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Memorandum No. 29 (1960)

Subject: Study No. 37(L) - Claims Against Public Officers
and Employees.

At its March 1960 meeting the Commission decided to repeal the existing statutes requiring the filing of a claim as a prerequisite to suit against a public officer or employee. The Commission also decided to clarify Section 2001 of the Government Code relating to defense of public officers and employees at public expense. Attached are drafts of statutes to carry out these decisions.

Repeal of statutes requiring filing of a claim as prerequisite to suit against a public officer or employee. See Exhibit I, attached. With respect to the statute set out in Exhibit I, the following comments are made:

- (1) Section 1 repeals existing statute sections.
- (2) Section 2 enacts a new code section to make inapplicable any charter, ordinance or regulation of a local public entity that requires a filing of a claim as a prerequisite to suit against a public officer, agent or employee. The Constitutional Amendment on claims applies to "officers, agents and employees" and this section uses that language in order to be consistent with the language of the Constitutional Amendment.
- (3) Section 3 (not codified) provides that the Act applies only to causes of action not barred on the effective date of the

Act. If a cause of action is not barred on the effective date of the Act, an action may be brought against the public officer or employee without complying with the claims filing procedure even though the cause of action arose prior to the effective date of the Act. Note that alternative forms of Section 3 are set out for consideration by the Commission.

Clarification of Section 2001 of the Government Code. See Exhibit II, attached. The statute recommended by the consultant to clarify Section 2001 of the Government Code is set out on pages 48-49 of his study. His statute has been modified and improved and is set out as Exhibit II. In drafting the statute, the staff discovered certain ambiguities not noted by the consultant and the statute set out in Exhibit II (together with the following comments) is intended to present a number of policy questions to the Commission. With respect to the statute set out in Exhibit II, the following comments are made:

(1) The revised statute eliminates the ambiguities in the present section with respect to the types of local public entities to which the section is applicable. See the definition of "public entity" in subdivision (1)(c). This definition is based on the language in Section 1956 of the Government Code, relating to insurance for public employees, which applies to "the State, a county, city, district, or any other public agency or public corporation." Present Section 2001 refers at one point to "any district," at another point only to "any school district"

and at a third point to "any district . . . or any other public or quasi public corporation."

(2) The revised statute will apply to a wrongful death action against a public officer or employee. See subdivision (2)(a), (b) and (c). The revised statute does not apply to an action or proceeding to remove a public officer or employee from his office or employment, to a criminal action or proceeding against a public officer or employee or to an action or proceeding brought by a public entity against a public officer or employee. See the definition of "action or proceeding" in subdivision (1)(a). In Tracy v. Fresno County, 125 C.A.2d 52, 270 P.2d 57 (1954), the court held that the employment of private counsel was not authorized by the mere claimed refusal by county counsel to defend a sheriff charged with misconduct by the grand jury, together with county counsel's advice to sheriff to obtain private counsel, at any price agreed on without previous authorization of the board of supervisors or the proper county officer. The court stated (125 C.A.2d at 54-56) with reference to Section 2001 of the Government Code:

Counsel for plaintiff argues that . . . public interest is involved in any proceeding brought to remove a public officer from office; that faithful public officers should be protected from unfounded accusations based on honest action taken by them in good faith and without malice; that if such public officer be wrongfully charged he should be defended in the public interest, because otherwise a public official, improperly charged, could be hounded out of office by unfounded charges brought against him requiring him to expend enormous funds for counsel fees and court costs in defending himself, and that for this reason Section 2001 supra, was amended to

so provide; that any decrease in the potential liability of an official will increase the willingness of competent people to assume the risk of office and an expenditure to that end is for a public purpose, and that similar statutes so providing have been held constitutional, citing People v. Standard Acc. Ins. Co., 42 Cal. App.2d 409, 413. . . .

The legislative history of that section shows that it was based on the Statutes of 1919, chapter 360, as amended by Statutes 1931, chapter 1168, and Statutes 1933, chapter 807. It then applied only to suits for damages on account of injury to persons or property resulting from the dangerous or defective condition of any public property on account of any action or work done by him in his official capacity. Under these circumstances it was the duty of the attorney for the county to act as counsel in defense of such suit "unless lawful provision had been made for the employment of other counsel in connection therewith." Under such circumstances the "fees and expenses involved . . . are a lawful charge" against the county. In all of these statutes, that portion relating to the duties of counsel now found in subdivision (b)(2) of the section was not segregated from and was obviously applicable to the entire section. Upon codification of the Act in 1943, it was divided into sections and subdivisions, substantially as it is now found. In 1951 [Stats. 1951, chap. 1087, § 1] Section 2001 was amended to read as above quoted, to eliminate the words "suit for damages" and substitute the words "any action or proceeding, including a taxpayer's suit."

It does not appear to us that this change clearly indicated a legislative intent to so radically enlarge and change the purpose of scope of the Act as to include the costs of defense of a criminal action or of a grand jury accusation, which is criminal in nature, instituted by a body politic in the name of the People of the State of California which, in effect, would call upon the district attorney to prosecute the action and the county counsel to defend the action at the county's expense.

(3) The revised statute eliminates an uncertainty in the present language of the section as to whether it applies to both

officers and employees, and makes it clear that the application is to "officers, agents and employees." See the definition of "employee" in subdivision (1)(b) of revised statute. The present language of Section 2001 uses the term "any officer" in subdivision (a), but uses the phrase "any officer . . . including officers as defined in Article 2" in subdivision (b), thereby incorporating the definitional phrase found in former Section 1980(c) of the Government Code, repealed by Cal. Stat. 1959, ch. 1715, § 1, which defined the term "officer" to include any deputy, assistant, agent or employee of the State, a school district, county or city.

(4) The statute clarifies the meaning of the phrase "unless provision has been made for the employment of other counsel in connection therewith" to read "unless provision has been made by the public entity for the employment of other counsel in connection therewith." See introductory clause of subdivision (2). In the Tracy case the court said (125 C.A.2d at 60):

By the section no machinery is provided for the employment of such other counsel by the official involved, and nothing is said about who is to determine the right of such official to the employment of other counsel, or under what conditions or for what remuneration such other counsel is to be paid. It does not appear that the legislative intent was to permit public officials, on their own initiative, to hire private attorneys and make the cost thereof, without any limitation, a public charge. Such a construction is repugnant to sound principles of public policy.

If plaintiff's construction of this section be correct, it would mean that the Legislature has,

at least in a measure, delegated to the official in question, in this case the sheriff, a power over the public purse in his own interest; a power exercised on the county level by the board of supervisors, presumably in the interest of the public as a whole. Whenever a statute relates to the payment of public money, or is an impairment of the prerogatives of government, any doubt should be resolved in favor of the government.

(5) The revised statute requires the public entity to provide the public officer or employee with a defense. Under the present language of Section 2001, the right of the public officer or employee to a defense is not clear because of the ambiguous language of the section. As the court said in the Tracy case (125 C.A.2d at 56-57):

In the present section it is clearly shown that before the county official would be entitled to be represented by the attorney for the county to defend a suit against such official for "any action taken or work done" by him, it would become immediately necessary for such official to show to someone or to some body (the manner in which and degree to which it must be shown is not indicated, and the section does not indicate the person or body) that he was free from bad faith and malice. Upon such showing it then becomes the duty of the attorney for the county to act in defense of such suit unless provision has been made (by someone - the section does not indicate) for the employment of other counsel.

The crucial question then arises as to who is to determine the question of good faith and lack of malice, and upon what standard it is to be determined. Is it the board of supervisors, the county attorney, or is it to be ultimately determined in a subsequent court action and must the county official's good faith and lack of malice be established by a preponderance of the evidence or beyond a reasonable doubt? It does not appear from the instant pleadings that the question of the sheriff's good faith and lack of malice was ever considered by any of the parties

above mentioned. It is apparent that the question was not presented to the board of supervisors. If it was considered by the county counsel it appears that the determination was against the sheriff on this issue because the county counsel allegedly refused to act and the reason may have been that he was not satisfied that the sheriff acted in good faith and without malice. Plaintiff's contention that the jury's finding that the allegations of the accusation were in favor of the sheriff and were accordingly res judicata on this issue is not supported by the pleadings or the law. The accusation did not plead either that the sheriff acted in good faith or bad faith and/or with or without malice. . . . Under Section 2001, supra, before the public official would be entitled to be represented by the county counsel or the district attorney, as the case may be, or to make provision for other counsel at the expense of the county, it would be necessary for the county official to first show, to someone or some authority, that the actions taken by him were in "good faith and without malice." Just what measure of proof is required is not indicated by the section, but it does seem reasonable that it would take no more than the greater weight of the evidence, and this would be a discretionary matter to be determined by the authority authorized to determine that issue

The section contemplates that the determination must be made by someone or some authority, other than the county official involved. The implication is that the refusal of the county counsel to act may have been predicated upon the belief that the sheriff had not established that he acted in good faith and without malice. . . . We do not believe that it was intended that the county official involved would be the one to determine whether he acted in good faith and without malice or that he was the one authorized by this section to make provision "for the employment of other counsel" in any unlimited amount and for his own personal defense in such action, without the sanction or direction of some other authority.

The court then referred to Section 2002 of the Government Code and stated:

This section clearly contemplates first, an authorization by the board of supervisors, and

second, a determination by the attorney that the county officer acted in good faith and without malice, before he would be entitled to be represented by county counsel and at public expense. It appears more reasonable that this was the intention of the Legislature in casting the Section here involved and that unless the board of supervisors, which body was authorized to audit and pay the claim in the final analysis, had previously by contract or otherwise, made provision for the employment of other counsel, the fees, costs, and expenses involved would not be a lawful charge against the county.

The statute set out in Exhibit II provides that a defense is to be provided a public officer or employee for any act or failure to act by such officer or employee occurring during the course of his service or employment. No showing by the officer or employee of good faith and lack of malice is required. However, the public entity is entitled to recover from the officer or employee any fees, costs and expenses paid by it if the action or proceeding is one described in subdivision (2)(c) of the section and it is established that the officer or employee acted or failed to act in bad faith or with malice. The procedure outlined above eliminates the troublesome problem of determining in advance of the trial whether or not the officer or employee acted in "good faith and without malice." Compare this procedure with that set out in Section 2002 of the Government Code (set out in Exhibit III, attached).

(6) Existing Section 2001 provides for a defense of an action or proceeding brought against an officer on account of "any action taken or work done by him in his official capacity." This language has been revised in the statute set out in Exhibit

II to read "on account of . . . any act or failure to act by such [officer, agent or] employee occurring during the course of his service or employment." The language of the revised section will cover a failure to act as well as "any action taken" and eliminates the redundant phrase "or work done." Note that under the revised statute the public entity is entitled to recover from the officer or employee any fees, costs and expenses paid where the action is brought on account of any act or failure to act by such officer or employee occurring during the course of his service or employment if it is established that the officer or employee acted or failed to act because of bad faith or malice.

Note that both the existing section and the revised section require a defense to be provided in cases when insurance is not authorized under Section 1956 of the Government Code. The text of Section 1956 is set out in Exhibit III, attached.

(7) The statute is in addition to and not in lieu of any rights the officer or employee may have under any other law, charter, ordinance or regulation providing for the defense of a public officer or employee. Actually, there is some overlap between Section 2001 and Sections 2000, 2002 and 2002.5 of the Government Code. See Exhibit III, attached, for text of these sections.

Clearly Section 2002.5, which is a very favorable provision applicable to a very limited class of state employees, should not be amended or repealed.

Consideration might be given to repealing Section 2000 which

covers certain suits against board members (city, county and school district). However, Section 2000 apparently would allow the board member to select his own counsel and to recover from the public entity the amounts expended by him in defending the action upon a showing of certain facts. Consequently, Section 2000 is more favorable than revised Section 2001 and should be retained.

Consideration might be given to repealing Section 2002. This section requires, first, that consent of the public agency must be obtained before a defense may be provided and, second, that the attorney for the public entity must also find that the official acted in good faith and without malice. This section is not more favorable to the public officer or employee than revised Section 2001 and should be repealed.

Editing of Claims Study

At its March 1960 meeting, the Commission decided not to prepare legislation for the 1961 legislative session to conform the procedure for filing claims against public officers and employees to the 1959 General Claims Act. The staff is now engaged in preparing Professor Van Alstyne's study for the printer. Does the Commission want the staff to edit out portions of the study that relate to Van Alstyne's alternative recommendation (to revise the procedure for filing claims against public officers and employees)?

Respectfully submitted,

John H. DeMouilly
Executive Secretary

ALTERNATIVE SECTION 3

[SEC. 3. This act applies not only to causes of action accruing on or after the effective date of this act but also to causes of action accruing prior to the effective date of this act that are not barred on the effective date of this act because of failure to file a claim or by the applicable statute of limitations. Nothing in this act shall be deemed to allow suit on or to reinstate a claim that has been barred prior to the effective date of this act.]

Note: Section 313 of the Code of Civil Procedure provides:

The general procedure for the presentation of claims as a prerequisite to commencement of actions for money or damages against the State of California, counties, cities, cities and counties, districts, local authorities, and other political subdivisions of the State, and against the officers and employees thereof, is prescribed by Division 3.5 (commencing with Section 600) of Title 1 of the Government Code.

Section 800, enacted by Section 2 of the above act, is added to Division 3.5 of Title I of the Government Code.

EXHIBIT II

An act to repeal Sections 2001 and 2002 of the Government Code and to add Section 2001 to said code, relating to defense of public officers, agents and employees.

The people of the State of California do enact as follows:

SECTION 1. Section 2001 of the Government Code is hereby repealed.

SEC. 2. Section 2001 is added to the Government Code, to read:

2001. (1) As used in this section:

(a) "Action or proceeding" does not include an action or proceeding to remove a public employee from his office or employment, a criminal action or proceeding against a public employee or an action or proceeding brought by a public entity against a public employee.

(b) "Employee" includes an officer, agent or employee.

(c) "Public entity" includes the State, a county, city, district or other public agency or public corporation.

(2) Unless provision has been made by the public entity for the employment of other counsel in connection therewith, the attorney for the public entity, upon request of the employee, shall act as counsel in the defense of any action or proceeding brought against an employee of the public entity, in his official or individual capacity, or both, on account of:

(a) The death or physical injury to person or property as a result of the dangerous or defective condition of any public property; or

(b) The death or physical injury to person or property as a result of the negligence of such employee occurring during the course of his service or employment; or

(c) Any act or failure to act by such employee occurring during the course of his service or employment.

(3) The fees, costs and expenses of defending the action or proceeding pursuant to this section are a lawful charge against the public entity. The public entity may recover from the public employee any fees, costs or expenses paid by it under the provisions of this section if the action or proceeding is one described in subdivision (2)(c) of this section and it is established that the public employee acted or failed to act because of bad faith or malice.

(4) The rights of a public employee under this section are in addition to and not in lieu of any rights the employee may have under any other law, charter, ordinance or regulation providing for the defense of a public employee.

SEC. 3. Section 2002 of the Government Code is hereby repealed.

EXHIBIT III

Section 2000 of Government Code

Whenever suit for damages resulting from

(a) injuries caused by or due to the inefficiency or incompetency of any appointee or employee of any board or any member thereof, or

(b) negligence in failing or neglecting to remedy the dangerous or defective condition of any public property or to take such action as is reasonably necessary to protect the public against the condition is brought against any member of a board, the cost of defending the suit, including attorney fees actually expended in defending the suit, is a charge against the county, city or school district of which the member was an officer if the member had neither knowledge nor notice of

(1) the inefficiency or incompetency of the appointee or employee at the time of the injury, or

(2) the dangerous or defective condition.

Section 2001 of Government Code

(a) Whenever any action or proceeding, including a taxpayer's suit, is brought against any officer in his official or individual capacity, or both, of the State or of any district, county, or city

(1) On account of injuries to persons or property resulting from the dangerous or defective condition of any public property or

(2) On account of any action taken or work done by him in his official capacity, in good faith and without malice, or

(b) Whenever any action or proceeding is brought against any officer, in his official or individual capacity, or both, including officers as defined in Article 2, of the State or of any school district, county or municipality on account of injuries to persons or property, alleged to have been received as a result of

(1) The negligence or carelessness of such officer occurring during the course of his service or employment, or

(2) The dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of such officer, it is the duty of the attorney for the State, district, county, municipality, or other public or quasi-public corporation, as the case may be, to act as counsel in defense of such suit, unless provision has been made for the employment of other counsel in connection therewith.

In such event the fees, cost and expenses involved in a suit referred to in subdivisions (a) and (b) are a lawful charge against the State, school district, county or municipality, as the case may be.

Section 2002 of Government Code

Whenever suit for damages is brought against any State or county officer or employee on account of his official actions the officer or employee may

(a) If he is a State officer or employee, with the consent of the head of the department in which he is employed, have the action referred to the Attorney General,

(b) If he is a county officer or employee, with the consent of the board of supervisors, have the action referred to the district attorney.

Upon the determination of such attorney that the officer or employee performed his official duty in good faith and without malice, it is the duty of the attorney to appear and defend the officer or employee or, in the case of a State officer or employee, to authorize any attorney in the department to appear and defend the State officer or employee.

The costs and expenses involved in such an action against a State or county officer or employee are a lawful charge against the funds of the department by which the State officer or employee was employed or of the county by which the county officer or employee was employed, and for which he was acting officially. The department or the county may recover from the officer or employee any costs or expenses paid out by it under the provisions of this section if it develops that the officer or employee acted in bad faith or with malice.

In any county having a county counsel the board of supervisors may direct him to perform the duties imposed by this section upon district attorneys.

Section 2002.5 of Government Code

Whenever a suit is filed against an employee or officer of the State of California licensed in one of the healing arts under Division 2 of the Business and Professions Code, for malpractice alleged to have arisen out of the performance of his duties as a state employee, a copy of the complaint shall also be served upon the Attorney General and the Attorney General upon the request of such employee shall defend said suit on behalf of such employee. If there is a settlement or judgment in the suit the State shall pay the same; provided, that no settlement shall be effected without the consent of the head of the state agency concerned and the approval of the Attorney General. The settlement of such claims or judgments shall be limited to those arising from acts of such officers and employees of the State in the performance of their duties on the grounds of state institutions or facilities; or by reason of emergency aid given to inmates, state officials, employees, and to members of the public for accidents occurring on such grounds.

Section 1956 of Government Code

The State, a county, city, district, or any other public agency or public corporation may insure its officers, deputies, assistants, agents, and employees against any liability, other than a liability which may be insured against under the provisions of Division 4 of the Labor Code, for injuries or damages resulting from their negligence or carelessness during the course of their service or employment and for the injuries or damages resulting from the dangerous or defective condition of public property, including public property as defined in Article 2, and due to their alleged negligence or carelessness, and the State, a school district, a county, or any municipality may insure its officers, including officers defined in Article 2, against any liability, other than a liability which may be insured against under the provisions of Division 4 of the Labor Code, for injuries or damages resulting from false arrest or false imprisonment, either by self-insurance, or in any insurer authorized to transact such insurance in the State (except in the case of school district governing boards to the extent they are authorized to place insurance in nonadmitted insurers by Sections 1044 and 15802 of the Education Code). The premium for the insurance is a proper charge against the Treasury of the State, county, city, district, public agency or public corporation.