

HOUSE BILL REPORT

ESB 5860

As Reported by House Committee On:

Judiciary

Appropriations Subcommittee on General Government

Title: An act relating to legal proceedings by the attorney general on behalf of superior court judges.

Brief Description: Addressing legal proceedings by the attorney general on behalf of superior court judges.

Sponsors: Senators Padden and Kline.

Brief History:

Committee Activity:

Judiciary: 3/27/13, 4/2/13 [DPA];

Appropriations Subcommittee on General Government: 4/4/13 [DPA(JUDI)].

Brief Summary of Engrossed Bill (As Amended by Committee)

- Provides that the Attorney General (AG) is not required to institute or prosecute actions on behalf of superior court judges against the state or a county with respect to fiscal issues.
- Provides that any duty on the part of the AG to continue to prosecute an action on behalf of superior court judges ceases after the effective date of the act.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 11 members: Representatives Pedersen, Chair; Hansen, Vice Chair; Rodne, Ranking Minority Member; O'Ban, Assistant Ranking Minority Member; Jinkins, Kirby, Klippert, Nealey, Orwall, Roberts and Shea.

Minority Report: Do not pass. Signed by 1 member: Representative Goodman.

Staff: Cece Clynch (786-7195).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

Washington Constitution Article III, section 21 provides that "[t]he attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law." In statute, the Legislature has provided that the Attorney General (AG) shall, among other things, "Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer."

Generally, each of the state's counties is to have at least one superior court judge elected by the qualified electors of the county, although the Constitution allows and provides for situations in which counties share a judge or judges. The exact number of superior court judges in each county is set by statute. The state and each county share the cost of superior court judges for that county.

In a variety of cases and contexts, the Supreme Court has held that Superior Court judges are state officers, or both state and county officers.

Summary of Amended Bill:

The Attorney General (AG) is not required to institute or prosecute actions or proceedings on behalf of a superior court judge or judges against the state or a county when any purpose of the action or proceeding, any cause of action, or any remedy sought, is related to or would require fiscal appropriations or funding or financial payment of any sort from the state or a county.

With respect to any proceeding already instituted on behalf of a judge or judges under the statutory provision imposing a duty to institute or prosecute actions on behalf of state officers, the AG's duty to prosecute ceases after the effective date.

Amended Bill Compared to Engrossed Bill:

Provisions are stricken that required the Attorney General (AG) to prosecute and institute actions on behalf of superior court judges only if requested to do so by the Administrative Office of the Courts (AOC), and further required the AG and the AOC to split the costs of such actions half and half. Also stricken is the provision concerning claim filing and mandatory mediation or other form of alternative dispute resolution.

The stricken provisions are replaced with the following:

- the AG is not required to institute or prosecute actions or proceedings on behalf of a superior court judge or judges against the state or a county when any purpose of the action or proceeding, any cause of action, or any remedy sought, is related to or would require fiscal appropriations or funding or financial payment of any sort from the state or a county;
- with respect to any proceeding already instituted on behalf of a judge or judges under the statutory provision imposing a duty to institute or prosecute actions on behalf of state officers, the AG's duty to prosecute ceases after the effective date; and

- an emergency clause which takes effect immediately.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) The Attorney General (AG) has no choice, under current law, but to represent superior court judges. In the suit that is currently pending, the special assistant attorney general representing the judges has already charged \$385,000. The AG had to seek outside counsel due to the issues involved in this "McCleary-esque" case and the AG's representation of the state. While the bill that came over from the Senate fixed only half of the problem, the striker fixes the entire problem.

(Opposed) The current suit involving judges from Grays Harbor County needs to be viewed in perspective. The suit was filed four months before one of the judges there was stabbed in the courthouse. Grays Harbor courts get less funding than courts in any other county in the state. Washington, as a state, provides less funding to courts than do other states. This bill treats superior court judges differently than all other state officers. Judges will face the Hobbesian choice of shutting the courthouse doors or funding such cases personally. Meanwhile, the AG has other options and could seek a line item in the budget just as with other agencies. Legislators get represented by the AG, and so should judges. There are obstacles to judges asking for pro bono representation. There is no urgency to this bill since the Grays Harbor case is all but settled. Besides, that case is only the second suit in 127 years by judges. The only other one before the current suit involved candles and fodder for horses. The bill upsets balance and comity.

Persons Testifying: (In support) Brian Morain, Office of the Attorney General.

(Opposed) Zach Edward, Grays Harbor County Bar Association; Tom Parker; Deborah Fleck; and Steve Warning.

Persons Signed In To Testify But Not Testifying: None.

HOUSE COMMITTEE ON APPROPRIATIONS SUBCOMMITTEE ON GENERAL GOVERNMENT

Majority Report: Do pass as amended by Committee on Judiciary. Signed by 8 members: Representatives Hudgins, Chair; Parker, Ranking Minority Member; Buys, Chandler, Dunshee, Hunt, Pedersen and Springer.

Minority Report: Do not pass. Signed by 1 member: Representative Taylor.

Staff: Danielle Cruver (786-7157).

Summary of Recommendation of Committee On Appropriations Subcommittee on General Government Compared to Recommendation of Committee On Judiciary:

No new changes were recommended.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) Senate Bill 5860 (SB 5860) is limited by its title, and concerns only superior court judges. House Bill 2024 applies to all state officers, and was dropped in response to concerns expressed by judges that they were being singled out under SB 5860. The bills stem from a specific case in Grays Harbor that has gone from ridiculous to outrageous. The core power of the Legislature is to decide how money is spent. The taxpayers should not have to pay for both sides of a lawsuit against the state, the purpose of which is to seek more funding. If a state officer wants to mount such a suit, the officer should be willing to hire his or her own counsel and pay for it. Both bills do not need to be passed, but one of them does need to pass if the Legislature is going to avoid having to appropriate another \$385,000. These bills only apply to suits that are instituted by a judge or a state officer as a plaintiff, and then only in cases that are concerned with the level or sufficiency of appropriations. Even if the Attorney General (AG) erects "fire walls" and represents the judge or state officer, rather than hires outside counsel, it is still the taxpayer that is funding both sides of the suit.

The Grays Harbor case is analogous to the McCleary case, and at its core concerns the level of state funding. Funding is primarily a Legislative function. In such a case, the AG could not erect a "fire wall" and represent both sides in-house. This is not like other cases. To date, about \$390,000 has been billed by the outside counsel representing the judges. The SB 5860 precisely addresses the Grays Harbor case. House Bill 2024 applies to all state officers. Neither bill prevents the AG, any state officer, or any judge from suing.

(Opposed) There are 189 superior court judges elected in this state. The superior courts are general jurisdiction courts, and hear all sorts of cases. In 2011 over 293,000 cases were filed statewide in superior courts. Each year, these courts collect about \$300 million, one-half of which goes to the state. The rest of the money remains at the county level. The framers understood that there would sometimes be cases and controversies between elected officials. To date, there have only been two instances when a superior court judge has sued for more funding. Grays Harbor County has been hard hit by the recession. It presented a unique situation. The judges sought additional funding for court services. The amount originally sought has turned out to be much less than what the fees have been. There were steps taken in the Grays Harbor case that caused the costs to be high. There were many appeals with

respect to discovery matters. In addition, the AG did not have to hire outside counsel to represent the judges and could have erected a "fire wall" and had different assistant attorneys general represent the state and the judges. The AG can control the costs better in-house. Passage will signify that the Legislature is taking sides in the current Grays Harbor case. Judges are in a difficult position when it comes to seeking pro bono representation, and whether a lawyer agreed or declined to represent pro bono, it would affect the judge's impartiality. Both these bills are bad, and upset the constitutional balance. There should be a study group put together to study the situation before any action is taken.

Persons Testifying: (In support) Jay Geck, Attorney General's Office.

(Opposed) Tom Parker, Superior Court Judges' Association.

Persons Signed In To Testify But Not Testifying: None.