

Memorandum No. 47(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Defense of Actions Brought Against Public Officers and Employees)

Attached is a copy of the Tentative Recommendation on this subject, dated June 1, 1962.

Also attached are copies of a number of communications we received containing comments on this Tentative Recommendation:

Exhibit I (gold)(Southern Section of State Bar Committee)

Exhibit II (pink)(City of Beverly Hills)

Exhibit III (white)(Los Angeles County Counsel)(pages 1-3)

The following matters are suggested for Commission consideration:

1. Section 991.1. The Office of the County Counsel of Los Angeles County (Exhibit III attached, pages 1-2) suggests that the definition of "action or proceeding" in Section 991.1 be revised to provide clearly that action or proceeding does not include appeals from or judicial review of administrative proceedings brought by public entities to remove, suspend or penalize employees. This addition does not seem to be necessary in view of Section 991.2 which provides for a mandatory defense only "of any civil action or proceeding brought against him [the employee] . . ." A proceeding brought against the public entity by the employee to obtain a review of an administrative act by the public entity would not be a civil action or proceeding brought against the employee. To add a

provision to the statute to deal with this matter would, the staff believes, introduce unnecessary complexity into the statute. Moreover, the text of the recommendation (page 9, item 4) makes clear the Commission's intent on this matter.

The definition of "employee" and "public entity" can be deleted from this proposed statute since general definitions of these terms will be made applicable to all of Division 3.5.

2. Section 991.2. The Office of the County Counsel of Los Angeles County (Exhibit III, attached, page 2) states that this section does not make clear that the defense of the action includes the filing or prosecution of a counterclaim, cross complaint or cross action. This apparently refers to a counterclaim, cross complaint or cross action that the public employee has against the plaintiff in the action brought against the public employee. The Commission determined not to complicate the proposed statute by including a provision covering this matter. Instead, the Commission added the first full paragraph on page 6 of the Tentative Recommendation to indicate the Commission's intent that the power to defend granted by the proposed statute should be construed broadly. The staff recommends that no change be made in the proposed statute to cover this matter.

The words "service, agency or" and "officer, agent or" should be deleted from this section. "Employment" will be defined in a general definition applicable to Division 3.5 to include employment, service or agency, and "employee" will be defined in a general definition to include officer, agent or employee. (See Exhibit I.)

3. Section 991.3. The Office of the County Counsel of Los Angeles

County suggests (Exhibit III, attached, page 2) that Section 991.3 should be expanded to authorize the agency to refuse to defend an action against an employee where there is a "conflict of interest." The staff believes that the proposed statute and the proposed statute relating to indemnification of public officers and employees will cover adequately the matter of conflict of interest and that no change should be made in the proposed defense statute. Moreover, if the public entity believes that its attorney will be placed in a position where there is a conflict of interest that would create a problem of legal ethics, the public entity is authorized by Section 991.5 of the statute to secure the services of another attorney to defend the public employee.

The Office of the County Counsel of Los Angeles County also notes (Exhibit III, attached, page 2) that Section 991.3 does not make clear who makes the determination as to whether or not the act was in the scope of the employee's agency or whether there was fraud, corruption or malice, but "we assume that since the governing body of the agency acts for it that this body would make the determination." The same point is made by the City Attorney of Beverly Hills: "When the 'public entity' is to make a determination, what person or body is intended? Is it an administrative decision to be made by the Mayor or City Manager, or is it to be made by the legislative body?" (Exhibit II, page 1). The same problem is presented by Section 991.4.

The words "office, agency or" should be deleted from Section 991.3(a).

4. Section 991.4. The City Attorney of Beverly Hills asks: "With respect to providing a defense of a criminal action, what would be the situation where the criminal charges are brought against the members of

the body, or the person, who is required to make the determination as to good faith and to exercise the discretion to provide the defense?" See his example set out in Exhibit II.

Note also that the words "service, agency or" and "officer, agent or" should be deleted from this section. (Exhibit I.)

5. Section 991.6. The words "service, agency or" and "officer, agent or" should be deleted from this section. (Exhibit I.)

6. Section 991.7. The City Attorney of Beverly Hills asks: "Would the payment, directly or indirectly, by the public entity of premiums for insurance for the employee, which insurance provides for the cost of defense, satisfy the requirement to provide a defense? If this is so, should there not be some clear language to that effect?" See his example set out in Exhibit II. This matter might be clarified by adding "or may purchase insurance, or pay for insurance purchased by the employee, which requires that the insurer defend the action or proceeding" at the end of the first sentence of Section 991.5.

General Comment. Note the fourth comment (page 2 pink sheets-- Exhibit II) of the City Attorney of Beverly Hills. It may be noted that the California Legislative Counsel uses the form of "a, b and c" in drafting statutes. This is not to say, however, that examples of "a, b, and c" cannot be found in the California Statutes. We would not want to use a different form for the text of statutes than that recommended by the California Legislative Counsel.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

EXTRACT

MINUTES OF JULY 18, 1962, MEETING
OF

STATE BAR COMMITTEE ON SOVEREIGN
IMMUNITY
SOUTHERN SECTION

3. DEFENSE OF ACTIONS BROUGHT AGAINST PUBLIC
OFFICERS AND EMPLOYEES

Mr. Heffernan in his letter feels that the Commission has not advanced sufficiently compelling reasons to justify the defense of criminal actions against public employees at public expense. The Section notes, however, that Section 991.4 purports to confer solely a discretionary authority in the public entity, to be exercised only if the defense of the employee is found to be "in the best interests of the public entity", and that he has acted in good faith and without malice. Whether or not such discretion to defend against criminal proceedings at public expense should be conferred on public entities, the Section concludes is a question of public policy which may well require further mature consideration, and the Section neither recommends nor objects to Section 991.4 as drafted.

Although the word "employee" is defined in Section 991.1 as including an officer, agent or employee, it is noted

that in Sections 991.2, 991.4 and 991.6 that the Commission uses the expression "an officer, agent or employee". Strictly, the words "officer, agent or" become redundant in view of the definition.

Robert H. Baida
City Attorney

Stephen M. Friedman
Asst. City Attorney

CITY OF BEVERLY HILLS

CALIFORNIA

July 2, 1962

California Law Revision Commission
School of Law
Stanford, California

Gentlemen:

This is in reference to your Tentative Recommendations relating to Defense of Actions Brought Against Public Officers and Employees. There are several comments and questions that I have with respect thereto.

First: When the "public entity" is to make a determination, what person or body is intended? Is it an administrative decision to be made by the Mayor or City Manager, or is it to be made by the legislative body?

Second: With respect to providing a defense of a criminal action, what would be the situation where the criminal charges are brought against the members of the body, or the person, who is required to make the determination as to good faith and to exercise the discretion to provide the defense?

For example, suppose that, in good faith reliance upon the advice of the City Attorney that there would be no violation of the Brown Act, members of a City Council attend and participate in a particular type of meeting. Thereafter, criminal charges are filed by the District Attorney, or the Attorney General, against the members who attended the meeting, and suppose the Council is the body charged with making the determinations and exercising the discretion on behalf of the public entity. Would their self-interest disqualify them from doing so, and thus deprive them of the opportunity of being provided a defense? Perhaps it could be provided that in such situations the determination could be made by another person or body.

Third: Would the payment, directly or indirectly, by the public entity of premiums for insurance for the employee, which insurance provides for the cost of defense, satisfy the requirement to provide a defense? If this is so, should there not be some clear language to that effect?

For example, suppose that a City reimburses its police officers for payments made by them to a local peace officers' association for

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false arrest insurance coverage under an association master policy, would the public entity, in addition, be required to provide an officer a defense in a false arrest action? Would the result be any different if the City paid the premiums directly to the association? (See: 39 Ops.Atty.Gen.71)

Fourth: It is noticed that, as a matter of draftsmanship, you have eliminated the comma before the conjunctive or disjunctive in a series. I realize that this is the modern grammatical usage, but it appears that such use may lead to ambiguities in legislation. Prior to its 1959 Edition, the United States Government Printing Office Style Manual prescribed the modern grammatical usage for all matters except legislation, and in legislation, it prescribed the insertion of the comma at the end of the series. In its 1959 Edition, the Style Manual abandoned the modern grammatical usage altogether, and now provides as follows:

"The comma is used ---

"9.27. After each member within a series of three or more words, phrases, letters, or figures used with and, or, or nor.

red, white, and blue
 horses, mules, and cattle
 by the bolt, by the yard, or in remnants
 a, b, and c
 6, 7, and 10
 neither snow, rain, nor heat
 2 days, 3 hours, and 4 minutes (series);
but 2 days 3 hours 4 minutes (age)"

I certainly do appreciate your making your preliminary material available and giving me an opportunity to comment and ask questions.

Sincerely,

/s/ Robert H. Baida

ROBERT H. BAIDA
 City Attorney

RHB/bb