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Auditor responds to CJP jurisdiction challenge

By Malcolm Maclachlan

Attorneys for the California State Auditor submitted a response Monday to a writ filed last month by the Commission on Judicial Performance challenging the auditor's jurisdiction.

The CJP sued State Auditor Elaine M. Howle in San Francisco Superior Court in October, seeking to limit the scope of an audit ordered by the Legislature in August. The CJP is the state agency that investigates and disciplines judges charged with misconduct. *Commission on Judicial Performance v. Howle*, CPF515308 (S.F. Super. Ct., filed Oct. 20, 2016).

Myron Moskowitz, who represents Howle, said the CJP's arguments seek to sidestep decades of well-established law around the auditor's office and its functions.

"After they see the answer, if they still want to go to trial we will," said Moskowitz, legal director of the Moskowitz Appellate Team in Piedmont. "I don't know why they would want to. I don't think they have much of a case."

Moskovitz said the CJP's writ made three main arguments. First was separation of powers based on the idea an audit would intrude on the core functions of the agency. The CJP's writ noted that it was written into the California Constitution, while the auditor's office was created by statute.

The answer filed by Moskowitz's team read: "The auditor has no legal authority to command or direct any audited agency to make any changes. The auditor regularly audits state agencies established by the Constitution, and never has an audit intruded on the core functions of those agencies. These include the Supreme Court, the State Bar, the Judicial Council, the Administrative Office of the Courts, various superior courts, the Secretary of State, the State Controller, the Public Utilities Commission, and the University of California."

"This is the first time anyone has ever complained about their right to audit a public agency that gets public money and is supposed to serve the public," explained Moskowitz. "I don't know what they are afraid of."

The second argument had to do with confidentiality. Moskowitz said the auditor routinely deals with confidential information, including criminal and medical files, and is bound by law to protect that information.

The answer states the past audits have looked into discipline by the State Bar, Child Protective Services and the attorney general's office.

Third, the writ claims that the CJP could be forced to pay "the nearly \$500,000 cost of the audit," something it claims that agency could not afford.

"The auditor has no control over that," Moskowitz said. "They are suing the wrong people. That is a Department of Finance decision."

The writ was filed by James M. Wagstaffe, a partner with Kerr & Wagstaffe LLP in San Francisco, who did not return a call seeking comment.

Acting on a request from four legislators, the Joint Legislative Audit Committee unanimously approved the audit in order to look into questions such as how the CJP decides what cases to pursue and what standards it uses in evaluating the credibility of witnesses and evidence.