

8/11/62

Memorandum No. 53(1962)

Subject: Study No. 52(L) - Sovereign Immunity (Limits on
Counsel Fees)

Attached (blue pages) are two copies of a revised tentative recommendation relating to the limitation of counsel fees in actions against public entities and public employees. This material supersedes Memorandum No. 39(1962) and the recommendation attached thereto. The statute has been revised to eliminate several objectionable features in the prior draft and to provide greater detail regarding scope, notice, jurisdiction and venue.

Respectfully submitted,

Jon D. Smock
Assistant Counsel

August 11, 1962

TENTATIVE RECOMMENDATION
of the
CALIFORNIA LAW REVISION COMMISSION
relating to
Counsel Fees In Actions Against Public Entities and Public
Officers and Employees

The Federal Tort Claims Act sets maximum limits within which a court may fix reasonable counsel fees in any action thereunder. This authority extends not only to cases actually brought to trial, but also to settlements and compromises of disputed cases. Similarly, some of the courts in New York--a state with broad experience in the area of governmental tort liability--have imposed limits upon counsel fees in certain kinds of actions. In California, the Industrial Accident Commission has authority to determine the reasonableness of counsel fees in industrial accident cases.

At least three policies underlie these limits upon counsel fees. First, the limitation upon counsel fees has the merit of protecting public entities against spurious and unfounded litigation. Second, counsel fees have been limited in some instances because a few attorneys had been exacting unreasonably exorbitant fees in particular types of cases. Third, counsel fees have been limited where the government is particularly concerned that the injured person receives most of the compensation. Thus, in industrial accident cases, for example, counsel

fees are limited so that the compensation to injured workers will not be eaten away by legal fees. And, where the government is expending public funds to compensate for injuries resulting from governmental activities, legal fees have been limited to provide assurance that the public money will not be diverted from the primary purpose of its expenditure.¹

The Law Revision Commission has concluded that these policies underlying limitations upon counsel fees are sound and may appropriately be applied in the area of governmental tort liability in California. Accordingly, the Commission makes the following recommendation:

1. The amount awarded to attorneys as compensation for services rendered in effecting a recovery upon a cause of action against a public entity founded upon a negligent or wrongful act or omission should be a reasonable amount as determined by a court. Such amount should not exceed 20 percent of the total amount recovered--the same maximum limit as is provided in the Federal Tort Claims Act--nor should it exceed any amount which may be agreed upon by the attorney and his client. The recommended limit on counsel fees should be applicable to every tort recovery by judgment, settlement or compromise, whether before or after suit is filed. To avoid unnecessarily complicating smaller claims, however, and to reduce the costs involved in effecting settlements and

1. For an excellent discussion of limitations on counsel fees in various government agencies, see Strickland, Limitations on Attorneys' Fees Under Federal Law (Am. Bar Found. May 1961), which contains exhaustive tables of the many federal statutes which limit counsel fees.

compromises, the matter of counsel fees should be left to agreement between the attorney and his client where the total amount recovered is less than \$500. The amount allowed as counsel fees should be paid out of the recovery and should not be in addition thereto.

2. A uniform procedure similar to that which applies to fixing counsel fees in the settlement of minors' actions should be provided so that the court can fix reasonable counsel fees in cases of settlement or compromise, whether before or after suit is filed.

3. An attorney who receives a greater fee than is fixed and allowed by the court should be liable to the client for three times the excess amount received by the attorney. This treble damage liability should be sufficient to deter unauthorized charges without the need for a penal sanction such as is provided in the Federal Tort Claims Act.

4. These limitations should also apply to cases where the public entity undertakes to defend an action brought against a public officer, agent or employee. This will prevent a claimant-plaintiff from instituting his action against the public officer, agent or employee (instead of against the public entity) merely to avoid the statutory limits placed on the amount he may pay his attorney. Moreover, it is sound public policy to discourage unfounded litigation against public officers, agents and employees, and a statutory limitation on counsel fees in such cases will tend to discourage litigation that lacks merit.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Article 2 (commencing with Section 830.1) to Chapter 3.5 of Division 3.5 of Title 1 of the Government Code, relating to counsel fees in actions against public entities and public officers, agents and employees.

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

SECTION 1. Article 2 (commencing with Section 830.1) is added to Chapter 3.5 of Division 3.5 of Title 1 of the Government Code, to read:

Article 2. Counsel Fees

830.1. As used in this article:

(a) "Tort action" means a cause of action against a public entity, or against a public officer, agent or employee where the cause of action is defended by a public entity, founded upon death or injury to persons or property proximately caused by a negligent or wrongful act or omission.

(b) "Tort recovery" means a recovery in a tort action where the amount recovered by judgment, settlement or compromise, whether before or after suit is filed, is \$500 or more.

830.2. This article does not apply to any tort action where the amount recovered by judgment, settlement or compromise, whether before or after suit is filed, is less than \$500.

830.3. No attorney may receive as compensation for services rendered in connection with any tort action an amount in excess of that fixed and allowed by the court pursuant to this article. An attorney who violates

this section is liable to the person paying such excess in an amount equal to three times the excess amount received by the attorney.

830.4. The court shall fix and allow out of any tort recovery, and not in addition thereto, reasonable counsel fees to be paid to the attorney representing the person compensated in any tort action. The counsel fees fixed and allowed by the court shall not exceed the lesser of (a) the fee fixed pursuant to any contractual arrangement between the attorney and the client or (b) 20 percent of the total amount of the tort recovery.

830.5. (a) Where the tort recovery is obtained by judgment in the tort action, the court in which the judgment is obtained shall fix and allow reasonable counsel fees in accord with this article.

(b) Where the tort recovery is obtained by settlement or compromise after suit is filed in the tort action, any attorney seeking compensation for services rendered in connection with such tort action shall petition the court in which the suit is pending for an order fixing and allowing reasonable counsel fees in accord with this article.

(c) Where the tort recovery is obtained before suit is filed in the tort action, any attorney seeking compensation for services rendered in connection with such tort action shall petition the superior court in the county in which the client resides or, if the client does not reside within the State, the superior court in the county in which the attorney has his office, for an order fixing and allowing reasonable counsel fees in accord with this article.

830.6. Written notice of the time and place of the hearing of any petition filed pursuant to this article shall be given not less than 10 days prior to the time set for such hearing to the client and the public entity involved. A copy of the petition shall be attached to the notice. Upon the hearing, the court shall fix and allow reasonable counsel fees in accord with this article.

SEC. 2. This act applies only to causes of action that accrue on or after its effective date.