

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

SFA**BILL ANALYSIS**

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 115 (as enrolled)
Sponsor: Senator Bill Schuette
Senate Committee: Judiciary
House Committee: Criminal Justice

PUBLIC ACT 706 of 2002

Date Completed: 1-10-03

RATIONALE

In some situations, a county prosecuting attorney might have a conflict of interest that prevents him or her from handling a case. For example, a prosecutor might be related to the victim of a crime, or might have represented the defendant before being elected to office. When a conflict of interest arises, or when a prosecutor is otherwise unable to perform his or her duties, a statutory procedure for the appointment of a special prosecuting attorney applies. This procedure is governed by Chapter 14 of the Revised Statutes of 1846 and case law. Under Chapter 14, the Michigan Supreme Court, Court of Appeals, or circuit court may appoint an attorney as a special prosecuting attorney to perform the duties of the prosecutor in that court. The circuit court also may appoint a special prosecuting attorney to perform the prosecutor's duties in any other court within the county. It has been suggested that this process has some inherent shortcomings: Judicial appointment of an executive branch official may have separation of powers implications; a special prosecutor need not have prosecutorial experience or training; and the statute does not address how to cover the costs of a special prosecutor's activities.

In addition, a 1983 Court of Appeals case, *In Re Special Prosecutor* (122 Mich App 632), held that the provisions of Chapter 14 dealing with appointment of a special prosecutor "do not allow the circuit court to appoint a special prosecutor to perform the duties of the prosecuting attorney in any matters outside of...courts, including the investigation of complaints of a crime or for the purpose of initiating criminal charges". This evidently has led to confusion and inconsistency in the appointment of special prosecuting attorneys in circuit court jurisdictions throughout the State. Since a special prosecutor cannot be

appointed until a matter is before the court, a prosecuting attorney may have to decide whether to file a criminal complaint to get the matter before the court even if the prosecuting attorney has a conflict of interest. Some people believe that the procedure for appointing a special prosecutor should be changed to address some of the problems experienced under current law.

CONTENT

The bill amends Chapter 14 of the Revised Statutes of 1846, which deals with county officers, to modify the procedure for appointment of a special prosecuting attorney when a county prosecuting attorney is disqualified by reason of conflict of interest or is otherwise unable to perform duties of the office. The bill takes effect on February 1, 2003.

Currently, if a prosecuting attorney is disqualified for conflict of interest or is otherwise unable to attend to the duties of office, the Supreme Court, the Court of Appeals, or the circuit court for that county, upon a finding to that effect, may appoint an attorney at law as a special prosecuting attorney to perform the duties of the prosecuting attorney in the respective court in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve. Under the same circumstances, the circuit court for that county also may appoint an attorney as a special prosecuting attorney to perform the prosecutor's duties in any other court within the county in any matter in which the prosecutor is disqualified or until he or she is able to serve.

The bill provides, instead, that if the prosecuting attorney of a county determines himself or herself to be disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office, he or she must file with the Attorney General a petition stating the conflict or reason for being unable to serve and requesting the appointment of a special prosecuting attorney. If the Attorney General determines that a prosecuting attorney is disqualified or otherwise unable to serve, the Attorney General may elect to proceed in the matter or may appoint a prosecuting attorney or assistant prosecuting attorney who consents to the appointment to act as a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which he or she is disqualified or until the prosecuting attorney is able to serve.

The bill specifies that the cost of prosecution, other than personnel costs, in any matter handled by a special prosecuting attorney must be borne by the office of the prosecuting attorney who has been determined to be disqualified or otherwise unable to serve.

The bill retains a provision that vests a special prosecuting attorney with all of the powers of the prosecuting attorney for the purpose of the appointment and during the period of appointment. Under the bill, these powers include the power to investigate and initiate charges. The bill also retains language specifying that the appointment provisions do not apply if an assistant prosecuting attorney has been or can be appointed by the prosecuting attorney to perform the necessary duties and is not disqualified from acting in place of the prosecuting attorney.

MCL 49.160

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The procedure for appointing a special prosecutor has been a problem in Michigan for some time. According to testimony before the Senate Judiciary Committee by an official in the Attorney General's office, the statute governing a special prosecutor's appointment

has resulted in a convoluted procedure that sometimes causes an improper appointment. The 1983 Court of Appeals case, *In Re Special Prosecutor*, allows a court to appoint a special prosecutor only in cases that are pending before that court. This means that a special prosecutor lacks the authority to originate a criminal complaint or to coordinate an investigation. Consequently, a prosecutor who may indeed have a conflict of interest must either assist in the investigation and authorize the criminal charge and then petition the court for the appointment of a special prosecutor, or seek the assistance of the Attorney General in pursuing the case. The first option places the prosecutor in the tenuous position of participating in an investigation and authorizing a criminal complaint even though he or she may have a conflict of interest, and the second option is often impractical because it depends on the caseload and resources of the Attorney General's office.

It stands to reason that a prosecutor should not engage in any aspect of a criminal case if he or she has a conflict pertaining to that case, but the 1983 Court of Appeals opinion prohibits the appointment of a special prosecutor until the case is pending before the court. To deal with the procedural difficulty in complying with statute and case law, some county prosecutors have sought to have a prosecuting attorney from another county review the police reports and make a recommendation to the Attorney General, who then either approves or disapproves the recommended charge. This is an informal procedure and has no statutory basis, so it is possible that this charging process could be challenged in court. In addition, problems arise if the investigating law enforcement agency needs assistance from the prosecutor, such as obtaining a search warrant or subpoena, since the local prosecutor has a conflict of interest and the neighboring prosecutor who is reviewing the case has no jurisdiction. In other counties, courts apparently have simply disregarded the 1983 opinion and have appointed special prosecutors before a case is in court.

By removing the courts from the special prosecutor appointment process, the bill will obviate problems resulting from the current statutory framework for appointment and the Court of Appeals case interpreting that

procedure. Since the bill requires that a special prosecuting attorney be appointed by the Attorney General, after a county prosecuting attorney excuses himself or herself and the Attorney General concurs, the appointment may be made before the case reaches the court. Counties will be able to avoid the possible pitfalls of pursuing informal review of cases or disregarding the controlling Court of Appeals decision.

Supporting Argument

Court appointment of a special prosecuting attorney raises questions regarding separation of powers between the judicial and executive branches of government, as constitutionally prescribed. The bill's appointment process removes any separation of powers implications, because the appointment of the special prosecutor will remain in the executive branch and will not be conducted by the judicial branch, as is currently the case.

Supporting Argument

Presently, when a court appoints a special prosecuting attorney, it can name any attorney to that position regardless of whether he or she has any prosecutorial experience or training. Reportedly, in some counties private attorneys are chosen for appointment off the same lists used to appoint defense counsel for the indigent. Although those attorneys may be capable of performing adequately as a prosecutor, there is no standard specified in statute for acting in that capacity. By providing that the Attorney General may proceed in the matter or appoint another prosecuting attorney or assistant prosecuting attorney to act as a special prosecutor, the bill will ensure that an actual prosecutor serves as a special prosecuting attorney.

Supporting Argument

The law has not addressed how to pay the costs associated with the activities of a special prosecuting attorney. Reportedly, in at least one instance, a judge, sitting as a one-man grand jury, appointed a prominent law firm to serve as a special prosecuting attorney. The special prosecutor evidently conducted an investigation into the activities of an interjurisdictional special narcotics squad and determined that no criminal charges should be brought against members of that police unit. Then, the firm reportedly submitted to the county a large bill for its services in conducting the investigation. The bill

addresses this type of situation by specifying that costs of prosecution, except for personnel costs, will be borne by the office of the disqualified prosecuting attorney. The public employee serving as the special prosecuting attorney, then, will continue to be paid his or her own salary from his or her employer, but investigation, administration, and other costs will have to be paid by the county that the special prosecuting attorney serves.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

Under State law, the Attorney General supervises the work of prosecuting attorneys and consults and advises prosecuting attorneys in all matters pertaining to the duties of their offices. The Department of Attorney General has stated that the bill will not result in additional costs to the Department. The annual number of prosecutor disqualifications is minimal.

Fiscal Analyst: Bill Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.