

8/12/62

First Supplement to Memorandum No. 47(1962)

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

Attached (Exhibit I - green pages) is an extract from the Minutes of a meeting of the State Bar Committee on Sovereign Immunity. You will recall that we attached to Memorandum No. 47(1962) an extract of the Minutes of the Southern Section of the State Bar Committee.

Listed below are the suggestions made by the State Bar Committee that are not already listed for Commission consideration in Memorandum No. 47(1962).

1. Section 991.1. The State Bar Committee recommends that a public employee should be entitled to a defense at the expense of the public entity in administrative proceedings where the public entity itself did not initiate or bring the proceeding.

Section 991.2. A change is suggested here to conform to the recommendation to provide a defense of administrative actions brought against public employees.

2. Section 991.3. The State Bar Committee suggests that a public employee should be entitled to a hearing before the employing public entity can refuse to defend him.

The State Bar Committee recommends the addition of the following to Section 991.3:

Any determination made by the public entity under this section shall be held in confidence and shall be inadmissible in evidence in any action or proceeding against the employee or former employee.

3. Section 991.6. The State Bar Committee suggests the addition of the substance of the following to this section:

Such recovery of reasonable attorney's fees, expenses and costs may be ordered by the court in the action in which the employee is sued, provided the public entity is joined therein, in advance of the making of any such order, by order to show cause or otherwise.

The State Bar Committee suggests that the antecedent of the word "it" in the sixth line is not clear. The words "the action or proceeding" should be substituted for the word "it."

Respectfully submitted,

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Executive Secretary

8/10/62

EXHIBIT I

DEFENSE OF ACTIONS BROUGHT AGAINST
PUBLIC OFFICERS AND EMPLOYEES

Section 991.1. The Committee recommends the deletion of the adjective "judicial" in the definition of "action or proceeding", so that a public employee may be represented by and at the expense of the public entity in administrative hearings, as well as simply judicial proceedings. For example, the State Medical Association might initiate a proceeding to suspend the license of a county employed doctor, where the county itself did not initiate or bring the proceeding.

Section 991.2. For the same reasons advanced above, it is recommended that the words "or administrative" be added in the third line, so that the phrase would read: "the public entity shall provide for the defense of any civil or administrative action or proceeding brought against him * * *".

Section 991.3(a). Elsewhere in the draft statute (see Sections 991.2 and 991.6) the Commission uses the expression "in the scope of his service, agency or employment". In the interests of consistency, it is recommended that "service" be substituted for "office".

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". The words "officer, agent or" become redundant in view of the definition.

Section 991.3. The Committee believes that an employee should be entitled to a hearing before the employing public entity can refuse to defend an action or proceeding against him. Accordingly, it is recommended that after the word "if" in the second line of the section there be added ", after a hearing,".

Section 991.3. The Committee recommends that no determination made by the public entity adverse to the defense of an employee should be subject to disclosure in discovery proceedings in an action against the employee and should be inadmissible in evidence. Accordingly, it is recommended that a sentence be added at the end of Section 991.3 as follows:

Any determination made by the public entity under this Section shall be held in confidence and shall be inadmissible in evidence in any action or proceeding against the employee or former employee.

Section 991.6. The Committee was of the view that the employee should not be required to institute a subsequent and separate action against the public entity to recover his reasonable attorney's fees when the court in the main action could readily determine whether the act complained of was within the scope of his employment or whether he acted out of fraud, corruption or malice. On the other hand, such recovery could not be made unless the court had jurisdiction of the public entity. Accordingly, it is suggested that there be added to this section a provision somewhat as follows:

Such recovery of reasonable attorney's fees, expenses and costs may be ordered by the court in the action in which the employee is sued, provided the public entity be joined therein, in advance of the making of any such order, by order to show cause or otherwise.

In this same section the Committee observes that the antecedent of the word "it" in the sixth line is not clear and requires clarification.