appoint “county counsel” for civil legal representation to the Board, its departments, officers, and board and commissions. Such decision to establish “county counsel” would not be mandatory, but an alternative option available to the Board of Supervisors, instead of using the County Attorney for civil services. The “county counsel” option would be solely within the discretion of the Board of Supervisors and will not require obtaining prior approval from the County Attorney. The County Attorney’s primary duties shall be that as the “public prosecutor”, unless requested by the Board of Supervisors to provide civil legal services.

B. Describe the problem and explain how the proposal solves it.

Currently, the statutes mandate that the elected County Attorney shall be the public prosecutor, as well as the civil legal adviser and representative to the Board of Supervisors and its departments. As a result of these dual representative duties, the attorney-client relationship in this particular government context involve unique rules and present a complex situation with potential conflicts and difficult ethical conundrums predominately relating to the County Attorney’s ethical responsibilities to his “client”.

Due to the hazy and sometimes confusing attorney-client relationship the potential to erode the constitutional separation of powers that exist between the legislative and executive branches of County government is ever present.

Many County Attorneys believe and often specifically state that due to their elected status they represent “the public”, “the people” or “the voters”. In fact, legal seminars designed for civil deputy county attorneys actually instruct the attendees using these aforementioned misconceptions.

Even more concerning is the inherent conflict involving an **elected attorney** who relies upon his own political ambitions and desires to stonewall projects, delay decisions, or provide advice based upon his own self-interests to the detriment of his client, the County.

The County Attorney, like the Board of Supervisors, is an elected officer established in the Arizona Constitution, Article 12, Section 3. This constitutional county officer is afforded those duties and powers as prescribed by the Arizona legislature in statutory law. See, Ariz. Const., Art. 12, Sec. 4.

The power and duties of the County Attorney over civil matters involving the Board of Supervisors, its officers, and departments are specifically contained within A.R.S. § 11-532, which mandates, in pertinent part, the following authority:

“A. The county attorney is the public prosecutor of the county and **shall:**

* * *

4. Draw indictments and informations, **defend actions brought against the county** and prosecute actions to recover recognizances forfeited in courts of record and actions for recovery of debts, fines, penalties and forfeitures accruing to the state or county.

* * *

7. When required, **give a written opinion to county officers** on matters relating to the duties of their offices.

8. Keep a register of official business, and **enter therein every action prosecuted, criminal or civil**, and of the proceedings therein.

9. **Act as the legal advisor to the board of supervisors, attend its meetings and oppose claims against the county which the county attorney deems unjust or illegal.**

* * *

12. **Defend all locally valued and assessed property tax appeals as provided in section 42-16208.**

* * * ”

Emphasis Added.

On the other hand, the power and duties of the Board of Supervisors over civil legal matters is specifically contained within A.R.S. § 11-251(14), which states, “The board of supervisors, under such limitations and restrictions as are prescribed by law, **may:. . . 14. Direct and control the prosecution and defense of all actions to which the county is a party, and compromise them.**” **Emphasis Added.**

As explained by the Arizona Court of Appeals, Division I, in *Romley v. Daughton*, 223 Ariz. 521, 241 P.3d 518 (2010), an analysis of the “*Woodall-Grossetta-Barnes* trilogy” of cases addresses the authority of a Board of Supervisors to hire independent counsel for civil legal matters. The following three cases that comprise the aforementioned “trilogy” outline the limited authority of a County Board of Supervisors to retaining independent civil counsel: *Board of Supervisors v. Woodall*, 120 Ariz. 379, 586 P.2d 628 (1978); *Pima County v. Grossetta*, 54 Ariz. 530, 97 P.2d 538 (1939); and, *County of Santa Cruz v. Barnes*, 9 Ariz. 42, 76 P. 621 (1904).

In a nutshell¹, a review of the aforementioned “trilogy” of cases reveals that since territorial times and under current law, the authority of a Board of Supervisors to hire its own counsel is narrow. Generally, a Board **may not** hire its own counsel to provide legal advice if the County Attorney is available to do so. The exceptions to this rule include, when the county attorney refuses to act, is incapable of acting, or is unavailable.

The determination of “**unavailability**” may include the County Attorney having a conflict of interest; however, the Board cannot seek a declaratory judgment concerning “unavailability” until having attempted and failed to resolve the matter through discussion with the County Attorney under the guidance of the Attorney General.

However, a Board of Supervisors is empowered as the “final authority” controlling cases involving the interests of the county to retain outside litigation counsel under the “implied authority” and discretion contained within A.R.S. § 11-251(14) to, “Direct and control the prosecution and defense of all actions to which the county is a party, and compromise them.”

Although seeking of the County Attorney’s consent to hire **is not** always required there are certain circumstances in addition to those exceptions discussed above that must be present before a Board can do so. However, each situation must be reviewed on a case by case basis. This includes situations where the Board and the County Attorney do not agree how a legal action is to be handled or brought. In other words, there must be a “*lack of harmony*” between the two offices. This disharmony specifically deals with legal strategy not relationships. Under these circumstances, the Board as the “final authority” possesses the unilateral ability to determine that

¹ Legal citations to the above discussed information relating to the Board’s “limited authority” have been deleted due to space limitation; however, is available upon request.

harmony is lacking and may seek independent counsel, even without the consent of the County Attorney. Of course, this does not mean that a Board can indiscriminately deprive the County Attorney of his authority to be the legal representative of the County.

Unfortunately, the current law limiting the authority of a Board of Supervisors to hire independent legal counsel has resulted in several abhorred and shocking cases of malfeasance, misfeasance, unethical misconduct, abuse of authority and legal process by County Attorneys against their own clients, the Board of Supervisors.

A recent textbook example of the type and extent of destructive abuse that can be unwarranted and intentional as illustrated in the disciplinary disbarment of former Maricopa County Attorney Andrew Thomas. A review of the published *Opinion and Order Imposing Sanctions*² from the Presiding Disciplinary Judge, William J. O’Neil in the Arizona Supreme Court Discipline clearly reveals the harmful impact that can be perpetrated upon a Board of Supervisors and County organization by the County Attorney.

Ironically, the initiating fact that first lit the fuse resulting in Thomas’ fervent pursuit of members of the Maricopa County Board of Supervisors relates back to a meeting with a Board member prior to Thomas’ election as County Attorney. At that subject meeting the question was raised whether as County Attorney Thomas would allow the Board of Supervisors to hire its own civil county counsel that answered directly to the Board. Candidate Andrew Thomas agreed to do so. After Thomas’ election the request for independent “county counsel” was formally requested by the Board, which sparked the controversial and unlawful indictments, search warrants, investigations, lawsuits, etc., against the Board.

All these actions were taken against his own client, the Board of Supervisors. In fact, he divulged attorney/client privileged and confidential information in press releases, as well as blocked the Board from hiring outside counsel even though an apparent conflict existed.

A review of the *Thomas* ethics opinion clearly found that the “client” of the County Attorney is the county through its Board of Supervisors. Nowhere did the ethics opinion state that the clients of the County Attorney was “the public” or “the people”, although Thomas argued “the voters”

² See http://www.azcourts.gov/Portals/9/Press%20Releases/2012/041012ThomasAubuchonAlexander_opinion.pdf

were his clients and had a “right to know” what the Board of Supervisors were doing. This contention was held groundless by the Disciplinary Judge.

Clearly, as a public prosecutor who represents the State’s interests the County Attorney represents the State on behalf of the people or general public; however, the real client in civil matters is much more difficult to ascertain when involving governmental entities.

Unfortunately, this is not an isolated incident. Abuse of authority and process can occur at any time due to the nature of human interaction.

As another example of the County Attorney misusing his authority can be found in *Upton v. La Paz County*, 986 P.2d 252, 195 Ariz. 219 (Ariz. App., 1999). In this action, a former County Supervisor, Greg Upton, was sued after he left office for recovery of alleged illegally paid funds for travel/mileage expenses paid during Upton’s term for special projects assigned to him by the Board.

Initially, allegations of misuse of monies were raised by the County Attorney just prior to the General Election. Although only raised in the trial court, the lame-duck County Attorney made these allegations even though he specifically knew of the Supervisor’s travel expenses by attending each Board meeting and actually advised the subject Supervisor of the appropriateness of such charges. Subsequently, Upton lost his re-election due to these allegations. The *Upton* Court held that the issue of estoppel should be heard by the trial court due to affirmative actions taken by county officials, including the County Attorney, to pay the reimbursements properly relied upon by Supervisor Upton. Clearly, the timing of the misuse of money allegations through the County Attorney’s actions were calculated and made for purely political purposes.

Moreover, other counties’ Board of Supervisors has experienced legal conflicts with their County Attorney. For instance, in the late 1980’s Gila County’s Board was sued over budgeting issues by its County Attorney. Besides representing his own office, the County Attorney also represented several other elected officials.

How can you trust the legal advice of your own attorney when he may sue you over doing your duties??

THE SOLUTION: In several other States' throughout the Country this ethical challenge has been addressed by a statutory option. The California and Michigan State Legislatures have promulgated statutes providing that County Boards of Supervisors (aka County Commissioners) are empowered, at each Board's sole discretion, to appoint "county counsel" or "corporate counsel" to represent the Board as well as other County officers, County departments, boards and commissions.

In these States, the County Attorney is designated as an elected "county prosecutor" who predominating pursues only matters of a criminal nature, unless required by or approved by the Board of Supervisors to handle civil actions (i.e., dependencies, etc.).

Under the "county counsel" system, the County Attorney does not have the authority to prevent the Board from hiring its own civil counsel. The decision and appointment of "county counsel" is left to the Board of Supervisors' discretion. This option is available in both charter and general law counties. The position of "county counsel" serves as a legal adviser and attorney to the County Board, its departments and officers; and serves as an at-will employee.

In the States that offer this option, the differing requirements to specifically establish "county counsel" run the gambit, from needing an unanimous or super-majority vote of the Board; to limiting the "county counsel" option only to smaller counties (e.g., with under 500,000 residents).

Clearly, those entities with "home rule" or charters could seek voter approval to established appointed "corporate counsel".

Although a Board may currently have no problem with their County Attorney providing services; every four years an election occurs and a new County Attorney may be elected that is uncooperative and does not have the Board's interests in mind.

Frankly, each County is only one election away from potential disastrous consequences. Regrettably, the pursuit of public office will always attract certain individuals of

questionable ethics and hidden agendas who based decisions and take actions that benefit their self-interests and political ambitions. By having an option to select independent county counsel the Board of Supervisors will have the tools to avoid the situation Maricopa County found itself in a few years ago.

C. What is the fiscal impact to the state or county budgets of the proposal?

The fiscal impact to the State and County governments is *de minimis* at best, in that, if the option to hire independent county counsel is approved a cost shift of current budgeted funds would occur. Simply put, those appropriations currently budgeted for the County Attorney Office civil divisions can be shifted to pay for “county counsel” depending upon whether a respective Board of Supervisors desires to use its discretionary authority to appoint its own counsel.

In fact, there may be a savings realized by a reduction of internal conflicts and subsequent legal actions between elected county offices.

D. What is the preliminary analysis of the political environment and stakeholders’ and affiliates’ comments?

The proposed legislation is intended to merely offer an alternative option for counties to appoint their own “county counsel”. Small to medium size counties do not necessarily have large civil divisions that would be affected, and therefore, would not result in mass layoffs if the proposed option was initiated.

Obviously, the Maricopa County Board of Supervisors, its staff, officers and departments had inordinately suffered under the Andrew Thomas Regime. A county may presently have no issue with their County Attorney; however, elections occur at least every four years and changes happen. It is only a matter of time before one of the Counties experiences issues with its County Attorney. It has happened in the past and surely will happen again.

Outside civil counsel, especially those who were targeted by Thomas may support this change. These attorneys include, Rick Romley and Thomas Irvine, etc., and perhaps the Arizona State Bar would also support.

It is believed that the County Attorneys will argue they are the “check and balance” against the Board’s illegal actions; however, this ignores the fundamental concept of the separation of powers in County government. The County Attorney as the public prosecutor can still proceed criminally against the Board without also providing civil representation.

E. Who is the primary county contact information for the proposal (name, phone, email and other relevant information)?

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