

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

relating to

Sovereign Immunity

Number 4—Defense of Public Employees

January 1963

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

NOTE

This pamphlet begins on page 1301. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

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STATE OF CALIFORNIA
CALIFORNIA LAW REVISION COMMISSION

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January 2, 1963

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California
and to the *Legislature of California*

The California Law Revision Commission was authorized by Resolution Chapter 202 of the Statutes of 1957 to make a study to determine whether the doctrine of sovereign or governmental immunity in California should be abolished or revised.

The Commission herewith submits its recommendation on one portion of this subject—defense of public employees. This is one of a series of reports prepared for the 1963 legislative session containing the recommendations of the Commission relating to various aspects of the subject of sovereign immunity. The Commission also has published a research study relating to sovereign immunity prepared by its research consultant, Professor Arvo Van Alstyne of the School of Law, University of California at Los Angeles.

Respectfully submitted,

HERMAN F. SELVIN, *Chairman*

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

Number 4—Defense of Public Employees

A number of California statutes either authorize or require public entities to defend actions and proceedings brought against their officers and employees. The two principal statutes are Section 2001 of the Government Code and Section 13007.1 of the Education Code.

Government Code Section 2001 requires that, upon request, a public entity defend a civil action or proceeding brought against its officer, agent or employee on account of any act or failure to act occurring during the course of his service or employment.¹ The section covers all public entities and includes all torts, whether negligent or intentional. Unless provision is made by the public entity for the employment of other counsel, the attorney for the public entity is required to act as defense counsel. The Attorney General has ruled that the lack of a regular or part-time counsel, or the disqualification or incapacity of regular counsel, does not relieve the public entity from the duty of defending the action or proceeding.²

Section 2001 was substantially amended in 1961. Prior to the 1961 amendment, the section apparently required a preliminary determination that the defendant had acted in good faith and without malice before he was entitled to be defended at public expense.³ Now, however, the section requires the public entity to defend the action or proceeding—even though the public entity believes that the defendant may have acted or failed to act because of bad faith or malice—and permits the public entity to recover the cost of the defense from the defendant if it is later established that he acted or failed to act because of bad faith or malice.

Section 2001 does not spell out the remedies available to the defendant in case the entity refuses to defend him upon request. The traditional remedy would be to petition for a writ of mandate to compel the appropriate public officials to act.⁴ In cases where this remedy would not be adequate, the defendant apparently may retain his own counsel upon the refusal of the public entity to do so, and the public

¹ Under Section 2001, the officer, agent or employee is not entitled to be defended at public expense if the action or proceeding is brought to remove him from his office, agency or employment or is brought by a public entity against him as an individual and not in his official capacity.

² 39 OPS. CAL. ATTY. GEN. 71 (1962).

³ The section did not indicate by whom this determination was to be made. See Tracy v. County of Fresno, 125 Cal. App.2d 52, 56-57, 270 P.2d 57, 59 (1954).

⁴ 39 OPS. CAL. ATTY. GEN. 71 (1962).

entity must reimburse him for the costs incurred, including a reasonable amount for attorney's fees.⁵

Although Section 2001 purports to apply to all public personnel, school district officers and employees also are covered by a special statute—Education Code Section 13007.1—enacted in 1961. Section 13007.1 (which adopts the former scheme of Section 2001—the scheme that was rejected when Section 2001 was amended in 1961) provides that a school district officer or employee is entitled to a defense at public expense only after a determination by the governing board of the school district that “the officer or employee performed his official duty in good faith in the apparent interests of the school district and without malice and that such defense would otherwise be in the best interests of the school district.”⁶

Section 2001 also overlaps and conflicts with other California statutes.⁷ For example, Government Code Section 2000, which applies only to cities, counties and school districts, apparently permits a public officer included within its terms to retain his own attorney without first requesting that the public entity defend the action, and gives the officer the right to recover the cost of defending the action from the public entity. Government Code Section 2002.5, which applies only to an officer or employee of the State licensed in one of the healing arts, requires that the Attorney General defend the officer or employee upon request, but it is not clear whether the State can recover the expenses of such defense from the officer or employee if it is later established that he acted or failed to act because of bad faith or malice.

The Law Revision Commission has concluded that the present overlapping and inconsistent statutes should be replaced by a general statute providing for the defense of public personnel at public expense.

Neither Section 13007.1 nor Section 2001 would provide a satisfactory scheme for a general statute. Section 13007.1 does not adequately protect a deserving public officer, agent or employee, for this section apparently leaves the decision as to whether he will be defended at public expense entirely to the discretion of the public entity. Section 2001 also is unsatisfactory, primarily because it requires the public entity to defend an action or proceeding even if the defendant actually acted or failed to act because of bad faith, corruption or malice. It seems contrary to sound public policy to expend public funds to defend a civil action or proceeding against such a defendant. Yet, this can be the result under Section 2001 because the right to recover the cost of the defense will be effective only to the extent of the defendant's financial resources. Moreover, Section 2001 does not adequately protect

⁵ Although Section 2001 does not expressly authorize this remedy, this is the interpretation given the section by the Attorney General. See 39 OPS. CAL. ATTY. GEN. 71 (1962). Presumably the officer, agent or employee would have to establish that he was in the course of his service or employment at the time of the act or omission; proof by the public entity that he acted or failed to act because of bad faith or malice apparently would defeat his attempt to obtain reimbursement.

⁶ See also CAL. EDUC. CODE § 1043, relating to defense of school district officers and employees.

⁷ CAL. GOVT. CODE §§ 2000, 2002.5, 26524, 26529, 61632; CAL. EDUC. CODE § 1043; CAL. WATER CODE §§ 31088, 60201; Kings River Conservation District Act (Chapter 931, Statutes of 1951) § 15; Municipal Water District Act of 1911 (Chapter 671, Statutes of 1911) § 21; Antelope Valley-East Kern Water Agency Law (Chapter 2146, Statutes of 1959) § 76; Desert Water Agency Law (Chapter 1069, Statutes of 1961) § 24; San Geronio Pass Water Agency Law (Chapter 1435, Statutes of 1961) § 24. Cf. CAL. WATER CODE § 5901, Art. IX(A)(6) (Klamath River Basin Compact).

the deserving public officer, agent or employee in cases where a conflict of interest may arise under its provisions. For example, the interest of the public entity may be served best by seeking to establish in the action against the officer, agent or employee—contrary to his interest—that he acted or failed to act because of bad faith or malice, for the public entity can then, under Section 2001, recover from him the cost of his defense.⁸

To eliminate this possible conflict of interest and at the same time to assure that deserving public employees⁹ will be defended at public expense, the Commission makes the following recommendation:

1. Upon request of a public employee, a public entity should be required to defend a civil action or proceeding brought against him on account of an act or omission in the scope of his employment unless the public entity determines (a) that the act or omission was not within the scope of his employment, or (b) that he acted or failed to act because of actual fraud, corruption or actual malice, or (c) that the defense of the action or proceeding would create a conflict of interest between the public entity and the employee.

If the public entity defends the action or proceeding, it should have no right to recover the costs of the defense from the employee. This will eliminate the possible conflict of interest pointed out above, for the public entity need not defend the action or proceeding if it determines that the employee acted or failed to act because of actual fraud, corruption or actual malice.¹⁰

The public entity in defending a civil action or proceeding brought against a public employee could, under the recommended legislation, take any appropriate action necessary to defend the action or proceeding, including the prosecution of a cross-action, counterclaim or cross-complaint by the employee against the plaintiff in the action being defended by the public entity.

2. The public employee should have two remedies if the public entity fails or refuses to provide him with a defense at public expense. First, he should be permitted to petition for a writ of mandate to compel the public entity to perform its statutory duty. This remedy would, however, rarely be effective where the public entity refuses to defend because it has determined that the defendant was not within the scope of his employment at the time of the act or omission or that he was guilty of actual fraud, corruption or actual malice or that the defense would create a conflict of interest between the entity and the employee, for such a determination would involve an exercise of discretion which a court would be unlikely to reverse. Nor would a petition for a writ of mandate be a satisfactory remedy if it becomes necessary for the public

⁸ See note 10 *infra*.

⁹ As used in this recommendation: "employee" includes an officer, agent or employee, but does not include an independent contractor; and "employment" includes office, agency or employment.

¹⁰ A more serious conflict of interest problem could arise in cases where the public entity is required to pay the judgment secured against the public employee unless the judgment is based on his actual fraud or actual malice. *E.g.*, Municipal Water District Act of 1911 (Chapter 671, Statutes of 1911) § 21; Antelope Valley-East Kern Water Agency Law (Chapter 2146, Statutes of 1959) § 76; Desert Water Agency Law (Chapter 1069, Statutes of 1961) § 24; San Geronimo Pass Water Agency Law (Chapter 1435, Statutes of 1961) § 24. This problem is dealt with in another recommendation. See *Recommendation Relating to Sovereign Immunity: Number 1—Tort Liability of Public Entities and Public Employees*, 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801 (1963).

employee to obtain counsel immediately by reason of limitations upon the time within which to appear and answer the complaint in the action against him. A second remedy should, therefore, be available to the defendant when the public entity fails or refuses to defend him: He should be given a cause of action against the public entity to recover the reasonable expenses he necessarily incurs in defending the action or proceeding if he establishes that the act or omission occurred in the scope of his public employment and the public entity fails to establish that he was guilty of actual fraud, corruption or actual malice.¹¹ The Attorney General has ruled that both of these remedies are available under appropriate circumstances under the existing law.¹²

3. A public entity should be authorized, but not required, to defend a criminal action or proceeding brought against a public employee on account of an act or omission occurring in the scope of his public employment if the public entity determines that such defense would be in the best interests of the public entity and that the employee acted in good faith, without actual malice and in the apparent interests of the public entity. Public entities do not now have this authority.¹³ The Commission has been advised, however, that cases occasionally arise where a criminal proceeding is brought against a public employee who was simply carrying out his orders. For example, one case brought to the attention of the Commission involved a school district employee charged with criminal assault for ejecting a bully from a school playground. Because the school district was not authorized to provide him with counsel, this employee was required to secure his own attorney to make an appropriate motion to dismiss the criminal proceeding brought against him. The Commission has concluded, therefore, that it would be sound public policy to give public entities a limited discretionary authority to defend criminal actions and proceedings brought against their employees.

A public entity also should be authorized, but not required, to defend an administrative proceeding brought against a public employee on account of an act or omission occurring in the scope of his public employment if the public entity determines that such defense would be in the best interests of the public entity and that the employee acted in good faith, without actual malice and in the apparent interests of the public entity. A case may arise, for example, where an administrative proceeding is initiated against a public employee who is performing his duties in compliance with regulations established by the public entity.

Although as a general rule a public employee should be given a right to a defense at public expense against a civil action or proceeding founded upon acts or omissions connected with his public employment, he should have no recourse against the public entity if it declines to furnish him with a defense against a criminal charge or against an

¹¹ Since the employee or former employee is entitled to be defended at public expense only if the act or omission occurred in the scope of his employment, he has the burden of proof on this issue. The burden of proving that he is not entitled to reimbursement because he acted or failed to act because of actual fraud, corruption or actual malice is placed on the public entity; if the burden of proof on this issue were placed on the employee, it would put him in the difficult position of having to prove a negative.

¹² 39 OPS. CAL. ATTY. GEN. 71 (1962).

¹³ But see CAL. GOVT. CODE § 61632; CAL. WATER CODE §§ 31088, 60201; Kings River Conservation District Act § 15 (added by Chapter 1728, Statutes of 1959).

administrative proceeding. Since it is necessary to weigh a great many factors to determine whether the public interest would be served by providing a public employee with a defense against a criminal charge or an administrative proceeding, and since these factors will vary in importance from case to case, the Commission has concluded that the decision whether it is in the public interest to provide the defense in any particular case is best left to the sound discretion of the public entity. In reaching this conclusion, the Commission is influenced also by the existence of such civil remedies as actions for false arrest, false imprisonment and malicious prosecution that may be available when unfounded criminal or administrative proceedings are brought against public personnel.

4. A public entity should be permitted, but not required, to defend a public employee against an action or proceeding brought by the public entity to remove, suspend or otherwise penalize him. Thus, a public employee would not be entitled as a matter of right to a defense at public expense when his employer brings a judicial or administrative proceeding to remove him, nor would he be entitled to counsel at public expense when he seeks judicial review of administrative disciplinary proceedings brought by his employer. Nor should a public employee be entitled as a matter of right to a defense at public expense against an action or proceeding brought by the public entity against him as an individual and not in his official capacity.¹⁴ Somewhat similar limitations on the right to be defended at public expense are found in Government Code Section 2001.

5. A former employee should have the same rights as a person still employed by the public entity 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.

6. The recommended legislation should be in addition to and not in lieu of any rights the public employee may have under any contract¹⁵ or under any other law, charter, ordinance or regulation providing for his defense. Government Code Section 2001 contains a similar provision.

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

¹⁴ An 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. In these cases, the public employee should be defended at public expense.

¹⁵ See 39 Ops. CAL. ATTY. GEN. 71 (1962).

An act to add Chapter 6 (commencing with Section 992.1) to Division 3.5 of Title 1 of the Government Code, and to add Part 7 (commencing with Section 995) to Division 3.6 of Title 1 of the Government Code as enacted by Senate Bill No. ___ of the 1963 Regular Session, and to repeal Sections 2000 and 2001 of, and to amend Sections 2002.5, 26529 and 61632 of, the Government Code, and to repeal Sections 1043 and 13007.1 of the Education Code, and to repeal Section 60201 of, and to amend Section 31088 of, the Water Code, and to amend Section 15 of the Kings River Conservation District Act (Chapter 931, Statutes of 1951), Section 21 of the Municipal Water District Act of 1911 (Chapter 671, Statutes of 1911), Section 76 of the Antelope Valley-East Kern Water Agency Law (Chapter 2146, Statutes of 1959), Section 24 of the Desert Water Agency Law (Chapter 1069, Statutes of 1961) and Section 24 of the San Geronio Pass Water Agency Law (Chapter 1435, Statutes of 1961), relating to defense of actions and proceedings brought against public officers, agents and employees.

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

SECTION 1. Chapter 6 (commencing with Section 992.1) is added to Division 3.5 of Title 1 of the Government Code, to read:

CHAPTER 6. DEFENSE OF PUBLIC EMPLOYEES

Article 1. Definitions

992.1. Unless the provision or context otherwise requires, the definitions contained in this article govern the construction of this chapter.

992.2. "Employee" includes an officer, agent or employee, but does not include an independent contractor.

992.3. "Employment" includes office, agency or employment.

992.4. "Enactment" means a constitutional provision, statute, charter provision, ordinance or regulation.

992.5. "Public entity" includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.

992.6. "Regulation" means a rule, regulation, order or standard, having the force of law, adopted by an employee or agency of the United States or of a public entity pursuant to authority vested by constitution, statute, charter or ordinance in such employee or agency to implement, interpret or make specific the law enforced or administered by the employee or agency.

Article 2. Defense of Actions and Proceedings Against Public Employees

995. 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.

For the purposes of this chapter, a cross-action, counterclaim or cross-complaint against an employee or former employee shall be deemed to be a civil action or proceeding brought against him.

995.2. A public entity may refuse to provide for the defense of an action or proceeding brought against an employee or former employee if the public entity determines that:

(a) The act or omission was not within the scope of his employment; or

(b) He acted or failed to act because of actual fraud, corruption or actual malice; or

(c) The defense of the action or proceeding by the public entity would create a conflict of interest between the public entity and the employee or former employee.

995.4. A public entity may, but is not required to, provide for the defense of:

(a) An action or proceeding brought by the public entity to remove, suspend or otherwise penalize its own employee or former employee, or an appeal to a court from an administrative proceeding by the public entity to remove, suspend or otherwise penalize its own employee or former employee.

(b) An action or proceeding brought by the public entity against its own employee or former employee as an individual and not in his official capacity, or an appeal therefrom.

995.6. A public entity is not required to provide for the defense of an administrative proceeding brought against an employee or former employee, but a public entity may provide for the defense of an administrative proceeding brought against an employee or former employee if:

(a) The administrative proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; 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.

995.8. A public entity is not required to provide for the defense of a criminal action or proceeding (including a proceeding to remove an officer under Sections 3060 to 3073, inclusive, of the Government Code) brought against an employee or former employee, but a public entity may provide for the defense of a criminal action or proceeding (including a pro-

ceeding to remove an officer under Sections 3060 to 3073, inclusive, of the Government Code) brought against an employee or former employee if:

(a) The criminal action or proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; 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.

996. A public entity may provide for a defense pursuant to this chapter by its own attorney or by employing other counsel for this purpose or by purchasing insurance which requires that the insurer provide the defense. All of the expenses of providing a defense pursuant to this chapter are proper charges against a public entity. A public entity has no right to recover such expenses from the employee or former employee defended.

996.2. Except as otherwise provided in Section 996.4, the mention of the existence of this chapter, or the mention of the fact that the employee or former employee has or has not requested a defense pursuant to this chapter or that the public entity has or has not provided or refused to provide a defense pursuant to this chapter, during the voir dire examination of jurors or at any other time in the presence of the jury, constitutes grounds for a mistrial.

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 chapter.

996.6. The rights of an employee or former employee under this chapter are in addition to and not in lieu of any rights he may have under any contract or under any other enactment providing for his defense.

SEC. 2. Section 2000 of the Government Code is repealed.

2000. ~~Whenever suit for damages resulting from~~

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

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

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

(2) the dangerous or defective condition.

SEC. 3. Section 2001 of the Government Code is repealed. 2001. (1) As used in this section:-

(a) "Action or proceeding" does not include an action or proceeding to remove an employee from his employment, a criminal action or proceeding against a public employee, or an action or proceeding brought by a public entity against a public employee as an individual and not in his official capacity.

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

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

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

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

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

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

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

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

SEC. 4. Section 2002.5 of the Government Code is amended to read:

2002.5. Whenever a suit is filed against an employee or officer of the State of California licensed in one of the healing arts under Division 2 of the Business and Professions Code, for malpractice alleged to have arisen out of the performance of his duties as a state employee, a copy of the complaint shall also be served upon the Attorney General ~~and the Attorney General upon the request of such employee shall defend said suit on behalf of such employee~~. If there is a settlement or judgment in the suit the State shall pay the same; provided, that no settlement shall be effected without the consent of the head of the state agency concerned and the approval of the Attorney General. The settlement of such claims or judgments shall be limited to those arising from acts of such officers and employees of the State in the performance of their duties; or by reason of emergency aid given to inmates, state officials, employees, and to members of the public.

SEC. 5. Section 26529 of the Government Code is amended to read:

26529. In counties which have a county counsel, the county counsel shall discharge all the duties vested in the district attorney by Sections 26520, 26522, 26523 and 26524. The county counsel shall defend or prosecute all civil actions and proceedings in which the county or any of its officers is concerned or is a party *in his official capacity*. ~~He shall defend all suits for damages instituted against officers or employees or former officers and employees for acts performed by them in furtherance of their duties while in the employ~~ *Except where the county or district provides other counsel, the county counsel shall defend as provided in Chapter 6 (commencing with Section 992.1) of Division 3.5 of Title 1 of the Government Code any action or proceeding brought against an officer, agent or employee of the county or of any district in the county, the legal services of which are required by law to be performed by him the county counsel.*

SEC. 6. Section 61632 of the Government Code is amended to read:

61632. The district may employ counsel to defend any action or proceeding brought against it ~~or any of its officers, agents, or employees~~ on account of any injury, taking, damage, or destruction, ~~or to defend as provided in Chapter 6 (commencing with Section 992.1) of Division 3.5 of Title 1 of the Government Code an action or proceeding brought against any of its officers, agents, or employees,~~ and the fees and expenses, including the cost of any bonds and undertakings, involved therein ~~shall be~~ *are* a lawful charge against the district.

SEC. 7. Section 1043 of the Education Code is repealed.

1043. ~~If suit is brought against any member of the governing board of any school district as an individual, for any act, or omission, in the line of his official duty as member of the board, or if suit is brought against any employee of any school~~

district for any act performed in the course of his employment, the district attorney of the county shall defend the member of the board or the individual employee upon request of the governing board of the school district, without fee or other charge.

SEC. 8. Section 13007.1 of the Education Code is repealed.

13007.1. As used in this section the term "action or proceeding" does not include an action or proceeding to remove an officer or employee from his employment or a criminal action or proceeding brought against an officer or employee. The term includes all other civil actions or proceedings brought against a school district officer or employee for an act committed during his assigned hours of duty and within the apparent course and scope of his employment.

The attorney for a school district, upon the request of the officer or employee, shall act as counsel in the defense of any action or proceeding brought against an officer or employee of the school district in his official or individual capacity, or both, on account of any alleged tortious or criminal conduct arising out of the performance of any official duty, upon, and following, the determination of the governing board of said school district that the officer or employee performed his official duty in good faith in the apparent interests of the school district and without malice and that such defense would otherwise be in the best interests of the school district.

The fees, costs and expenses of defending the action or proceeding pursuant to this section are a lawful charge against the funds of the school district. The school district may recover from the officer or employee any fees, costs or expenses paid or incurred by it under the provisions of this section if it is established that the officer or employee acted or failed to act because of bad faith or malice.

SEC. 9. Section 60201 of the Water Code is repealed.

60201. The district may employ counsel to defend any litigation brought against any director or other officer, agent or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the district.

SEC. 10. Section 31088 of the Water Code is amended to read:

31088. The district may employ counsel to defend any action or proceeding brought against it or any of its officers, agents, or employees on account of any injury, taking, damage, or destruction, or to defend as provided in Chapter 6 (commencing with Section 992.1) of Division 3.5 of Title 1 of the Government Code an action or proceeding brought against any of its officers, agents or employees, and the fees and expenses involved therein shall be a lawful charge against the district.

SEC. 11. Section 15 of the Kings River Conservation District Act (Chapter 931, Statutes of 1951) is amended to read:

Sec. 15. Claims for money or damages against the district are governed by the provisions of Chapter 2 (commencing

with Section 700) of Division 3.5 of Title 1 of the Government Code, except as provided therein. Claims not governed thereby or by other statutes or by ordinances or regulations authorized by law and expressly applicable to such claims shall be prepared and presented to the governing body, and all claims shall be audited and paid, in the same manner and with the same effect as are similar claims against the county. The district may employ counsel to defend any action or proceeding brought against it ~~or any of its directors, officers, agents or employees~~ on account of any taking, injury, damage or destruction to any property or injury or damage to any person, *or to defend as provided in Chapter 6 (commencing with Section 992.1) of Division 3.5 of Title 1 of the Government Code an action or proceeding brought against any of its officers, agents or employees,* and the fees and expenses involved therein ~~shall be~~ *are* a lawful charge against the district.

Sec. 12. Section 21 of the Municipal Water District Act of 1911 (Chapter 671, Statutes of 1911) is amended to read:

Sec. 21. No director or other officer, agent, or employee of any district shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

~~The district may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the district.~~

If any director or other officer, agent, or employee of the district is held liable for any act or omission in his official capacity, and any judgment is rendered thereon, the district, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent, or employee.

Sec. 13. Section 76 of the Antelope Valley-East Kern Water Agency Law (Chapter 2146, Statutes of 1959) is amended to read:

Sec. 76. No director or other officer, agent, or employee of the agency shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

~~The agency may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and ex-~~

penses involved therein shall be a lawful charge against the agency.

If any director or other officer, agent, or employee of the agency is held liable for any act or omission in his official capacity and any judgment is rendered thereon, the agency, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent, or employee.

Sec. 14. Section 24 of the Desert Water Agency Law (Chapter 1069, Statutes of 1961) is amended to read:

Sec. 24. No director or other officer, agent, or employee of the agency shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

~~The agency may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the agency.~~

If any director or other officer, agent, or employee of the agency is held liable for any act or omission in his official capacity, and any judgment is rendered thereon, the agency, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent or employee.

Sec. 15. Section 24 of the San Gorgonio Pass Water Agency Law (Chapter 1435, Statutes of 1961) is amended to read:

Sec. 24. No director or other officer, agent, or employee of the agency shall be liable for any act or omission of any officer, agent or employee appointed or employed by him unless he had actual notice that the person appointed or employed was inefficient or incompetent to perform the service for which such person was appointed or employed or unless he retains the inefficient or incompetent person after notice of the inefficiency or incompetency.

~~The agency may employ counsel to defend any litigation brought against any director or other officer, agent, or employee thereof, on account of his official action, and the fees and expenses involved therein shall be a lawful charge against the agency.~~

If any director or other officer, agent, or employee of the agency is liable for any act or omission in his official capacity, and any judgment is rendered thereon, the agency, except in case of his actual fraud or actual malice, shall pay the judgment without obligation for repayment by such director or other officer, agent or employee.

SEC. 16. Part 7 (commencing with Section 995) is added to Division 3.6 of Title 1 of the Government Code as enacted by Senate Bill No. ___ of the 1963 Regular Session, to read:

PART 7. DEFENSE OF PUBLIC EMPLOYEES

995. 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.

For the purposes of this part, a cross-action, counterclaim or cross-complaint against an employee or former employee shall be deemed to be a civil action or proceeding brought against him.

995.2. A public entity may refuse to provide for the defense of an action or proceeding brought against an employee or former employee if the public entity determines that:

(a) The act or omission was not within the scope of his employment; or

(b) He acted or failed to act because of actual fraud, corruption or actual malice; or

(c) The defense of the action or proceeding by the public entity would create a conflict of interest between the public entity and the employee or former employee.

995.4. A public entity may, but is not required to, provide for the defense of:

(a) An action or proceeding brought by the public entity to remove, suspend or otherwise penalize its own employee or former employee, or an appeal to a court from an administrative proceeding by the public entity to remove, suspend or otherwise penalize its own employee or former employee.

(b) An action or proceeding brought by the public entity against its own employee or former employee as an individual and not in his official capacity, or an appeal therefrom.

995.6. A public entity is not required to provide for the defense of an administrative proceeding brought against an employee or former employee, but a public entity may provide for the defense of an administrative proceeding brought against an employee or former employee if:

(a) The administrative proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; 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.

995.8. A public entity is not required to provide for the defense of a criminal action or proceeding (including a proceeding to remove an officer under Sections 3060 to 3073, in-

clusive, of the Government Code) brought against an employee or former employee, but a public entity may provide for the defense of a criminal action or proceeding (including a proceeding to remove an officer under Sections 3060 to 3073, inclusive, of the Government Code) brought against an employee or former employee if:

(a) The criminal action or proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; 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.

996. A public entity may provide for a defense pursuant to this part by its own attorney or by employing other counsel for this purpose or by purchasing insurance which requires that the insurer provide the defense. All of the expenses of providing a defense pursuant to this part are proper charges against a public entity. A public entity has no right to recover such expenses from the employee or former employee defended.

996.2. Except as otherwise provided in Section 996.4, the mention of the existence of this part, or the mention of the fact that the employee or former employee has or has not requested a defense pursuant to this part or that the public entity has or has not provided or refused to provide a defense pursuant to this part, during the voir dire examination of jurors or at any other time in the presence of the jury, constitutes grounds for a mistrial.

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.

996.6. The rights of an employee or former employee under this part are in addition to and not in lieu of any rights he

may have under any contract or under any other enactment providing for his defense.

SEC. 17. Section 26529 of the Government Code is amended to read:

26529. In counties which have a county counsel, the county counsel shall discharge all the duties vested in the district attorney by Sections 26520, 26522, 26523 and 26524. The county counsel shall defend or prosecute all civil actions and proceedings in which the county or any of its officers is concerned or is a party *in his official capacity*. ~~He shall defend all suits for damages instituted against officers or employees or former officers and employees for acts performed by them in furtherance of their duties while in the employ~~ *Except where the county or district provides other counsel, the county counsel shall defend as provided in Part 7 (commencing Section 995) of Division 3.6 of Title 1 of the Government Code action or proceeding brought against an officer, agent or employee of the county or of any district in the county, the legal services of which are required by law to be performed by him the county counsel.*

SEC. 18. Section 61632 of the Government Code is amended to read:

61632. The district may employ counsel to defend any action or *proceeding* brought against it ~~or any of its officers, agents, or employees~~ on account of any injury, taking, damage, or destruction, *or to defend as provided in Part 7 (commencing with Section 995) of Division 3.6 of Title 1 of the Government Code an action or proceeding brought against any of its officers, agents or employees*, and the fees and expenses, including the cost of any bonds and undertakings, involved therein ~~shall be~~ *are* a lawful charge against the district.

SEC. 19. Section 31088 of the Water Code is amended to read:

31088. The district may employ counsel to defend any action or *proceeding* brought against it ~~or any of its officers, agents, or employees~~ on account of any injury, taking, damage, or destruction, *or to defend as provided in Part 7 (commencing with Section 995) of Division 3.6 of Title 1 of the Government Code an action or proceeding brought against any of its officers, agents or employees*, and the fees and expenses involved therein ~~shall be~~ *are* a lawful charge against the district.

SEC. 20. Section 15 of the Kings River Conservation District Act (Chapter 931, Statutes of 1951) is amended to read:

Sec. 15. Claims for money or damages against the district are governed by the provisions of Chapter 2 (commencing with Section 700) of Division 3.5 of Title 1 of the Government Code, except as provided therein. Claims not governed thereby or by other statutes or by ordinances or regulations authorized by law and expressly applicable to such claims shall be prepared and presented to the governing body, and all claims shall be audited and paid, in the same manner and with the same effect as are similar claims against the county. The district may employ counsel to defend any action or *proceeding*

brought against it or any of its directors, officers, agents or employees on account of any taking, injury, damage or destruction to any property or injury or damage to any person, or to defend as provided in Part 7 (commencing with Section 995) of Division 3.6 of Title 1 of the Government Code an action or proceeding brought against any of its officers, agents or employees, and the fees and expenses involved therein shall be a lawful charge against the district.

SEC. 21. Sections 16, 17, 18, 19 and 20 of this act shall become operative only if Senate Bill No. --- is enacted by the Legislature at its 1963 Regular Session, and in such case at the same time as Senate Bill No. --- takes effect, at which time Sections 1, 4, 5, 6, 10, 11, 12, 13, 14 and 15 of this act are repealed.

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