

Memorandum 2021-37

**Statutes Made Obsolete by Trial Court Restructuring (Part 8):
Representation and Indemnification of Court and Court Personnel
(Discussion of Issues)**

In preparing its 2002 report on *Statutes Made Obsolete by Trial Court Restructuring: Part 1*,¹ the Commission set aside for further study six provisions relating to representation and indemnification of trial courts and trial court personnel. The Commission started to revisit those provisions earlier this year. It decided how to handle five of them for purposes of a tentative recommendation, but asked the staff to conduct further research regarding the last provision, Government Code Section 27648.² This memorandum addresses that issue.

The following materials are attached for the Commission’s consideration:

	<i>Exhibit p.</i>
• Government Code Sections 995-996.6 (defense of public employees)	1
• California Rules of Court 10.201-10.203	5
• Government Code Section 825 (indemnification of public employees)	11

The memorandum begins by summarizing the Commission’s prior work pertaining to Section 27648 and related matters. The memorandum then provides additional information and analysis for the Commission to consider.

Unless otherwise specified, all further statutory references are to the Government Code.

1. 32 Cal. L. Revision Comm’n Reports 1 (2002) (hereafter, “TCR #1”). Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Minutes (April 2021), pp. 3-7; see also Memorandum 2021-21.

PRIOR WORK

The Commission's prior work pertaining to Section 27648 and related matters can be divided into two phases: (1) initial work and (2) recent work.

Initial Work

In 2000, the Legislature directed the Commission to review the codes and recommend revisions to remove material made obsolete by the following major reforms of California's trial court system:

- (1) Trial court unification (i.e., unification of the municipal and superior courts).
- (2) Enactment of the Lockyer-Isenberg Trial Court Funding Act of 1997, under which the state (rather than the counties) assumed full responsibility for funding trial court operations.
- (3) Enactment of the Trial Court Employment Protection and Governance Act ("TCEPGA"), which established a new personnel system for the trial courts, with the local superior court as the employer (not the county or the state).³

In response, the Commission promptly prepared and sought input on a tentative recommendation proposing to revise hundreds of code sections to reflect these reforms (the "2001 tentative recommendation").⁴

Among other things, the tentative recommendation addressed Sections 27647 and 27648, which are interrelated provisions. Both sections focus on situations in which a county counsel or other government entity provides legal representation for a superior court or a judge of that court, or is responsible for providing such representation. The tentative recommendation's treatment of each section is described separately below, as well as the comments submitted in response.

2001 Approach to Section 27647

Section 27647 authorizes a county counsel to represent a superior court or a superior court judge in specified circumstances:

27647. (a) If requested to do so by the superior court of the county of the county counsel, or by any judge thereof, and insofar as such duties are not in conflict with, and do not interfere with, other duties, the county counsel may represent any such court or judge thereof in all matters and questions of law pertaining to any of such judge's duties, including any representation authorized by

3. See Gov't Code § 71674; see also *TCR #1*, *supra* note 1, at 5, 7-9.

4. See Tentative Recommendation on *Statutes Made Obsolete by Trial Court Restructuring* (Nov. 2001), available at <http://www.clrc.ca.gov/pub/Misc-Report/TR-TrialCtRestruct.pdf>.

Section 68111 and representation in all civil actions and proceedings in any court in which with respect to the court's or judge's official capacity, such court or judge is concerned or is a party.

(b) This section does not apply to any of the following:

(1) Any criminal proceedings in which a judge is a defendant.

(2) Any grand jury proceedings.

(3) Any proceeding before the Commission on Judicial Qualifications.

(4) Any civil action or proceeding arising out of facts under which the judge was convicted of a criminal offense in a criminal proceeding.⁵

In the 2001 tentative recommendation, the Commission proposed to repeal Section 27647 as obsolete.⁶ The accompanying Comment said that the section "is repealed to reflect enactment of Section 811.9, which governs representation, defense, and indemnification of trial court judges, judicial officers, court executive officers, and employees."⁷

The tentative recommendation also included a Note on the proposed repeal. Like the Comment, the Note said that Section 27647 "appears to have been superseded" by Section 811.9, which had just been added to the Government Claims Act to help clarify its application to the judiciary in the restructured trial court system.⁸ The Note also solicited comments on whether Section 27647 "should be preserved in any form."⁹

The Commission received two comments in response. In particular, Los Angeles County Superior Court objected to the proposed repeal. It explained:

This section should not be repealed as it continues to have practical application. County counsel may be the desired choice for representation in some circumstances. *The scope of section 811.9 does not extend to all actions in which the court or its employees are represented and the authorization in section 27647 should be preserved.* Courts may contract for county counsel services pursuant to section 77212 and the authority for county counsel representation is a prerequisite to such a contract.¹⁰

5. Until recently, Section 27647 also referred to municipal courts. That reference was deleted in the 2019 bill on maintenance of the codes. See 2019 Cal. Stat. ch. 497, § 144 (AB 991 (Gallagher)).

6. 2001 tentative recommendation, *supra* note 4, at 183.

7. *Id.*

8. *Id.* at 184.

9. *Id.*

10. Memorandum 2002-14, Exhibit p. 54 (emphasis added).

Contra Costa County Superior Court also objected to the proposed repeal. Like Los Angeles County Superior Court, it expressed “some concern that GC 811.9 may be narrower in scope than other provisions for representation and defense.”¹¹

2001 Approach to Section 27648

Section 27648 is located immediately after Section 27647. It provides for reimbursement of judges who normally would be entitled to legal representation “pursuant to Section 825, 995, or 27647,” but must instead obtain and pay for other legal representation due to a conflict of interest:

27648. If, because of a declared conflict of interest, any judge, who is otherwise entitled to representation pursuant to Section 825, 995, or 27647, is required to retain his own counsel, such judge is entitled to recover from the appropriate public entity such reasonable attorney’s fees, costs, and expenses as were necessarily incurred thereby.

In the 2001 tentative recommendation, the Commission did not propose any revisions of Section 27648. Rather, it reproduced the section in the tentative recommendation and included the following Note:

Note: Comment Requested. Government Code Section 27648 will require revision if Government Code Section 27647 is repealed as proposed in this tentative recommendation. The Commission solicits comment on whether the provision should be amended to delete the reference to Section 27647, repealed in its entirety due to the enactment of Government Code Section 811.9, continued with revisions in Section 811.9, or otherwise revised.

In response to this Note, Los Angeles County Superior Court said: “At minimum, any amendment to this section must preserve the principle that any judge otherwise entitled to representation who is required to retain his or her own counsel is entitled to reimbursement, unless this principle is implemented elsewhere in the Code.”¹² Contra Costa County Superior Court agreed, but also urged the Commission to go further:

[T]here are no specific provisions in GC 811.9 for reimbursement of attorney fees where a judge (or other court staff member) is

11. Memorandum 2002-14, Exhibit p. 22. Contra Costa County Superior Court also raised some concerns about reimbursement of a judge who has to pay for representation out of the judge’s own pocket. See *id.* Although the court referred to Section 27647 in expressing those concerns, they appear to relate to Section 27648, not to Section 27647. They are therefore described later in this memorandum (in the discussion of Section 27648), not here.

12. Memorandum 2002-14, Exhibit p. 54.

required to retain their own counsel due to conflict of interest. While GC 27647 [sic] limits this protection to judges, *all court staff should have this reimbursement provision*. That could be accomplished by repealing GC 26747 [sic] and expanding GC 811.9.¹³

Commission Response to Comments on Sections 27647 and 27648

In light of the comments on Sections 27647, 27648, and a few other sections relating to representation and indemnification, the Commission removed those sections from its proposal, so that it could study them further. Its 2002 report on trial court restructuring explained:

Representation, Defense, and Indemnification of Trial Courts and Trial Court Judges

A few statutes pertain to the representation of a superior court or superior court judge by county counsel or the district attorney. These sections may have been superseded by newly-enacted Government Code Section 811.9, which requires the Judicial Council to provide for the representation, defense, and indemnification of superior courts, superior court judges, officers, and employees. The Commission is studying several issues relating to these provisions, including whether the earlier representation provisions are indeed obsolete or continue to have practical application.¹⁴

Recent Work

Although the Commission has been working on trial court restructuring clean-up almost continuously since 2002, it did not revisit Sections 27647 and 27648 until earlier this year. In part, that was because the Judicial Council and other stakeholders were still resolving policy issues relating to representation and indemnification in the restructured court system. Their efforts resulted in 2002 and 2005 statutory reforms on that subject,¹⁵ as well as some implementing court rules.¹⁶

In April of this year, the Commission started to take another look at the provisions on representation and indemnification that it set aside for further study in 2001.¹⁷ It reached decisions about how to handle most of those

13. Memorandum 2002-14, Exhibit p. 22 (emphasis added). Although the court referred to “GC 27647” and “GC 26747,” it is clear from the context that the court meant to refer to Section 27648.

14. *TCR #1, supra* note 1, at 24-26 (footnote omitted).

15. See 2002 Cal. Stat. ch. 1007 (AB 2321 (Hertzberg)); 2005 Cal. Stat. ch. 706 (Committee on Judiciary).

16. See Cal. R. Ct. 10.201-10.203.

17. See Memorandum 2021-21; Minutes (April 2021), pp. 3-7.

provisions in a tentative recommendation, including Section 27647.¹⁸ It did not make such a decision regarding Section 27648, because it wanted more information first.¹⁹

To assist the Commission in resolving how to handle Section 27648, here is a summary of its April deliberations relating to Sections 811.9, 27647, and 27648.

Preliminary Decision to Leave Section 811.9 Alone

As previously discussed, Section 811.9 was added to the Government Claims Act in the midst of trial court restructuring, to provide guidance on how that Act would apply to the judiciary in the restructured court system. The section was refined in several respects in 2005.²⁰ It currently provides:

811.9. (a) *Notwithstanding any other provision of law*, judges, subordinate judicial officers, and court executive officers of the superior courts are state officers for purposes of Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive, and trial court employees are employees of the trial court for purposes of Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive. The Judicial Council shall provide for representation, defense, and indemnification of those individuals and the court pursuant to Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive. The Judicial Council shall provide for that representation or defense through the county counsel, the Attorney General, or other counsel. The county counsel and the Attorney General may, but are not required to, provide representation or defense for the Judicial Council. The fact that a justice, judge, subordinate judicial officer, court executive officer, court employee, the court, the Judicial Council, or the Administrative Office of the Courts is or was represented or defended by the county counsel, the Attorney General, or other counsel shall not be the sole basis for a judicial determination of disqualification of a justice, judge, subordinate judicial officer, the county counsel, the Attorney General, or other counsel in unrelated actions.

(b) To promote the cost-effective, prompt, and fair resolution of actions, proceedings, and claims affecting the trial courts, the Judicial Council shall adopt rules of court requiring the Administrative Office of the Courts to manage actions, proceedings, and claims that affect the trial courts and involve superior courts, superior court judges, subordinate judicial officers, court executive officers, or trial court employees in consultation with the affected courts and individuals. The Administrative Office

18. See Minutes (April 2021), pp. 3-6.

19. See *id.* at 7.

20. See 2005 Cal. Stat. ch. 706, § 16 (AB 1742 (Committee on Judiciary)).

of the Courts' management of these actions, proceedings, and claims shall include, but not be limited to, case management and administrative responsibilities such as selection of counsel and making strategic and settlement decisions.

(c) Nothing in this section shall be construed to affect the employment status of subordinate judicial officers, court executive officers, and trial court employees related to any matters not covered by subdivision (a).²¹

As the italics indicate, the section expressly applies "notwithstanding any other provision of law." In other words, its requirements and the referenced provisions of the Government Claims Act are apparently intended to override any contrary law on the subject.

In analyzing Section 811.9 for the April meeting, the staff wrote:

The 2005 amendment of Section 811.9 was sponsored by the Judicial Council, as was a 2002 bill that revised various provisions in the Government Claims Act to specifically address claims against courts and court personnel. *The current version of Section 811.9 (which incorporates the updated provisions of the Government Claims Act by reference) thus reflects both the Legislature's views and the Judicial Council's views on how representation, defense, and indemnification of trial court personnel should be handled in the restructured trial court system.*²²

The Commission therefore concluded that Section 811.9 "does not appear to contain any material made obsolete by trial court restructuring" and "should be left as is."²³

Proposed Amendment of Section 27647

In analyzing Section 27647 for the April meeting, the staff described the concerns that Los Angeles County Superior Court and Contra Costa County Superior Court raised in 2002. The staff then tried to evaluate their argument that repealing the section would be unwise because it might be broader in scope than Section 811.9.²⁴

The staff began by pointing out that "Section 811.9 pertains to representation, defense, and indemnification of courts and court personnel 'pursuant to Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive' — i.e., representation, defense, and indemnification *pursuant to the*

21. Emphasis added.

22. Memorandum 2021-21, p. 4 (emphasis added; footnotes omitted).

23. Minutes (April 2021), p. 3.

24. See Memorandum 2021-21, pp. 8-9.

*Government Claims Act.*²⁵ The staff then cautioned that Los Angeles County Superior Court and Contra Costa County Superior Court may have been “correct in saying that Section 27647 applies more broadly than this.”²⁶

In support of that view, the staff described two possible examples.

First, the staff noted that Section 27647 expressly includes “any representation authorized by Section 68111.” That provision says:

68111. Whenever any judge of any court of this state is a witness in his official capacity as judge in any action or proceeding, such judge shall be entitled to be represented at such action or proceeding by counsel of his choice.²⁷

The staff observed that this language “presumably would include representation of a judge who is summoned to testify in a criminal case in the judge’s official capacity,” such as when “a member of the public is accused of stealing a juror’s purse from the judge’s courtroom.”²⁸ The staff postulated that representation in such circumstances “seems to be beyond the scope of the Government Claims Act.”²⁹

Second, the staff referred to the scenario that Los Angeles County Superior Court raised in 2002: Under Section 77212, a court that received county counsel services before enactment of the Trial Court Funding Act can continue to contract with the county for such services if that is mutually agreeable.³⁰ In the April memorandum, the staff surmised that such an arrangement “could perhaps include some types of representation (e.g., negotiating a business transaction for the court) that are beyond the scope of the Government Claims Act.”³¹ We acknowledged that we were “not sure of this” and encouraged input on the point.³²

In light of these examples and the possibility of other such situations, the staff raised, but did not squarely endorse, the idea of proposing to amend Section

25. *Id.* at 10 (emphasis in original).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Section 77212(d) says in part: “If a trial court desires to receive or continue to receive a specific service from a county or city and county as provided in subdivision (c), and the county or city and county desires to provide or continue to provide that service as provided in subdivision (b), the presiding judge of that court and the county or city and county shall enter into a contract for that service.”

31. Memorandum 2021-21, p. 10.

32. *Id.*

27647, rather than proposing to repeal it.³³ In particular, the staff pointed out that the section could be amended to recognize the Judicial Council's key role in matters governed by the Government Claims Act.³⁴

The Commission decided to follow that approach and include the following amendment in a tentative recommendation:

Gov't Code § 27647 (amended). Representation of court or judge by county counsel

SEC. ____ . Section 27647 of the Government Code is amended to read:

27647. (a) If requested to do so by the ~~superior court of the county of the county counsel, or by any judge thereof~~ Judicial Council when the Government Claims Act (Division 3.6 (commencing with Section 810) of Title 1) applies, or by the local superior court or any judge thereof when that act does not apply, and insofar as ~~such~~ these duties are not in conflict with, and do not interfere with, other duties, the county counsel may represent ~~any such~~ the superior court or a judge thereof in all matters and questions of law pertaining to any of ~~such~~ the judge's duties, including any representation authorized by Section 68111 and representation in all civil actions and proceedings in any court in which with respect to the court's or judge's official capacity, ~~such~~ the court or judge is concerned or is a party.

(b) This section does not apply to any of the following:

- (1) Any criminal proceedings in which a judge is a defendant.
- (2) Any grand jury proceedings.
- (3) Any proceeding before the Commission on Judicial Qualifications Performance.

33. *Id.* at 11. The staff also saw another reason why Section 27647 might continue to be useful:

Section 811.9 says that "[t]he county counsel ... may, but [is] not required to, provide representation or defense *for the Judicial Council.*" It is not clear whether that sentence (1) only authorizes a county counsel to represent the Judicial Council itself, or (2) also authorizes a county counsel to represent the judicial branch entities and individuals for which the Judicial Council must arrange representation (e.g., superior courts and their officers and employees). If the quoted sentence only authorizes a county counsel to represent the Judicial Council itself, then perhaps statutory language expressly giving county counsels the latter type of authority would also be helpful.

Memorandum 2021-21, pp. 10-11 (emphasis in original).

34. See *id.*

(4) Any civil action or proceeding arising out of facts under which the judge was convicted of a criminal offense in a criminal proceeding.

Comment. Section 27647 is amended to reflect the enactment of Section 811.9 (2000 Cal. Stat. ch. 447, § 4.5) and subsequent legislation clarifying and solidifying the Judicial Council’s role in handling claims against trial courts and trial court personnel (see 2002 Cal. Stat. ch. 1007 and 2005 Cal. Stat. ch. 706, § 16; see also Sections 810-998.3; Cal. R. Ct. 20.201-10.203).

The section is also amended to update an obsolete reference to the “Commission on Judicial Qualifications,” which is now known as the “Commission on Judicial Performance.”³⁵

Request for More Information on Section 27648

With regard to Section 27648, the staff investigated Contra Costa County Superior Court’s suggestion about creating a broad requirement for reimbursement of court personnel who have to provide their own legal representation. As reported in the April memorandum, the staff discovered that “a broad reimbursement requirement along the lines suggested by Contra Costa Superior Court already exists in the Government Claims Act.”³⁶

Specifically, Section 996.4 says that an employee or former employee of a public entity is entitled to reimbursement of attorney’s fees, costs, and expenses in specified circumstances:

996.4. If after request a public entity fails or refuses to provide an employee or former employee with a defense against a civil action or proceeding brought against him and the employee retains his own counsel to defend the action or proceeding, he is entitled to recover from the public entity such reasonable attorney’s fees, costs and expenses as are necessarily incurred by him in defending the action or proceeding if the action or proceeding arose out of an act or omission in the scope of his employment as an employee of the public entity, but he is not entitled to such reimbursement if the public entity establishes (a) that he acted or failed to act because of actual fraud, corruption or actual malice, or (b) that the action or proceeding is one described in Section 995.4.

Nothing in this section shall be construed to deprive an employee or former employee of the right to petition for a writ of mandate to compel the public entity or the governing body or an employee thereof to perform the duties imposed by this part.

35. Minutes (April 2021), p. 6.

36. Memorandum 2021-21, p. 13.

Due to this broad reimbursement provision, the staff suggested that Section 27648 (focusing solely on reimbursement of judges) might be unnecessary for two of the three types of representation it covers:

Given the existence of this reimbursement provision in the Government Claims Act, and the language in Section 811.9 making the Government Claims Act applicable to the judicial branch, *Section 27648 may be obsolete with regard to at least two of the three types of representation it mentions: “representation pursuant to Section 825” and “representation pursuant to Section ... 995,” both of which fall within the Government Claims Act.* To the extent that there is any difference in coverage between Section 27648 and Section 996.4, the latter section would appear to control, given the “notwithstanding” clause in Section 811.9.³⁷

The third type of representation mentioned in Section 27648 is “representation pursuant to Section ... 27647.” Thus, the proper approach to Section 27648 might depend on the Commission’s approach to Section 27647. The staff explained:

- *If Section 27647 is repealed (as the Commission proposed in 2001), then Section 27648 will no longer need to refer to “representation pursuant to ... Section 27647.” Because the references to “representation pursuant to Section 825” and “representation pursuant to Section ... 995” may also be obsolete, the whole section might be ripe for repeal.*
- *If Section 27647 is retained ..., then Section 27648 might still be needed, at least for matters beyond the scope of the Government Claims Act. An amendment limiting the section to such matters might be in order.*³⁸

The Commission discussed these ideas at the April meeting, but did not resolve how to treat Section 27648 in a tentative recommendation. Instead, the Commission directed the staff to do further research on it and seek input from knowledgeable sources.³⁹ The Commission was particularly interested in whether Section 27648 “applies in any situations beyond the scope of the Government Claims Act and, if so, what those situations are.”⁴⁰

37. *Id.* (emphasis added).

38. *Id.* at 13-14.

39. Minutes (April 2021), p. 7.

40. *Id.*

NEW RESEARCH

Since the April meeting, the staff has done additional research on the outstanding issues. Among other things, the staff consulted an expert in this area who agreed to speak off-the-record. The staff much appreciates the assistance.

The discussion below presents the research findings. It is organized as follows:

- Overview of the Government Claims Act.
- Scope of the Government Claims Act.
- The Government Claims Act and the judicial branch.

Later in this memorandum, the staff analyzes how this information applies to Section 27648 and the other statutes the Commission has been examining.

Overview of the Government Claims Act

The Government Claims Act (Government Code Sections 810-998.3) was enacted in 1963,⁴¹ on recommendation of this Commission.⁴² It replaced a “Byzantine claims system” consisting of “numerous state statutes and local ordinances.”⁴³ It was enacted “to provide a comprehensive codification of the law of governmental liability and immunity in California.”⁴⁴

For many years, the Act was commonly known as the “Tort Claims Act.”⁴⁵ The California Supreme Court rejected that approach in 2007, pointing out that “Government Claims Act” is a more appropriate name because the Act extends

41. 1963 Cal. Stat. chs. 1681, 1682, 1683, 1684, 1685, 1686, 1715, 2029.

42. See *Sovereign Immunity #1 – Tort Liability of Public Entities and Public Employees*, 4 Cal. L. Revision Comm’n Reports 801 (1963); *Sovereign Immunity #2 – Claims, Actions and Judgments Against Public Entities and Public Employees*, 4 Cal. L. Revision Comm’n Reports 1001 (1963); *Sovereign Immunity #3 – Insurance Coverage for Public Entities and Public Employees*, 4 Cal. L. Revision Comm’n Reports 1201 (1963); *Sovereign Immunity #4 – Defense of Public Employees*, 4 Cal. L. Revision Comm’n Reports 1301 (1963); *Sovereign Immunity #6 – Workmen’s Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officer*, 4 Cal. L. Revision Comm’n Reports 1501 (1963); *Sovereign Immunity #7 – Amendments and Repeals of Inconsistent Statutes*, 4 Cal. L. Revision Comm’n Reports 1601 (1963).

See also Van Alstyne, *A Study Relating to Sovereign Immunity*, 5 Cal. L. Revision Comm’n Reports 1 (1963); *Sovereign Immunity #5 – Liability of Public Entities for Ownership and Operation of Motor Vehicles*, 4 Cal. L. Revision Comm’n Reports 1401 (1963); *Sovereign Immunity #8 – Liability of Public Entities for Ownership and Operation of Motor Vehicles; Claims and Actions Against Public Entities and Public Employees*, 7 Cal. L. Revision Reports 401 (1965); *Sovereign Immunity #9 – Statute of Limitations*, 9 Cal. L. Revision Comm’n Reports 49 & 175 (1969); *Sovereign Immunity #10 – Revisions of the Governmental Liability Act*, 9 Cal. L. Revision Comm’n Reports 801 (1969).

43. *Dicampoli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 997.

44. *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1001.

45. *Baines Pickwick Ltd. v. City of Los Angeles*, 72 Cal. App. 4th 298, 302-03, 85 Cal. Rptr. 2d 74 (1999).

to breach of contract claims, not just tort claims.⁴⁶ All statutory references to the “Tort Claims Act” have since been eliminated on the Commission’s recommendation.⁴⁷ The Act is now officially known as the “Government Claims Act.”⁴⁸

The Government Claims Act “balances the competing policies of governmental liability and immunity.”⁴⁹ Although there are strong interests in holding government accountable for a wrongful act that causes harm to an individual, there are also strong competing interests, including protection of the public treasury and facilitation of a functional government.⁵⁰

In drafting the Act, the Commission rejected the concept of total immunity for public entities, because of the harsh consequences to injured parties and the lack of a deterrent effect on public entities.⁵¹ The Commission also rejected the concept of full liability, because it was likely to be unaffordable and could impede efficient functioning of government.⁵²

Instead, the fundamental premise of the Act is “a presumption of non-liability except by statute or constitution.”⁵³ In other words, “there is no such thing as common law tort liability for public entities; a public entity is not liable for an injury ‘[e]xcept as otherwise provided by statute.’”⁵⁴

The Government Claims Act addresses several different but interrelated substantive matters:

Liability and Immunity

The intent of the Government Claims Act is to “confine potential governmental liability to rigidly delineated circumstances.”⁵⁵ The Act “authorizes plaintiffs to bring certain ... claims against public entities, while also immunizing public entities from liability in particular circumstances.”⁵⁶

46. See *City of Stockton v. Superior Court* (2007) 42 Cal. 4th 730, 737-42.

47. See 2012 Cal. Stat. ch. 759; *Statutory References to “Tort Claims Act,”* 41 Cal. L. Revision Comm’n Reports 285 (2011).

48. Section 810(b).

49. *Charter Schools and the Government Claims Act*, 42 Cal. L. Revision Comm’n Reports 2256 (2012).

50. For a good discussion of the competing interests, see Memorandum 2010-6, pp. 1-7.

51. *Sovereign Immunity #1*, *supra* note 42, at 811.

52. *Id.*

53. Memorandum 2010-6, p. 6; see Section 815; *Sovereign Immunity #1*, *supra* note 42, at 811.

54. *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 803.

55. *Williams v. Horvath* (1976) 16 Cal.3d 834, 838; see also *Dicampli-Mintz*, 55 Cal.4th at 991.

56. *Quigley*, 7 Cal.5th at 802.

“The liability and immunity provisions provide an avenue of compensation for those injured by governmental activities.”⁵⁷ In addition, they “protect the public fisc by limiting the activities for which compensation is allowed, and they allow the government to govern by minimizing interference with governmental activities.”⁵⁸

Claim Presentation

The Government Claims Act establishes certain conditions precedent to filing a lawsuit against a public entity. In particular, a plaintiff must timely file a claim for money or damages with the public entity.⁵⁹ Failure to comply with this claim presentation requirement generally bars the plaintiff from bringing suit against the public entity.⁶⁰

“The claims presentation provisions protect the public fisc and provide just compensation to injured parties by potentially allowing claims to be resolved before litigation ensues.”⁶¹

Indemnification

When an employee is sued for an act or omission occurring in the scope of employment for a public entity, the Government Claims Act generally requires the public entity to pay any judgment against the employee or any settlement to which the public entity is a party.⁶² Subject to certain exceptions, the public entity is not entitled to seek reimbursement from the employee.⁶³ “In sum, the public entity can never receive indemnification for the employee's good faith conduct of his regular duties.”⁶⁴

“The indemnification provisions encourage public employees to execute their employment duties with zeal by limiting their personal tort liability.”⁶⁵ Those provisions also “remove the risk of making a public employee personally liable for risks created by public employment when the public entity is not liable ...”⁶⁶

57. Memorandum 2010-6, p. 7.

58. *Id.*

59. See Sections 905 (claim against local public entity), 905.2 (claim against state).

60. *Le Mere v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 237, 246; see also *Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 938; *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1150-52.

61. Memorandum 2010-6, p. 7.

62. *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1001; see Sections 825-825.6.

63. See Sections 825.4, 825.6.

64. *Johnson v. State of California* (1968) 69 Cal.2d 782, 791.

65. Memorandum 2010-6, p. 7; see also *Johnson*, 69 Cal.2d at 792.

66. Memorandum 2010-6, p. 7.

Representation and Reimbursement of the Costs of Representation

“As part of its overall statutory scheme, the Tort Claims Act provides that in the usual civil case brought against a public employee, a public entity is required to defend the action against its employee”⁶⁷ If the public entity refuses to do so and the employee has to pay for such representation, the public entity is required to reimburse the employee, subject to some restrictions.⁶⁸

“In most cases, employees can be reassured that they will not be liable for their own defenses.”⁶⁹

Scope of the Government Claims Act

The proper treatment of Sections 27647 and 27648 may hinge on the scope of the Government Claims Act. As the Commission requested in April, the staff researched that matter and it is discussed below.

Variation in Scope

Before getting into specifics, it is important to point out that the scope of the Government Claims Act is not uniform throughout the Act. The key substantive aspects of the Act vary in scope.

For example:

- **Liability and immunity.** The Act’s provisions relating to liability and immunity focus on *tort* claims.⁷⁰ The Act “reaffirms the longstanding rule that governmental immunity *does not* encompass *contractual* liability.”⁷¹
- **Claim presentation requirements.** Unlike the liability and immunity provisions, the Act’s claim presentation requirements apply to breach of contract claims, as well as tort claims.⁷² However, the Act extends those requirements only to claims for money or damages,⁷³ and expressly exempts some such claims.⁷⁴

67. *Farmers Ins. Group*, 11 Cal.4th at 1001 (citing Sections 995 *et seq.*).

68. *Id.* at 1002 (citing Sections 996.4, 995.2(a)).

69. Memorandum 2010-6, p. 5.

70. See Sections 814-823.

71. *City of Stockton*, 42 Cal.4th at 741 (emphasis added); see Section 814.

72. See *id.* at 734, 737-42.

73. See Sections 905, 905.2. “[W]here a claimant seeks both damages and nonmonetary relief from a public entity in the same action, the applicability of the claim filing requirement turns on whether the damages sought are ancillary to the equitable relief also sought, in which case the claim filing requirement is inapplicable, or the reverse is true, in which case the filing requirement applies.” *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 761-62. “The requirement of filing a claim within one year does not apply to actions brought primarily for declaratory or injunctive relief, even though incidental money damages are sought.” *Independent Housing Services of San Francisco v. Fillmore Center Associates* (1993) 840 F. Supp. 1328, 1358.

74. See, e.g., Sections 905, 905.2.

If the Act does not include an express exemption, “a court will infer a legislative intent to excuse compliance only where a claim is based on a statutory scheme with a ‘functionally equivalent claim process’ and a comparable scheme for administrative enforcement.”⁷⁵ Such exceptions to the claim presentation requirements “are rare;”⁷⁶ they include claims pursuant to the Whistleblower Protection Act,⁷⁷ the Emergency Flood Relief Law,⁷⁸ and the Fair Employment and Housing Act.⁷⁹

Federal civil rights claims are also exempt from the claim presentation requirements, due to the Supremacy Clause.⁸⁰

- **Indemnification.** The key indemnification requirement of the Government Claims Act is still different in scope. As one might expect, it only applies to a claim or action against a public employee for an injury arising out of an act or omission occurring within the scope of employment.⁸¹ The burden rests upon the public employee to establish that the act or omission was within the scope of employment.⁸² Various other restrictions also apply.⁸³

Here, the Commission is trying to figure out how to address Section 27648, which relates to representing a judge and reimbursement of a judge’s costs of representation. Thus, what the Commission needs to examine, for purposes of comparison, is the scope of the Act’s provisions on providing representation for a public employee and reimbursement of a public employee’s costs of representation.

“The requirements pertaining to a public entity’s duty to defend an employee are set forth at sections 995 through 996.6.”⁸⁴ For convenient reference, those sections are reproduced at Exhibit pages 1-4.

Providing a defense for a public employee is mandatory in some situations and permissive in other situations. We first describe the mandatory situations, then the permissive ones.

75. *Cornejo*, 220 Cal.App.4th at 938-39, quoting *Gatto*, 98 Cal.App.4th at 764.

76. *Cornejo*, 220 Cal.App.4th at 939.

77. *Id.* at 941, 942; see also Section 905.2(h), which did not become effective until after *Cornejo* was decided.

78. *Cornejo*, 220 Cal.App.4th at 939.

79. See *id.*; *Murray v. Oceanside Unified School Dist.* (2000) 79 CA4th 1338, 1360; *Garcia v. Los Angeles Unified School Dist.* 173 Cal.App.3d 701, 711; *Lozada*, 145 Cal.App.4th at 1153.

80. *Lozada*, 145 Cal.App.4th at 1153; *Gatto*, 98 Cal.App.4th at 764.

81. Section 825.

82. *Farmers Ins. Group*, 11 Cal.4th at 1002.

83. See Section 825.

84. *Farmers Ins. Group*, 11 Cal.4th at 1001.

Scope of the Mandatory Representation and Reimbursement Rules

With some exceptions, Section 995 *requires* a public entity to provide for the defense of any *civil action or proceeding* brought against a public employee on account of an act or omission *in the scope of employment*.⁸⁵ A public entity's obligation under Section 995 to defend its employee, and the employee's related right under Section 996.4 to recover the costs of defense if the entity declines to provide a defense when requested, "are limited to the defense of *civil judicial proceedings* against the employee."⁸⁶ "[T]he Legislature contemplated formal litigation activity, not merely investigative activity."⁸⁷ "The entity may provide the employee with a defense through the entity's own attorney, by employing other counsel, or through insurance that requires the insurer to provide the defense."⁸⁸

There are several exceptions to this duty to defend and the related duty of reimbursement, including the following:

- **Act or omission was not within the scope of employment.** When a public entity refuses to defend a public employee upon request and the employee pays for the defense instead, the employee must prove that the act or omission in question occurred within the course and scope of employment. Otherwise, the employee is not entitled to recover reasonable attorney's fees, costs, and expenses.⁸⁹
- **Employee acted or failed to act because of actual fraud, corruption, or actual malice.** A public employee is not entitled to reimbursement of reasonable attorney's fees, costs, and expenses if the public entity establishes that the employee "acted or failed to act because of actual fraud, corruption, or actual malice."⁹⁰ The burden of proving such misconduct is on the public entity,⁹¹

85. *Id.* at 1001-02. A special provision governs defense and reimbursement of a public employee who allegedly interfered with exercise of rights under the Whistleblower Protection Act. See Section 995.3.

86. *Thornton v. California Unemployment Ins. Appeals Bd.* (2012) 204 Cal.App.4th 1403, 1417 (emphasis added).

87. *Id.* at 1415.

88. Arvo Van Alstyne, et al., *California Government Tort Liability Practice, Defense & Indemnification* § 4.2 (CEB 2021); see Section 996. A public employee's right to a defense under the Government Claims Act is in addition to any similar right the employee may have under any contract or other enactment. *Van Alstyne, supra*, at *Defense & Indemnification* § 4.7; see Section 996.6. This does not, however, "permit a public entity to provide a defense where other sections of the Tort Claims Act would prohibit such a defense." *City of Bell v. Superior Court* (2013) 220 Cal.App.4th 236, 258-59.

89. See Sections 995.2(a)(1), 996.4; see also *Farmers Ins. Group*, 11 Cal.4th at 997, 1002; *Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 176.

90. Sections 995.2(a)(2), 996.4.

91. *LA Police Protective League*, 27 Cal.App.4th at 176.

because it would not be fair to put the employee “in the difficult position of having to prove a negative.”⁹²

- **Employee disciplinary context.** A public entity is not required to provide a defense in a disciplinary proceeding by the public entity against its own employee. “This obviously constitutes a conflict of interest of such magnitude that the entity should not be compelled to litigate, in effect, against itself.”⁹³ The public entity may provide such a defense if it chooses to do so.⁹⁴

Another exception to the duty to defend a public employee in a civil case, particularly important for present purposes, concerns conflicts of interest. “A public entity may refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the public entity determines [that] defense of the action or proceeding by the public entity would create a *specific conflict of interest* between the public entity and the employee or former employee.”⁹⁵ For this purpose, a “specific conflict of interest” is “a conflict of interest or an adverse or pecuniary interest, as specified by statute or by a rule or regulation of the public entity.”⁹⁶

“[A] public entity is relieved of its duty to defend only when an ‘actual’ conflict of interest exists.”⁹⁷ A potential conflict of interest is not enough. In that situation, the employee is entitled to a defense, but not to a separate defense.⁹⁸

According to what the California Supreme Court recently described as “the leading treatise” on the Government Claims Act,⁹⁹

[a]n employee or former employee who is denied a defense on the ground of a “specific conflict of interest” stands in a distinctly different position from an employee denied a defense on the grounds that his or her acts or omissions were not “within the scope of employment” or constituted ‘actual fraud, corruption, or

92. *Sovereign Immunity #4*, *supra* note 42, at 1308 n. 11.

93. *Van Alstyne*, *supra* note 88, at *Defense & Indemnification* § 4.25.

94. Section 995.4. As this Commission pointed out long ago, “[a]n action or proceeding is sometimes brought by a public entity against an employee in his official capacity as a test case to determine in advance the validity of a particular expenditure of funds or other proposed action.” *Sovereign Immunity #4*, *supra* note 42, at 1309 n. 14. In that circumstance, “the public employee should be defended at public expense.” *Id.*

“[T]he election by a public entity to provide for a defense under 995.4 is not subject to any conditions precedent. Nor is an election not to provide such defense subject to limitation.” 62 *Ops. Cal. Atty. Gen.* 611 (1979).

95. Section 995.2(a)(3) (emphasis added).

96. *Id.*

97. *City of Huntington Beach v. Petersen Law Firm* (2002) 95 Cal.App.4th 562, 567; see also *Van Alstyne*, *supra* note 88, at *Defense & Indemnification* § 4.36 (discussing *Petersen Law Firm* and related cases).

98. *Petersen Law Firm*, 95 Cal.App.4th at 567.

99. *J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648, 655.

actual malice. Under Govt C § 996.4, the latter cannot recover defense costs unless he or she acted within the scope of employment, and even then not if the entity establishes that he or she acted or failed to act because of “actual fraud, corruption, or actual malice.” *The former, on the other hand, is entitled to recover his or her reasonable fees, costs, and expenses under § 996.4.*¹⁰⁰

Scope of the Permissive Representation and Reimbursement Rules

In some situations, a public entity may, but is not required to, represent a public employee.

One such category relates to the four statutory exceptions described above: (1) outside scope of employment, (2) actual fraud, corruption, or actual malice, (3) employee discipline, and (4) specific conflict of interest. Each of those statutory exceptions “indicate[s] circumstances in which a public entity ‘may refuse’ to provide a defense for a public employee; they do not suggest that the public entity *may not* provide a defense in those circumstances.”¹⁰¹ Thus, for instance, a public entity may “properly defend a public employee in a civil suit alleging sexual harassment if the entity determines that the harassment charges are not well founded,” while “refus[ing] the defense of other employees whose acts of sexual harassment are undisputed.”¹⁰² “Indeed, providing a defense in such circumstances is consistent with one of the purposes of governmental defense statutes, to provide public employees acting in the scope of employment with a measure of protection from the harassment of vexatious lawsuits.”¹⁰³

Other contexts in which representation is permissive are addressed in Sections 995.6, 995.8, and 995.9. In particular:

- **Defense in criminal case.** A public entity “is not required to provide for the defense of a criminal action or proceeding ... brought against an employee or former employee,” but may do so if (a) the action or proceeding is brought on account of an act or omission in the scope of employment, and (b) the public entity “determines that such defense would be in the best interests of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent interests of the public entity.”¹⁰⁴ In other words, a public

100. *Van Alstyne, supra* note 88, at *Defense & Indemnification* § 4.24 (emphasis added); see also *id.* at *Defense & Indemnification* § 4.30 (discussing reimbursement requirements of Section 996.4).

101. *City of Bell*, 220 Cal.App.4th at 254 (emphasis in original).

102. *Farmers*, 11 Cal.4th at 1018. The California Supreme Court has “decline[d] to adopt a bright line rule that all sexual harassment falls outside the scope of employment as a matter of law under all circumstances.” *Id.* at 1019 n. 18.

103. *Id.*

104. Section 995.8.

entity has *limited* discretionary authority to defend its employees in a criminal case; it can do so only if the statutory conditions are satisfied.¹⁰⁵ “Public policy necessarily rejects the concept that a public entity allegedly victimized by a corrupt employee must provide that employee with a defense to those charges.”¹⁰⁶ Further, public entities “are *not required* to reimburse their employees for criminal defense costs incurred successfully defending against criminal charges arising out of conduct within the course and scope of employment.”¹⁰⁷

- **Defense in administrative proceeding.** As in a criminal case, a public entity “is not required to provide for the defense of an administrative proceeding brought against an employee or former employee,” but may do so if (a) the administrative proceeding is brought on account of an act or omission in the scope of employment, and (b) the public entity “determines that such defense would be in the best interests of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent interests of the public entity.”¹⁰⁸
- **Defense and indemnification of a witness who testifies on behalf of a public entity in a criminal, civil, or administrative action.** Notwithstanding any other provision of law, Section 995.9 permits a public entity, upon written request, to “defend or indemnify or defend and indemnify *any witness* who has testified on behalf of the public entity in any criminal, civil, or administrative action.¹⁰⁹ The public entity’s decision on whether to take this step rests in its “sound discretion” and may be based on any relevant factors, including the potential impact on the public interest.¹¹⁰ A number of restrictions apply.¹¹¹

The Government Claims Act and the Judicial Branch

Having taken a general look at the Government Claims Act and its scope, this memorandum next explores how the Government Claims Act applies to the judicial branch. The discussion is organized chronologically, focusing on a series of bills involving representation and indemnification of courts and court personnel.

105. See *City of Bell*, 200 Cal.App.4th at 258-59.

106. *Id.* at 261.

107. *LA Police Protective League*, 27 Cal.App.4th at 182.

108. Section 995.6.

109. Emphasis added.

110. Section 995.9.

111. See *id.*

Early Statutory Framework

Before the Government Claims Act was enacted, the following provisions on representation and indemnification of courts and court employees were already in the codes in close to their present form:

- **Section 26524**, which requires a district attorney to represent a trial court or judge thereof upon a request from a judge in an action against the court or judge in official capacity; and
- **Section 26529**, which requires a county counsel to discharge all duties vested in the local district attorney by Section 26524, as well as other duties.¹¹²

The Government Claims Act was enacted in 1963. As originally enacted, it does not appear to have contained any specific references to claims against courts or court personnel.¹¹³

In 1971, the Legislature enacted two new provisions that do specifically address that context, neither of which is located in the Government Claims Act. Those provisions are:

- **Section 27647** (previously discussed),¹¹⁴ which authorizes county counsel to represent a trial court or trial court judge in specified circumstances.¹¹⁵
- **Section 68111**, which says: “Whenever any judge of any court of this state is a witness in his official capacity as judge in any action or proceeding, such judge shall be entitled to be represented at such action or proceeding by counsel of his choice.”¹¹⁶ This section

112. Sections 26524 and 26529 were originally enacted by 1947 Cal. Stat. ch. 424, § 1. Each section has since been amended several times.

In April, the Commission tentatively decided to (1) propose to repeal Section 26524 as obsolete due to the enactment of Section 811.9 (making the Judicial Council broadly responsible for providing representation for courts and court personnel) and (2) propose to delete Section 26529’s cross-reference to Section 26524 for the same reason. See Minutes (April 2021), pp. 4-5; see also Memorandum 2021-21, pp. 6-8.

113. See 1963 Cal. Stat. ch. 1681, 1682, 1683, 1684, 1685, 1686, 1715, 2029.

114. The current text of Section 27647 is shown in the discussion of “2001 Approach to Section 27647” *supra*. The Commission’s efforts to address that section are described in the discussions of “2001 Approach to Section 27647” and “Proposed Amendment of Section 27647” *supra*.

115. Section 27647 was enacted by 1971 Cal. Stat. ch. 1723, § 1. It has been amended twice since then: first to remove the reference to justice courts and later to remove the reference to municipal courts. See 1998 Cal. Stat. ch. 931, § 207; 2019 Cal. Stat. ch. 497, § 144.

For examples of situations in which county counsel provided representation pursuant to Section 27647, see *James G. v. Superior Court* (2000) 80 Cal.App.4th 275, 283 (holding that county counsel could represent judge pursuant to Section 27647 in mandate proceeding challenging judge’s order denying criminal defendant’s request for appointment of expert witness); *Estate of Di Grazia v. Anderlini* (1993) 13 Cal.App.4th 681, 685 (holding that county counsel could properly represent probate judge pursuant to Section 27647 in ancillary hearing on validity of challenge to judge for cause).

116. Section 68111 has never been amended.

“is limited to participation by a judge in a proceeding as a witness.”¹¹⁷ According to a 1979 Attorney General’s opinion, the section “does *not* provide ... for the expenditure of public funds for the expense of counsel retained by the judge.”¹¹⁸ Notably, the Government Claims Act did not contain a general provision on defense and indemnification of witnesses when Section 68111 was enacted; that was not added until later.¹¹⁹

1977 Bill

The Government Claims Act applies to “public entities”¹²⁰ and “public employees.”¹²¹ In 1977, the Legislature amended the Act’s definition of “employee” to expressly include “judicial officers.”¹²² The bill that made this revision was *not* intended to abrogate the longstanding common law doctrine of judicial immunity for exercise of their judicial functions.¹²³ “There is no indication the Legislature intended to expand judicial liability”¹²⁴

Rather, the Legislature appears to have been concerned with representation and reimbursement of judges.¹²⁵ Tellingly, the same bill that expressly included “judicial officers” within the Government Claims Act also added a new provision elsewhere in the Government Code: Section 27648, the provision that the Commission is trying to figure out how to handle in a tentative recommendation.¹²⁶ As previously discussed, that section gives a judge a right to reimbursement of reasonable attorney’s fees, costs, and expenses if the judge is “entitled to representation pursuant to Section 825, 995, or 27647,” but has to retain other counsel due to a “declared conflict of interest.”¹²⁷

117. 62 Ops.Cal.Atty.Gen. 611 (1979).

118. *Id.* (emphasis added).

119. Section 995.9 was enacted by 1995 Cal. Stat. ch. 799, § 2. For a description of this provision, see the discussion of “Scope of the Permissive Representation and Reimbursement Rules” *supra*.

120. See Section 811.2 (defining “public entity”).

121. See Sections 810.2 (defining “employee”), 811.4 (defining “public employee” as “an employee of a ‘public entity’”).

122. See 1977 Cal. Stat. ch. 745, § 1 (amending Section 810.2). The term “judicial officer” includes a retired judge sitting by assignment. See 68 Ops.Cal.Atty.Gen. 127 (1985).

123. See *Fisher v. Pickens* (1990) 225 Cal.App.3d 708, 715-18; *Frost v. Geernaert* (1988) 200 Cal.App.3d 1104, 1107-09.

124. *Frost*, 200 Cal.App.3d at 1109.

125. See *id.* at 1109.

126. See 1977 Cal. Stat. ch. 745, § 2. Section 27648 has never been amended.

127. Section 27648. The text of Section 27648 is shown in the discussion of “2001 Approach to Section 27648” *supra*. The Commission’s efforts to address that section are described in the discussions of 2001 Approach to Section 27648” and Request for More Information on Section 27648” *supra*.

The existence of Section 27648 buttresses the view that Section 68111 does not give a judge a right to reimbursement for the costs of representation. See 62 Ops.Cal.Atty.Gen. 611 (1979) (“While section 27648 pertains to the government of counties (§ 23000 et seq.), it necessarily

There only seem to be two cases that discuss how Section 27648 applies, both of which predate the restructuring of California’s trial court system. A 1982 case, *Alhambra Municipal Court District v. Bloodgood*,¹²⁸ involved a proposed budget for Los Angeles County that would have drastically reduced the funding for its 24 municipal court districts. “Although the courts would have been entitled to be represented [in the budget negotiations] by County Counsel (Gov.Code, § 27647), the judges believed that the primary duty of County Counsel was to represent the [Board of Supervisors] in the event of a dispute between the board and the courts.”¹²⁹ They therefore declared a conflict of interest and hired private counsel to represent the courts in those negotiations instead.

When the municipal court districts later sued the county over the attorneys’ fees, costs, and expenses that they had incurred, the trial court determined that the courts properly hired independent counsel pursuant to Sections 27647 and 27648 and were entitled to be reimbursed by the county for that expense.¹³⁰ With some adjustments relating to the amount of recovery, that result was upheld on appeal.¹³¹ In so doing, the court of appeal stressed that the budget threat to the municipal courts “appeared imminent and pervasive” and “the judges had every reason to believe that the courts would have been unable to function if the proposed alternate budget were to be adopted.”¹³²

A few years later, another court decision sharply limited the application of Sections 27647 and 27648. In *Municipal Court v. County of Placer*,¹³³ the county probation department, represented by county counsel, challenged certain rulings of a municipal court judge. In addition, the county’s public defender filed a

reflects the legislative perception that section 68111 does not by its own terms constitute authority for the expenditure of funds for private counsel.”).

128. (1982) 137 Cal.App.3d 29.

129. *Id.* at 37.

130. *Id.* at 36. The trial court also referred to the courts’ “inherent power” to hire independent counsel. *Id.*

131. See *id.* at 48; see also *id.* at 43 (“[T]he judges could properly hire private attorneys under section 27648.”); *id.* at 46 (“It is Government Code section 27648 that permits a judge to recover those reasonable attorneys’ fees as were necessarily incurred when the judge who was otherwise entitled to representation is required to hire his own counsel due to a declared conflict of interest.”).

132. *Id.* at 39.

The court of appeal also pointed out that Section 27648 permits recovery of attorneys’ fees that are “necessarily incurred.” It was thus “unnecessary for the judges to resort to any theory of recovery based on being a prevailing party or based on a contract.” *Id.* at 46.

In addition, the court of appeal held that “under Government Code section 27648 judges may declare a conflict of interest.” *Id.* at 41. The court did not decide whether county counsel could do so. See *id.* at 41 n. 3.

133. (1988) 200 Cal.App.3d 1173.

separate petition challenging the same judge's handling of a different matter. The judge asked county counsel to represent him and the court in those challenges, but county counsel declined due to "the obvious conflict of interest."¹³⁴ The judge therefore hired private counsel to represent both himself and the court. Relying on Sections 27647 and 27648, they later sought reimbursement for that expense.

The trial court denied that request and the court of appeal affirmed, explaining:

We must determine if, within the meaning of section 27648, plaintiffs were "... otherwise entitled to representation pursuant to Section ... 27647." As plaintiffs construe section 27647, unless there is a conflict of interest, the judge and the trial court are entitled to representation by county counsel in every matter or proceeding which involves the duties of the judge, and in every matter in which the court or judge is "concerned." If, as in this case, county counsel is unable to accept the representation because of a conflict of interest, the judge or trial court is entitled pursuant to section 27648 to secure the services of outside counsel, and the public entity is obliged to pay reasonable attorney's fees thereby incurred. *In our view, the scope of the statute is not so sweeping.*

Although we are not here required definitively and comprehensively to define the scope of section 27647, we are satisfied it does not authorize trial courts or judges to retain outside counsel to "defend" the judicial rulings of the court whenever such rulings are challenged. Each year thousands of appealable orders and judgments are rendered by the trial courts of this state. In addition, countless nonappealable orders are the subject of writ proceedings in higher courts. Broadly speaking, when such an order is challenged by appeal or writ it can be said the challenged raises a "question ... of law pertaining to any of such judge's duties," or is otherwise a matter "in which with respect to the court's or judge's official capacity, such court or judge is concerned..." *Yet, in our view, it is inconceivable that the Legislature intended sections 27647 and 27648 to authorize trial courts and judges to retain counsel to represent them in all such matters at the expense of the taxpayers.*¹³⁵

The court of appeal distinguished *Bloodgood*, pointing out that the matter at hand was different because it did not involve "a threat to the ability of the municipal court to guarantee basic constitutional rights, i.e., to carry out its organic functions and responsibilities."¹³⁶ The court did not identify any other situation

134. *Id.* at 1176.

135. *Id.* at 1177-78 (emphasis added).

136. *Id.* at 1179.

in which Sections 27647 and 27648 would apply, but did not rule out that possibility either.

2000 Bill

The key trial court restructuring reforms took place about a decade after *Placer* was decided. The Lockyer-Isenberg Trial Court Funding Act was enacted in 1997,¹³⁷ making the state responsible for funding trial court operations, instead of the counties.¹³⁸ The following year, the voters approved a ballot measure on county-by-county trial court unification;¹³⁹ the unification process was completed by 2001.¹⁴⁰ The TCEPGA was enacted in 2000, revamping California’s personnel system for trial court employees.¹⁴¹

For present purposes, two aspects of those reforms are most pertinent:

- (1) Due to the switch in responsibility for funding of trial court operations, it became inappropriate for *counties* to bear the expense of representing and indemnifying courts and court personnel. After enactment of the Trial Court Funding Act, that responsibility should rest with the *state* instead.
- (2) Due to the enactment of the TCEPGA, trial court personnel became employees of the *local superior court*, not the *counties*. Again, this meant that counties should be relieved of requirements to represent and indemnify court personnel.

Recognizing this situation, the Legislature included Section 77204 in the Trial Court Funding Act, which authorized the Judicial Council to allocate funds “for the purpose of paying legal costs resulting from lawsuits or claims arising out of the actions or conduct of a trial court, trial court bench officer, or trial court employee, and for which the state is named as a defendant or alleged to be the responsible party.”¹⁴²

The Judicial Council and the California State Association of Counties also co-sponsored¹⁴³ a bill in 2000 that included a new provision to further address the

137. 1997 Cal. Stat. ch. 850; see generally Sections 77000-77655.

138. See Sections 77200-77201.1; see also Section 77003 (defining “court operations”); Cal. R. Ct. 10.810 (same).

139. See Prop. 220, approved June 2, 1998.

140. <https://www.courts.ca.gov/documents/unidate.pdf>.

141. 2000 Cal. Stat. ch. 1010; see generally Sections 71600-71675.

142. 1997 Cal. Stat. ch. 850, § 42. For additional provisions along these lines, see Sections 935.8 (“The Judicial Council may adjust and pay any claim arising out of the activities of a judicial branch entity or judge thereof”) and 948.1 (“The Judicial Council may settle, adjust, or compromise any pending action arising out of the activities of a judicial branch entity or judge thereof”), both of which were enacted in the 2002 bill discussed *infra*.

143. See Assembly Committee on Judiciary Analysis of SB 1533 (June 20, 2000), p. 4.

situation. That provision was Section 811.9,¹⁴⁴ which is shown above, in the discussion on “Preliminary Decision to Leave Section 811.9 Alone.”

The bill in question consisted of general clean-up legislation on trial court funding, addressing many different aspects of that sweeping reform, not just representation and indemnification. Consequently, the bill analyses do not say much about the addition of Section 811.9.

The Senate floor analysis, prepared just before the bill passed out of the Legislature, includes the most clear description of that section and its impact:

Existing law sets forth the Governmental Tort Claims Act governing the tort liability and immunity of public entities and their officers and employees, claims and actions against public entities and their officers and employees, insurance indemnification, and the defense of public officers and employees.

This bill would specify that, for purposes of those provisions, judges and court officers are state officers and trial court employees and employees of the trial court. *The bill would require the Judicial Council to provide for the representation, defense, and indemnification of judges and court officers and employees, and to adopt rules of court requiring the Administrative Office of the Courts to manage claims and actions involving the trial courts and their officers and employees.*¹⁴⁵

The italicized language in the above quote is broad and unqualified, referring simply to “representation, defense, and indemnification of judges and court officers and employees” and management of “claims and actions involving the trial courts and their officers and employees.” There is some similarly broad language in subdivision (b) of Section 811.9:

(b) To promote the cost-effective, prompt, and fair resolution of *actions, proceedings, and claims affecting the trial courts*, the Judicial Council shall adopt rules of court requiring the Administrative Office of the Courts to manage *actions, proceedings, and claims that affect the trial courts and involve superior courts, superior court judges, subordinate judicial officers, court executive officers, or trial court*

144. 2000 Cal. Stat. ch. 447, § 4.5 (SB 1533 (Costa)).

145. Senate Floor Analysis of SB 1533 (Aug. 19, 2000), p. 4 (emphasis added). After the quoted language, the analysis says: “The bill would also state the intent of the Legislature in this regard.” That statement presumably was meant to refer to an uncodified section of the bill, which says:

The Legislature hereby declares that Section 4.5 of this act [which adds Section 811.9] shall not be interpreted as applicable to, nor legislative preference of, an employment status for trial court employees. The Legislature recognizes that pursuant to Chapter 850 of the Statutes of 1997, the Task Force on Trial Court Employees will make recommendations to the Legislature regarding an appropriate system of employment and governance for trial court employees. The recommendations of the Task Force on Trial Court Employees shall take effect only upon subsequent action of the Legislature.

*employees in consultation with the affected courts and individuals....*¹⁴⁶

Subdivision (a) of Section 811.9 appears to focus more precisely on matters governed by the Government Claims Act:

(a) Notwithstanding any other provision of law, judges, subordinate judicial officers, and court executive officers of the superior courts are state officers for purposes of *Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive*, and trial court employees are employees of the trial court for purposes of *Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive*. The Judicial Council shall provide for representation, defense, and indemnification of those individuals and the court pursuant to *Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive*. The Judicial Council shall provide for that representation or defense through the county counsel, the Attorney General, or other counsel. The county counsel and the Attorney General may, but are not required to, provide such representation or defense for the Judicial Council....¹⁴⁷

The analyses of the 2000 bill do not mention this difference in wording and give no indication that the Legislature perceived any distinction between the scope of subdivision (a) and the scope of subdivision (b). The Legislature might have regarded them as one and the same.

Importantly, Section 811.9 starts with the phrase “[n]otwithstanding any other provision of law.” It is not altogether clear whether the Legislature meant that *all* of Section 811.9 overrides other law, or only *part* of Section 811.9 (e.g., the first sentence) overrides other law. The former interpretation seems most likely, because the “notwithstanding clause” surely must be meant to encompass the sentences in the middle of subdivision (a), which describe the new roles of the Judicial Council and county counsel with regard to representation, defense, and indemnification. Those sentences make clear that the Judicial Council is *required*

146. Emphasis added. The quoted language is from the existing version of Section 811.9(b). The version of subdivision (b) enacted in 2000 referred to municipal courts and municipal court judges, as well as superior courts and superior court judges. Otherwise, it was the same as the existing version.

147. Emphasis added. The quoted language is from the existing version of Section 811.9(a). The version of subdivision (a) enacted in 2000 referred to municipal courts and municipal court judges, as well as superior courts and superior court judges. Otherwise, the quoted sentences were essentially the same as in the existing version.

In addition to the language quoted above, Section 811.9(a) includes a sentence that was intended to “continue to permit” a county counsel or the Attorney General’s office to provide legal representation to the judiciary “without creating an automatic conflict of interest.” Senate Committee on Judiciary Analysis of AB 1533 (April 4, 2000), p. 6.

to “provide for representation, defense, and indemnification” of trial courts and trial court personnel, while county counsel “may, but [is] not required to” serve as the means by which the Judicial Council fulfills that duty.

2002 Bill

In 2002, the Government Claims Act was further amended to reflect trial court restructuring.¹⁴⁸ “Enactment of Assembly Bill No. 2321 was necessitated because the trial courts were no longer considered a branch of county government.”¹⁴⁹ The bill was “a comprehensive legislative effort establishing rules for the presentation and resolution of government claims against judicial branch entities.”¹⁵⁰

The bill was “intended to *further solidify and clarify the Judicial Council’s responsibility* for claims made against a court, judge, court executive officer or trial court employee and to *provide clear direction to potential claimants* as to where to go to present a claim or serve a summons and how the claim would be processed.”¹⁵¹ The bill analysis for the Senate Committee on Judiciary explains:

While Section 811.9 brought under the umbrella of state officers all judges, subordinate judicial officers, court administrators and court executive officers, and trial court employees as court employees (thus, state employees), *there is still a great deal of confusion as to where claims against the judiciary may be filed.* This is the result of the turnover of the court system from the counties to the state. The Tort Claims Act currently requires the filing of claims against the court or its employees with the county Board of Supervisors (because the courts were funded through the counties and court employees were deemed to be county employees) and for the county to then process those claims as it does every other claim against the county, a procedure that is now out of step with the reality of the courts being part of the state system today.

However, because the courts are a separate branch of government and are not a state agency, the procedure for filing claims against them must also be separate and parallel from those made against the state. *AB 2321 provides this claim presentation procedure as well as the management and payment of claims, settlements, or judgments.*¹⁵²

148. See 2002 Cal. Stat. ch. 1007 (AB 2321 (Hertzberg)).

149. *Judicial Council v. Superior Court* (2014) 229 Cal.App.4th 1083, 1097.

150. *Id.* at 1100.

151. Senate Committee on Judiciary Analysis of AB 2321 (June 25, 2002), p. 9 (emphasis added).

152. *Id.* at 4-5.

The 2002 bill, authored by then-Speaker Robert Hertzberg, made numerous revisions of the Government Claims Act.¹⁵³ The bill focused on claims *against* a court or court personnel. For example, the analysis for the Senate Committee on Judiciary says that the bill “would clarify that the Judicial Council has *sole authority* to act on any claim *against* any judicial branch entity, judge or employee of the court.”¹⁵⁴

The bill analyses do not specifically refer to other situations, such as when a judge testifies about a court-related matter as a witness, or when a court seeks to enforce a contract. Although such situations do not appear to have been the object of this bill, the bill analyses seem to recognize that Section 811.9 is broad in

153. The bill amended Sections 900.2, 912.4, 912.8, 913, 915, 935.6, 940.2, 946.6, 948, 955.4, 965, 965.2, 965.6, and 965.65. It also added Sections 900.3, 912.7, 935.8, 940.3, 948.1, and 955.9.

A recent court decision summarized the bill’s effect as follows:

Assembly Bill No. 2321 amended various provisions of the Government Code to define the term “judicial branch entity” (§§ 900.3, 940.3); expressly provide the council “shall act on a claim against a judicial branch entity or judge of one of those entities in accordance with the procedure that the [council] provides by court rule (§ 912.7); specify how a government claim is to be presented in cases involving a judicial branch entity or its employees (§ 915, subds. (c) & (d)); authorize the council to “adjust and pay any claim arising out of the activities of a judicial branch entity or judge thereof” (§935.8; see § 948.1); permit the council to adopt court rules concerning settlement of claims (§ 935.8); specify a different method of service of petitions for permission to file late claims in cases involving judicial branch entities from those involving other government agencies (§§ 911.4, 946.6); provide specified methods for serving a summons against a judicial branch entity (§ 955.9); establish a separate method for payments of claims, settlements or judgments for judicial branch entity litigation which differs from that applicable to other government agencies (§§ 948, 965, subd. (c)); specify the manner in which the Administrative Director of the Courts certifies to the State Controller that sufficient funds exist to pay a judgment or settlement (§§ 965.2, sub. (a), 965.6, subd. (c)); and require the Administrative Director of the Courts in specified cases to report to the council how to avoid a recurrence of the circumstances giving rise to liability (§ 965.65, subd. (b)).

Judicial Council, 229 Cal.App.4th at 1092.

154. Senate Committee on Judiciary Analysis of AB 2321 (June 25, 2002), p. 5 (emphasis added).

For a few examples of other statements along these lines, see Section 912.7 (“The Judicial Council shall act on a claim against a judicial branch entity or judge of one of those entities in accordance with the procedure that the Judicial Council provides by rule of court.”); Assembly Committee on Judiciary Analysis of AB 2321 (April 22, 2002), p. 1 (“[T]his bill ... seeks to amend the Tort Claims Act to clarify and create new procedures to be followed by parties wishing to file claims for money or damages arising from the activities of a judicial branch entity.”); Assembly Appropriations Committee Analysis of AB 2321 (May 8, 2002), p. 1 (“This bill establishes procedures and clarifies responsibilities regarding the presentation and payment of tort claims against the judicial branch.”); Senate Floor Analysis of AB 2321 (Aug. 7, 2002), p. 1 (“This bill authorizes the Judicial Council to act on a claim filed against a judicial branch entity, a judge or a trial court employee and to adopt rules of court authorizing any committee of the Judicial Council to perform its functions related to tort claims against the judiciary.”).

scope, giving the Judicial Council responsibility for “claims affecting the trial courts.”¹⁵⁵

2005 Bill

In 2005, the Legislature further refined the Government Claims Act to account for trial court restructuring. It enacted an omnibus court-related bill, which (among other things) amended a few sections of that Act.¹⁵⁶ The objective of those revisions was to “establish conformity” by “enact[ing] statutes to govern judicial branch entities that parallel existing provisions applicable to the state.”¹⁵⁷

The bill also added Section 905.7 to the Government Claims Act,¹⁵⁸ which made the Act’s claim presentation requirements expressly applicable to both tort and contract claims against a judicial branch entity:

905.7. All claims against a judicial branch entity for money or damages based upon an express contract or for an injury for which the judicial branch entity is liable shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part.

That new provision was considered declaratory of existing law.

Current Situation

Since trial court restructuring, the Judicial Council has adopted court rules as Section 811.9 requires. For convenient reference, the current version of those rules is attached as Exhibit pages 5-10.

The court rules reflect a broad conception of the Judicial Council’s role in handling court-related litigation. Of particular note, the stated objective of Rule 10.202 is to:

- (1) Ensure that the trial and appellate courts are provided with timely, quality legal assistance; and
- (2) Promote the cost-effective, prompt, and fair resolution of actions, proceedings, and claims that affect the trial and appellate courts and involve justices of the Courts of Appeal or the Supreme Court,

155. Assembly Committee on Judiciary Analysis of AB 2321 (April 22, 2002), p. 4; see also *id.* at 3 (explaining that existing law directs Judicial Council to adopt rules of court requiring AOC to manage “actions, proceedings, and claims that affect the trial courts”); Assembly Floor Analysis of AB 2321 (June 29, 2002), p. 2 (same); Senate Floor Analysis of AB 2321 (Aug. 7, 2002), p. 3 (referring to the Judicial Council’s “authority to manage claims arising from activities of any judicial branch entity, a judge, or court employee.”).

156. See 2005 Cal. Stat. ch. 706, §§ 16-17, 19, 39 (AB 1742 (Committee on Judiciary)) (amending Sections 811.9, 905, 910.4).

157. Senate Committee on Judiciary Analysis of AB 1742 (July 12, 2005), p. 7.

158. 2005 Cal. Stat. ch. 706, § 18 (AB 1742 (Committee on Judiciary)).

trial court judges, subordinate judicial officers, court executive officers or administrators, or employees of the trial and appellate courts.

As the court rules contemplate, the role of the Judicial Council's Office of Legal Services expanded after trial court restructuring and it developed expertise in managing claims involving courts and court personnel. It now "provide[s] to the superior courts legal services that previously had been provided by county counsels' offices."¹⁵⁹ It typically accomplishes that result by hiring private counsel or the Attorney General's office to represent the courts and their personnel.¹⁶⁰

Ties between the courts and the counties are not as close as they were in the past. Although Section 811.9 still authorizes the Judicial Council to hire county counsel to fulfill its responsibility to provide for representation of courts and court personnel, that does not occur much now, in part because of the potential for conflicts of interest.¹⁶¹ While definitive information is difficult to obtain, Sections 27647 and 27648 appear to have little impact at present; matters involving representation of the courts and court personnel typically arise under the Government Claims Act and the implementing court rules.

A recent appellate decision summarizes the situation, emphasizing the strong role of the Judicial Council in such matters:

The Judicial Council establishes the policies and procedures governing practices and procedures for budgeting in the trial courts

The Judicial Council is also the agency that is required to provide for "the representation, defense, and indemnification" of any actions affecting the courts, and shall manage any proceedings, actions or claims that affect the trial courts. It is responsible for "paying legal costs resulting from lawsuits or claims involving the state, the Judicial Council" or its employees arising out of "the actions or conduct of a trial court" or its employees, or "the actions or conduct of the Judicial Council."¹⁶²

159. See <https://www.courts.ca.gov/documents/jc-20140425-itemO.pdf>.

160. See, e.g., <https://www.law.com/therecorder/2020/11/30/where-the-california-judiciary-has-spent-millions-in-legal-services-contracts/?sreturn=20210715132137>.

161. Representation of a court or court personnel by a district attorney is even more unlikely.

162. *Templo v. State* (2018) 24 Cal.App.5th 730, 736 (emphasis added; citations omitted).

STAFF ANALYSIS

What does the foregoing information mean for purposes of this study? Does Section 27648 contain any material made obsolete by trial court restructuring? If so, how should it be revised to remove that material?

The issues relating to Section 27648 are discussed below. The memorandum then revisits Section 27647 and also suggests revisions of Sections 811.9 and 68111 in light of the new information.

Reassessment of Section 27648

The legal landscape described above is complex, making it challenging to grasp the implications of each aspect and coherently integrate them. It might be helpful to proceed incrementally, developing the analysis of Section 27648 in bite-size pieces, rather than tackling the whole puzzle at once.

Section 27648 is short but not simple. Here again is the entire text, for convenient reference:

27648. If, because of a declared conflict of interest, any judge, who is otherwise entitled to representation pursuant to Section 825, 995, or 27647, is required to retain his own counsel, such judge is entitled to recover from the appropriate public entity such reasonable attorney's fees, costs, and expenses as were necessarily incurred thereby.

Location in the Codes

Section 27648 is located in a chapter entitled "County Counsel," which is in "Part 3. Other Officers" of "Division 2. Officers" of "Title 3. Government of Counties."

Now that the Judicial Council holds the purse strings for the trial courts, rather than the counties, it seems inappropriate for the substance of Section 27648 to remain in "Title 3. Government of Counties." **If that substance is retained at all (with or without revisions), it probably should be relocated to the Government Claims Act or to "Title 8. The Organization and Government of Courts."**

Representation Pursuant to Section 825

Section 27648 refers to three different types of representation to which a judge might be entitled:

- (1) Representation pursuant to Section 825.

- (2) Representation pursuant to Section 995.
- (3) Representation pursuant to Section 27647.

It is worth examining each of these types separately, starting with “representation pursuant to Section 825.”

Section 825 is the key provision of the Government Claims Act on indemnification of public employees. For convenient reference, it is reproduced at Exhibit pages 11-12.

Section 825 does not expressly give a public employee a right to a defense. Rather, the key language requires a public employee to request a defense, and to reasonably cooperate in good faith in the defense, in order to be entitled to indemnification:

(a) Except as otherwise provided in this section, *if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.*

....¹⁶³

At best, the section *implicitly assumes* that upon proper request, a public entity will provide a defense where an alleged wrongful act or omission was within the scope of employment, or will at least provide a defense subject to a reservation of rights.

Representation Pursuant to Section 995

The provision in the Government Claims Act that does expressly give a public employee a right to a defense in a civil case is Section 995. It says in key part: “*Except as otherwise provided in Sections 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity.*”¹⁶⁴

163. Emphasis added.

164. Emphasis added. The full text of Sections 995-996.6 is shown in Exhibit pp. 1-4.

As previously discussed, this right to a defense is subject to the following exceptions:

- (1) The public employee's alleged wrongful act or omission was not within the scope of employment.
- (2) The public employee's wrongful act or omission occurred because of actual fraud, corruption, or actual malice.
- (3) The dispute in question is a disciplinary proceeding by the public entity against the public employee.
- (4) Defense of the public employee would create a specific conflict of interest between the public entity and the employee.¹⁶⁵

Because Section 995 expressly creates a right to a defense and addresses it in detail, while Section 825 only implicitly touches on the matter, Section 995 appears to control the contours of the Government Claims Act's right to a defense in a civil case.¹⁶⁶ Section 825 is just additional authority supporting the right to a defense as defined in Section 995.

Reimbursement for Providing Own Defense

If a public entity does not defend a public employee on request in a civil case, Section 996.4 (shown above, in the discussion of "Request for More Information on Section 27648") governs reimbursement of the employee's defense costs under the Government Claims Act. That provision would apply, for example, if a public entity refused to provide a defense due to a "specific conflict of interest."¹⁶⁷

In that circumstance, the public entity would have to reimburse "reasonable attorney's fees, costs, and expenses" that the employee "necessarily incurred" in defending the case, so long as:

- The case arose out of an act or omission in the scope of employment;
- The public entity does not establish that the employee "acted or failed to act because of actual fraud, corruption or actual malice;" and

165. See discussion of "Scope of the Mandatory Representation and Reimbursement Rules" *supra*.

166. See, e.g., *San Francisco Taxpayers Ass'n v. Board of Supervisors* (1992) 2 Cal.4th 571, 577 (specific provision relating to particular subject will govern in respect to that subject, as against general provision, although the latter, standing alone, would be broad enough to include subject to which the more particular provision relates).

167. Section 995.

- The case is not a disciplinary proceeding by the public entity against the employee.¹⁶⁸

In other words, the requirements for obtaining reimbursement under Section 996.4 when a public entity refuses to defend a public employee due to a “specific conflict of interest” *are the same as* the requirements for being “otherwise entitled to representation pursuant to Section ... 995” and thus obtaining reimbursement when there is a “declared conflict of interest” under Section 27648.

Unless there is a distinction between a “specific conflict of interest” and a “declared conflict of interest,” a judge would fare the same under Section 996.4 as under Section 27648 when the judge is “entitled to representation pursuant to Section ... 995.” Because Section 825 merely reinforces the right of representation defined in Section 995, that would also be true when a judge is “entitled to representation pursuant to Section 825” within the meaning of Section 27648.

Moreover, the “notwithstanding” clause in Section 811.9 reflects a legislative intent to override any conflicting provision of law. Thus, to the extent there is any difference between a “specific conflict of interest” under Section 996.4 and a “declared conflict of interest” under Section 27648, the former would control. **There does not seem to be any reason to retain the aspects of Section 27648 that refer to “representation pursuant to Section 825” and “representation pursuant to Section ... 995.”**

Representation Pursuant to Section 27647

The last type of representation mentioned in Section 27648 is representation that a judge would be entitled to “pursuant to Section ... 27647” if a “declared conflict of interest” did not exist. The staff finds this an odd concept, because Section 27647 does not expressly create an entitlement to representation. It merely *permits* a county counsel to represent a judge in specified circumstances:

27647. (a) If requested to do so by the superior court of the county of the county counsel, or by any judge thereof, and insofar as such duties are not in conflict with, and do not interfere with, other duties, the county counsel *may* represent any such court or judge thereof in all matters and questions of law pertaining to any of such judge’s duties, including any representation authorized by Section 68111 and representation in all civil actions and proceedings in any court in which with respect to the court’s or judge’s official capacity, such court or judge is concerned or is a party.

168. Section 996.4.

- (b) This section does not apply to any of the following:
- (1) Any criminal proceedings in which a judge is a defendant.
 - (2) Any grand jury proceedings.
 - (3) Any proceeding before the Commission on Judicial Qualifications.
 - (4) Any civil action or proceeding arising out of facts under which the judge was convicted of a criminal offense in a criminal proceeding.¹⁶⁹

(The statutes that used to *require* a county counsel to represent a judge in specified circumstances were the combination of Section 26524 (which requires a district attorney to represent a trial court or judge thereof upon a request from a judge in an action against the court or judge in official capacity) and Section 26529 (which, among other things, requires a county counsel to discharge all duties vested in the local district attorney by Section 26524). In April, the Commission tentatively decided to (1) propose to repeal Section 26524 as obsolete due to the enactment of Section 811.9 (making the Judicial Council broadly responsible for providing representation for courts and court personnel) and (2) propose to delete Section 26529's cross-reference to Section 26524 for the same reason.¹⁷⁰)

Although Section 27647 is phrased in the permissive, Section 27648 refers to a "judge, who is otherwise *entitled* to representation pursuant to Section ... 27647."¹⁷¹ Similarly, the court in *Bloodgood* (described above, in the discussion of "1977 Bill") cited Section 27647 for the proposition that "the courts would have been *entitled* to be represented by County Counsel" absent the conflict of interest.¹⁷²

To the extent that Section 27647 creates an entitlement to representation, however, the court of appeal in *Placer* (described above, in the discussion of "1977 Bill") took a narrow view of it. The court expressly *rejected* the contention that "unless there is a conflict of interest, the judge and the trial court are entitled to representation by county counsel in every matter or proceeding which involves the duties of the judge, and in every matter in which the court or judge is 'concerned.'"¹⁷³ The court also limited *Bloodgood* to its facts, which involved "a

169. Emphasis added.

170. See Minutes (April 2021), pp. 4-5; see also Memorandum 2021-21, pp. 6-8.

171. Emphasis added.

172. *Bloodgood*, 137 Cal.App.3d at 37 (emphasis added).

173. *Placer*, 200 Cal.App.3d at 1177-78.

threat to the ability of the municipal court to ... carry out its organic functions and responsibilities.”¹⁷⁴

It has been almost 40 years since *Bloodgood* was decided, yet there do not seem to have been any more published cases holding that a court or judge was “entitled to representation pursuant to Section ... 27647” within the meaning of Section 27648. That suggests that the situation does not arise frequently. The subject matter expert that the staff consulted off-the-record had the same perception, based on many years of working in the area.

Moreover, circumstances comparable to what occurred in *Bloodgood* — an “imminent and pervasive” threat to functioning of the courts, created by the same entity responsible for representing the courts — are unlikely to happen in the restructured court system. The Judicial Council is now responsible for providing representation for the trial courts and their judges, not the counties. The Council would not be inclined to do anything that would pose an existential threat to the functioning of the judicial branch; its constitutional duty is precisely the opposite.

Further, the 2000, 2002, and 2005 bills revising the Government Claims Act to reflect trial court restructuring (particularly the enactment of Section 811.9), as well as the implementing court rules, evince a legislative intent to build a comprehensive system for handling claims affecting the judicial branch, with the Judicial Council in charge. The legislative history discloses no intent to treat judges specially for claims involving their work, to give them privileges that the Act does not give to other public employees. Rather, in constructing the new system, the Legislature sought to closely parallel the Act’s existing provisions for claims involving the state.

In the context at hand, that seems to be a sound policy choice. Section 996.4’s restrictions on reimbursing a public employee’s attorney’s fees, costs, and expenses where there is a conflict of interest (such as denying recovery when there is actual fraud, corruption, or actual malice) are well-grounded. It would be hard to justify treating judges preferentially in this regard.

Lastly, the two hypotheticals that the staff presented in analyzing Section 27647 for the April meeting seem less persuasive to us now that we have done further research. In particular, those hypotheticals were:

174. *Id.* at 1179.

- **Representation authorized by Section 68111.** Section 27647 expressly includes “any representation authorized by Section 68111,” which says that “[w]henver any judge of any court of this state is a witness in his official capacity as judge in any action or proceeding, such judge shall be entitled to be represented at such action or proceeding by counsel of his choice.” In Memorandum 2021-21, the staff observed that this language “presumably would include representation of a judge who is summoned to testify in a criminal case in the judge’s official capacity,” such as when “a member of the public is accused of stealing a juror’s purse from the judge’s courtroom.”¹⁷⁵ The staff postulated that representation in such circumstances “seems to be beyond the scope of the Government Claims Act.”¹⁷⁶

At the time, the staff was unaware of Section 995.9 (described above, in the discussion of “Scope of the Permissive Representation and Reimbursement Rules”), which addresses defense and indemnification of a witness who testifies on behalf of a public entity in a criminal, civil, or administrative action. We were also unaware of the Attorney General’s opinion concluding that Section 68111 “does *not* provide ... for the expenditure of public funds for the expense of counsel retained by the judge.”¹⁷⁷

In light of those authorities, particularly the reasonable restrictions of representation of a witness pursuant to Section 995.9 (e.g., “[n]either defense nor indemnification shall be provided if the testimony giving rise to the action against the witness was false in any material respect ...”), it appears that the Government Claims Act encompasses and soundly addresses the staff’s hypothetical, and, under Section 811.9, that approach probably overrides any differing treatment under Sections 27647, 27648, and 68111.

- **Contract with county counsel under Section 77212.** The other hypothetical from April was initially raised by Los Angeles County Superior Court in 2002. In cautioning that “[t]he scope of section 811.9 does not extend to all actions in which the court or its employees are represented,” the court pointed to Section 77212, under which a court that received county counsel services before enactment of the Trial Court Funding Act can continue to contract with the county for such services if that is mutually agreeable.¹⁷⁸

The court’s comments on this point predate the California Supreme Court’s decision in *City of Stockton v. Superior Court*,¹⁷⁹ which made clear that the claim requirements of the Government Claims Act “apply to contract causes of action,”¹⁸⁰ and “the

175. Memorandum 2021-21, p. 10.

176. *Id.*

177. 62 Ops.Cal.Atty.Gen. 611 (1979).

178. For the key text of Section 77212(d), see *supra* note 30.

179. (2007) 42 Cal. 4th 730.

180. *Id.* at 738.

employee indemnification and defense provisions found in parts 2 and 7 of the act apply to contract as well as tort causes of action.”¹⁸¹

The court’s comments also predate the 2002 and 2005 bills adjusting the Government Claims Act to reflect trial court restructuring. Those bills include language expressly addressing contract claims against the judiciary.¹⁸²

In light of these developments, the Los Angeles County Superior Court might no longer take the same position on how Section 811.9 compares to Section 27647, and the implications of that for a contract pursuant to Section 77212.

For all of these reasons, **it does not appear necessary to retain Section 27648’s reference to representation that a judge is “otherwise entitled to ... pursuant to Section ... 27647.”**

Suggested Approach to Section 27648

Section 27648 refers to three types of representation, yet none of those references appear appropriate today, given the way that the Legislature adjusted the Government Claims Act in 2000, 2002, and 2005 to reflect trial court restructuring. **For purposes of a tentative recommendation, the staff suggests proposing to repeal Section 27648:**

Gov’t Code § 27648 (repealed). Reimbursement where judge is required to retain own counsel due to conflict of interest

~~27648. If, because of a declared conflict of interest, any judge, who is otherwise entitled to representation pursuant to Section 825, 995, or 27647, is required to retain his own counsel, such judge is entitled to recover from the appropriate public entity such reasonable attorney’s fees, costs, and expenses as were necessarily incurred thereby.~~

Comment. Section 27648 is repealed to reflect:

(1) Enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Sections 77000-77655).

181. *Id.* at 742 n. 7; see also Van Alstyne, *supra* note 88, at *Defense & Indemnification* § 4.2 (“Because the claims presentation requirement applies to both contracts and torts, the Act’s defense and indemnification provisions would likely apply to both contract and tort cases.”).

182. See, e.g., Section 905.7 (“All claims against a judicial branch entity for money or damages based upon an express contract or for an injury for which the judicial branch entity is liable shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part.”).

(2) Enactment of the Trial Court Employment Protection and Governance Act (“TCEPGA”), 2000 Cal. Stat. ch. 1010 (see generally Sections 71600-71675).

(3) Enactment of three bills adjusting the Government Claims Act (Sections 810-998.3) to reflect enactment of the Trial Court Funding Act and the TCEPGA: 2000 Cal. Stat. ch. 447, § 4.5; 2002 Cal. Stat. ch. 1007; and 2005 Cal. Stat. ch. 706, §§ 16-17, 19, 39. Those bills made the Judicial Council responsible for providing representation, in accordance with the Government Claims Act, for trial courts and trial court personnel in matters relating to their work. For the provision in the Government Claims Act governing reimbursement of a public employee’s attorney’s fees, costs, and expenses, see Section 996.4. See also Section 811.9 (defining Judicial Council’s role and scope of responsibility “[n]otwithstanding any other provision of law”).

How would the Commission like to handle Section 27648 for purposes of a tentative recommendation?

Reassessment of Section 27647

Although the staff suggests repealing Section 27648, we do not suggest the same for Section 27647. Section 811.9 says in part:

The Judicial Council shall provide for ... representation or defense [of trial courts and trial court personnel under the Government Claims Act] through the county counsel, the Attorney General, or other counsel. The county counsel and the Attorney General *may, but are not required to*, provide representation or defense for the Judicial Council....¹⁸³

Section 27647, located in the part of the code relating to county counsel, complements and provides details regarding the permissive authority granted to a county counsel in Section 811.9.

Consistent with that view, the Commission previously decided to propose to revise Section 27647, not repeal it. However, the proposed amendment (shown above, in the discussion of “Proposed Amendment of Section 27647”) was based on the notion that Section 27647 encompasses situations in which the Government Claims Act does not apply. Because of the breadth of the Government Claims Act — providing not only for mandatory defense and

183. Emphasis added.

reimbursement of court personnel in a civil case (including both tort and contract claims),¹⁸⁴ but also permissive representation and reimbursement of court personnel in criminal cases or administrative proceedings against them, and in witness appearances¹⁸⁵ — **we now suggest the following amendment instead:**

Gov't Code § 27647 (amended). Representation of court or judge by county counsel

SEC. ____ . Section 27647 of the Government Code is amended to read:

27647. (a) If requested to do so by the ~~superior court of the county of the county counsel, or by any judge thereof~~ Judicial Council, and insofar as ~~such~~ these duties are not in conflict with, and do not interfere with, other duties, the county counsel may represent ~~any such~~ the superior court or a judge thereof in all matters and questions of law pertaining to any of ~~such~~ the judge's duties, including any representation authorized by Section 68111 and representation in all civil actions and proceedings in any court in which with respect to the court's or judge's official capacity, ~~such~~ the court or judge is concerned or is a party.

(b) This section does not apply to any of the following:

(1) Any criminal proceedings in which a judge is a defendant.

(2) Any grand jury proceedings.

(3) Any proceeding before the Commission on Judicial Qualifications Performance.

(4) Any civil action or proceeding arising out of facts under which the judge was convicted of a criminal offense in a criminal proceeding.

Comment. Section 27647 is amended to reflect the enactment of Section 811.9 (2000 Cal. Stat. ch. 447, § 4.5) and subsequent legislation clarifying and solidifying the Judicial Council's role in handling claims against trial courts and trial court personnel (see 2002 Cal. Stat. ch. 1007 and 2005 Cal. Stat. ch. 706, § 16; see also Sections 810-998.3; Cal. R. Ct. 20.201-10.203).

The section is also amended to update an obsolete reference to the "Commission on Judicial Qualifications," which is now known as the "Commission on Judicial Performance."¹⁸⁶

184. See discussion of "Scope of the Mandatory Representation and Reimbursement Rules" *supra*.

185. See discussion of "Scope of the Permissive Representation and Reimbursement Rules" *supra*.

186. Minutes (April 2021), p. 6.

This amendment would authorize the county counsel to provide representation in specified circumstances “[i]f requested to do so by the Judicial Council.” In contrast, the amendment that the Commission previously approved would authorize the county counsel to provide representation in specified circumstances “[i]f requested to do so by the Judicial Council when the Government Claims Act (Division 3.6 (commencing with Section 810) of Title 1) applies, or by the local superior court or any judge thereof when that act does not apply.”

Which version would the Commission like to use in a tentative recommendation: the new version shown above, the April version, or some other approach?

Clarification of Section 811.9

Section 811.9 could perhaps benefit from some clarification. In particular, the section (1) requires the Judicial Council to “provide for representation, defense, and indemnification of” trial courts and trial court personnel, (2) requires the Judicial Council to “provide for that representation or defense through the county counsel, the Attorney General, or other counsel,” and (3) says that “[t]he county counsel and the Attorney General may, but are not required to, provide representation or defense *for the Judicial Council*.”¹⁸⁷ The last statement makes it sound as if *the Judicial Council itself* would be represented or defended by the county counsel, Attorney General, or other counsel.

That almost certainly was not the intent. **The staff suggests the following clarification:**

Gov’t Code § 811.9 (amended). Representation, defense, and indemnification of trial courts and trial court personnel

811.9. (a) Notwithstanding any other provision of law, judges, subordinate judicial officers, and court executive officers of the superior courts are state officers for purposes of Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive, and trial court employees are employees of the trial court for purposes of Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995), inclusive. The Judicial Council shall provide for representation, defense, and indemnification of those individuals and the court pursuant to Part 1 (commencing with Section 810) to Part 7 (commencing with Section 995),

187. Emphasis added.

inclusive. The Judicial Council shall provide for that representation or defense through the county counsel, the Attorney General, or other counsel. The county counsel and the Attorney General may, but are not required to, provide representation or defense for ~~the Judicial Council~~ a trial court, judge, subordinate judicial officer, court executive officer, or trial court employee if the Judicial Council requests that assistance to fulfill its duties under this section. The fact that a justice, judge, subordinate judicial officer, court executive officer, court employee, the court, the Judicial Council, or ~~the Administrative Office of the Courts~~ the staff of the Judicial Council is or was represented or defended by the county counsel, the Attorney General, or other counsel shall not be the sole basis for a judicial determination of disqualification of a justice, judge, subordinate judicial officer, the county counsel, the Attorney General, or other counsel in unrelated actions.

(b) To promote the cost-effective, prompt, and fair resolution of actions, proceedings, and claims affecting the trial courts, the Judicial Council shall adopt rules of court requiring ~~the Administrative Office of the Courts~~ its staff to manage actions, proceedings, and claims that affect the trial courts and involve superior courts, superior court judges, subordinate judicial officers, court executive officers, or trial court employees in consultation with the affected courts and individuals. The ~~Administrative Office of the Courts'~~ staff's management of these actions, proceedings, and claims shall include, but not be limited to, case management and administrative responsibilities such as selection of counsel and making strategic and settlement decisions.

(c) Nothing in this section shall be construed to affect the employment status of subordinate judicial officers, court executive officers, and trial court employees related to any matters not covered by subdivision (a).

Comment. Section 811.9 is amended for purposes of clarification. This is not a substantive change.

The section is also amended to update the references to the Administrative Office of the Courts. The Judicial Council no longer uses that name to refer to its staff. See Cal. R. Ct. 10.81 & Advisory Committee Comment.

Would the Commission like to include this proposed clarification in a tentative recommendation?

Revision of Section 68111

The following amendment of Section 68111 might also be helpful, to make more clear what the section means and how it interrelates with the Government Claims Act:

Gov't Code § 68111 (amended). Representation of judge appearing as witness in official capacity

68111. (a) Whenever any judge of any court of this state is a witness in ~~his~~ official capacity as judge in any action or proceeding, ~~such the~~ judge shall be entitled to be represented at ~~such the~~ action or proceeding by counsel of ~~his the~~ judge's choice, at the judge's own expense.

(b) Representation of a judge at public expense is governed by the Government Claims Act (Division 3.6 (commencing with Section 810) of Title 1), including, but not limited to, Section 995.9.

Comment. Section 68111 is amended for purposes of clarification. This is not a substantive change. See 62 Ops.Cal.Atty.Gen. 611 (1979) (Section 68111 "does not provide ... for the expenditure of public funds for the expense of counsel retained by the judge."); see also Section 811.9 (establishing system under which Judicial Council is responsible for handling claims affecting trial courts and trial court personnel, which applies "[n]otwithstanding any other provision of law) and Section 995.9 (stating rules for defense and indemnification of witness who testifies on behalf of public entity, which apply "[n]otwithstanding any other provision of law").

Does the Commission want to propose this clarification of Section 68111 in a tentative recommendation?

CLOSING REMARKS

Since the trial court restructuring reforms, the Legislature, with assistance from the judiciary, has enacted three bills to adjust the Government Claims Act to reflect the trial court restructuring reforms. Those bills give the Judicial Council broad authority to manage claims involving trial courts and trial court personnel. The new system created by the bills and the implementing court rules generally conforms to the way the Government Claims Act addresses a claim against the state or a state employee.

Given the attention that the Legislature and the judiciary devoted to drafting those bills, it is natural to wonder why they only revised the Government Claims Act and did not make any conforming changes in pertinent provisions outside that Act, such as Sections 26524, 26529, 27647, 27648, and 68111.

The answer is simple. They were relying on this Commission to do that clean-up work as directed by Section 71674.

It is time to complete that task. **Comments on any aspect of this memorandum would be very helpful.**

Respectfully submitted,

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