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Place of Meeting

State Bar Building
601 McAllister Street
San Francisco

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

August 16-18, 1962

Meeting will start at 7:00 p.m. on August 16 and will continue until approximately 10:00 p.m. Meeting will start at 9:00 a.m. on August 17 and August 18.

August 16 (7:00 p.m.)

1. Minutes of July 1962 Meeting (sent August 7, 1962)
2. Study No. 52(L) - Sovereign Immunity
 - (a) Memorandum No. 47(1962) (Defense of Actions Brought Against Public Officers and Employees) (sent August 8, 1962)

First Supplement to Memorandum No. 47(1962) (to be sent)
 - (b) Memorandum No. 48(1962) (Insurance Coverage for Public Entities and Public Officers and Employees) (sent August 8, 1962)

First Supplement to Memorandum No. 48(1962) (to be sent)
 - (c) Memorandum No. 49(1962) (Workmen's Compensation Benefits for Persons Required or Requested to Assist Law Enforcement Officers) (sent August 8, 1962)

First Supplement to Memorandum No. 49(1962)(to be sent)
 - (d) Memorandum No. 38(1962) (Payment of Costs and Interest in Actions Against Public Entities and Public Officers and Employees) (tentative recommendation)(sent July 14, 1962)
 - (e) Memorandum No. 44(1962) (Compromise of Claims and Actions Against the State) (tentative recommendation) (sent July 16, 1962)
 - (f) Memorandum No. 52(1962) (Venue in Actions Against the State) (sent August 9, 1962)

August 17 (9:00 a.m.)

1. Study No. 52(L) - Sovereign Immunity
 - (a) Memorandum No. 54(1962) (Comprehensive Liability Statute)
(tentative recommendation) (to be sent)
 - (b) Memorandum No. 45(1962) (Vehicle Code Sections 17000-17003)
(tentative recommendation) (enclosed)
 - (c) Memorandum No. 37(1962) (Payment of Debts of Dissolved Local
Public Entities) (tentative recommendation) (sent July
11, 1962)
 - (d) Memorandum No. 53(1962) (Counsel Fees in Actions Against Public
Entities and Public Officers and Employees) (tentative
recommendation) (enclosed)

August 18 (9:00 a.m.)

1. Study No. 52(L) - Sovereign Immunity
 - (a) Memorandum No. 46(1962) (Liability for Dangerous Conditions
of Public Property) (sent August 9, 1962)

Research Study, Part X (Park and Recreation Torts) (sent
June 1, 1962) and other portions of study referred
to in Memorandum No. 46(1962)

First Supplement to Memorandum No. 46(1962) (to be sent)

Second Supplement to Memorandum No. 46(1962) (enclosed)
2. Continuation of Agenda for August 16.
3. Continuation of Agenda for August 17.

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MINUTES OF MEETING

of

AUGUST 16, 17 and 18, 1962

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on August 16, 17 and 18, 1962.

Present: Herman F. Selvin, Chairman
John R. McDonough, Jr., Vice Chairman
Honorable Clark L. Bradley
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr..

Absent: James A. Cobey
Joseph A. Ball
James R. Edwards

Messrs. John H. DeMouilly, Joseph B. Harvey and Jon D. Smock of the Commission's staff were also present.

Mr. Benton A. Sifford, special research consultant to the Senate Fact Finding Committee on Judiciary, was present on August 17 and 18, 1962.

The following persons were also present:

Carlos Bea, Dunne, Dunne and Phelps (August 16, 1962)
Jack F. Brady, Department of Finance (August 16 and 17, 1962)
Robert F. Carlson, Department of Public Works
George Hadley, Department of Public Works (August 16 and 17, 1962)
Robert Lynch, Office of the County Counsel, Los Angeles
Mark C. Nosler, Department of Finance
Robert Reed, Department of Public Works
John J. Savage, Bureau of Casualty Underwriters
Willard Shank, Office of the Attorney General

Minutes of July Meeting. The minutes of the July 1962 meeting were approved as submitted.

ADMINISTRATIVE MATTERS

Move of Commission Office. The Executive Secretary reported that it will be necessary to move the office of the Commission to the basement of the law dormitory. The move is a temporary one (approximately 10 months) and is made necessary because of the remodeling of a portion of the law school. The lease covering the space now occupied by the Commission in the law school has been terminated by Stanford.

The Commission authorized the Chairman to determine what recommendation the Commission should make to the Department of Finance concerning the terms of the lease covering the new space.

Hearsay (printing pamphlet). The Commission authorized the Executive Secretary to make arrangements for the sale of the Hearsay Pamphlet with the Documents Section of the State Printing Department.

Sovereign Immunity Study (printing pamphlet). The Commission determined that the Sovereign Immunity Study be printed separately and the Executive Secretary was authorized to make arrangements for the sale of the printed study with the Documents Section of the State Printing Department.

The Commission determined that the various recommendations relating to sovereign immunity be printed in separate pamphlets. What is to be printed in a separate pamphlet will be determined at the time when a particular recommendation is ready to be printed. The Executive Secretary was directed to make recommendations concerning this matter at appropriate times.

Meeting Dates and Places. Future meetings of the Commission
are tentatively scheduled as follows:

September 21-22	Beverly Hills (State Bar Convention)
October 18-19-20	San Francisco
November 15-16-17	Los Angeles
December 14-15	San Francisco

STUDY NO. 52(L) - SOVEREIGN IMMUNITY

General Liability Recommendation

The Commission considered Memorandum No. 54 (1962), containing the text of a recommendation and draft statute relating to liability of public entities and public officers and employees.

The Commission first considered the draft statute and took the following actions:

ARTICLE 1 - DEFINITIONS

901.05. This section was approved without change.

901.10. This section was approved without change.

901.15. This section was approved without change.

901.20. This section was approved after it was revised to read:

901.20. "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, character, feelings or estate of such nature that would be actionable if negligently or wrongfully inflicted by a private person.

901.25. This section was approved after it was revised to define "enactment" instead of "law."

It was noted that the word "law" used in each section of the proposed statute would have to be carefully examined to determine whether "law" should be used instead of "enactment." With the change in the definition, the word "law" will now include the common law as well as statutory law.

The word "statute" will be used in the proposed legislation to mean a state statute.

901.30. This section was approved as drafted.

901.35. This section was approved as drafted.

ARTICLE 2 - GENERAL PROVISIONS RELATING TO LIABILITY

It was determined that this article should be split into three articles. The first article would deal with liability of public entities; the second with liability of public employees; the third article with indemnification of public employees. The staff is directed to revise the article accordingly.

The Commission adopted the general policy that in drafting the statute that sections indicating the liability or immunity of public employees should contain no reference to liability or immunity of public entities. This general policy is not to apply, however, to the discretionary immunity--a provision providing a discretionary immunity for the public entity and another provision providing a discretionary immunity for the public employees are to be contained in the proposed statute. This decision was made so that the question as to whether a discretionary immunity for public entities (rather than one for public employees--which would provide public entities with the same immunity since the public entity is not liable unless its employee is liable) can be voted upon by the entire Commission at a later time.

It was suggested that the statute should be consistent in form: either it should state "no public entity is liable" or "a public entity

is not liable." It was noted that the proposed statute was not consistent because some sections include a statement as to the liability of the employee as well as the public entity. Statements as to the immunity of public employees should be consistent in form.

902.05. The word "enactment" was substituted for "statute" in this section and the section was approved as so revised. As revised, the section permits liability to be imposed by constitutional provision, statute, charter provision, ordinance or regulation. This provision does not give the power to impose liability--it merely indicates that where the power to impose liability (as by a regulation) otherwise exists, that power will continue to exist.

902.10. This section was approved as drafted.

902.15. This section was approved after it was revised to read:

902.15. Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

The examples that were listed in Section 902.15 as proposed by the staff are to be included in the text of the recommendation.

902.20. This section was approved after it was revised to read:

902.20. A public entity is liable for injury proximately caused by a nuisance created or maintained by it.

This section states the existing law.

902.25. This section was approved in principle. The staff was directed to use the same language as is used in the Civil Code. As

proposed to be revised, the section was approved.

902.30. It was recognized that this section does not spell out the discretionary exception in any detail. The Commission has studied a number of areas and provided specific rules indicating whether a particular phase of an activity is discretionary or not. The general discretionary exception contained in Section 902.30 is intended to cover those areas not yet studied. We have already covered the major areas of liability--dangerous conditions of public property, vehicle torts--and provided specific rules. Thus, the area of potential liability that remains is not too great.

Section 902.30 in effect overrules the Lipman case--the public entity gets the same discretionary immunity that the public employee gets.

Section 902.30 is to be divided into two provisions to read as follows:

A public entity is not liable for an injury resulting from an act or omission of an employee where the act or omission was the result of the exercise of the discretion vested in such employee, whether or not such discretion be abused.

A public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

The provision relating to the discretionary immunity of the public entity is to be moved so that it follows Section 902.10.

902.35. This section was approved after it was revised to read:

902.35. A public employee is not liable for his act or omission, exercising due care, in the execution of any enactment.

902.40. It was pointed out that this section makes a public

employee not liable for trespass ab initio, even though he causes injury after he enters property. Under the section, he would be liable only for the injury caused by his negligent or wrongful act or omission. The section was approved as drafted.

902.45. This section was approved after it was revised to read:

902.45. If a public employee, exercising due care, acts in good faith and without malice under the apparent authority of an enactment which is held to be unconstitutional, invalid or inapplicable for any reason, he is not liable for injury caused thereby except to the extent that he would have been liable had the law not been held unconstitutional, invalid or inapplicable.

The Commission considered whether the public entity should be liable where an employee acts under an unconstitutional, invalid or inapplicable enactment, notwithstanding the fact that the employee would be immune from liability. The Commission determined that this was a type of discretionary action for which there should be immunity, but that the immunity of the public employee should exist only if the employee exercised due care.

902.50. Subdivision (a) providing an immunity for injury caused by "the adoption of or failure to adopt any enactment" was deleted as unnecessary because such adoption or failure to adopt is clearly discretionary.

The Commission considered whether an immunity should be granted for the exercise of judicial functions. Such an addition was considered unnecessary because the exercise of judicial functions has been held to be clearly discretionary.

Subdivision (b) was revised to read "His failure to enforce any enactment unless such liability is specifically imposed by enactment."

The exception to the immunity was included to cover the mob and riot damage cases. This subdivision covers such cases as one where a police officer fails to arrest a drunk who subsequently causes injury to another person.

Subdivision (c) covers such cases as one where a building permit is negligently issued. New York in such cases has held no liability because the duty does not run to each individual injured but is instead a duty that runs to the public at large. Another case--a boxer is authorized to box on the basis of a negligently administered physical examination. The reason why these cases might not be considered discretionary is because the permit, license, etc., is required to be issued if and only if certain conditions are satisfied.

Section 902.50 was approved after it was revised to read:

902.50. A public employee is not liable for injury caused by:

(a) His failure to enforce any enactment unless such liability is specifically imposed by enactment.

(b) His issuance, denial, suspension or revocation, whether negligent or wrongful, of any permit, license, certificate or similar authorization where he is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

A suggestion to include a good faith requirement was not adopted because the inclusion would permit the case to go to the jury if the plaintiff alleged a lack of good faith. Moreover, there are ordinarily administrative and judicial remedies available in the case of a denial, suspension or revocation of a permit, license or certificate.

902.55. After considerable discussion, this section was deleted.

A proposal that the statute contain a provision imposing liability upon a public entity for lack of due care in acting where the public

entity has undertaken to carry out an activity was not adopted.

902.60. This section was approved after it was revised to read:

902.60. Except as otherwise provided in [the statute relating to dangerous conditions of public property], a public employee is not liable for injury caused by his failure to inspect or by his inspection, whether negligent or wrongful, of any property while acting within the scope of his employment for the purpose of determining whether such property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

A similar section is to be inserted in the article relating to the liability of public entities.

902.65. This section should be divided: the portion relating to liability of public entities should be in the article on public entities; the portion relating to nonliability of public employees should be in the article on public employees.

The provisions of proposed Section 902.65 were revised as follows and approved as so revised:

No public employee is liable for instituting or prosecuting a judicial or administrative proceeding within the scope of his employment, even if done maliciously and without probable cause.

A public entity is liable for injury proximately caused by an employee of the entity, acting within the scope of his employment, if the employee instituted or prosecuted a judicial or administrative proceeding without probable cause and out of personal animosity or ill will or corruption.

The Commission considered a letter from Richard Dinkelspiel relating to Section 902.65. He suggested that a provision contained in a previous staff draft (to require plaintiffs in malicious prosecution actions to post a bond and to pay attorneys' fees if

the action failed) be included in the proposed statute. A motion to include such a provision was tabled.

902.70. This section was divided into three sections and revised in substance as follows and approved as so revised:

Except as otherwise provided by enactment, a public employee is not liable for an injury caused by the negligent or wrongful act or omission of another employee unless he directs or participates in the negligent or wrongful act or omission.

A public entity is liable for an injury caused by an employee if the injury was proximately caused by the failure of the appointing power of the public entity to:

(a) Exercise due care in selecting or appointing the employee; or

(b) Exercise due care to eliminate the risk of such injury after the appointing power had knowledge or notice that the conduct, or continued retention, of the employee in the position to which he was assigned created an unreasonable risk of such injury.

A public entity is liable for an injury caused by an employee if the injury was proximately caused by the failure of the public entity to exercise due care in supervising the employee.

The three sections set out above will replace a large number of existing sections (that will be repealed) that govern the liability of a superior employee for torts of his subordinates. These existing statutes are overlapping, inconsistent and ambiguous.

902.75. This section, which retains the substance of Section 1953.5 of the Government Code, was revised as follows and approved as revised:

Except as otherwise provided by statute, a public employee is not liable for moneys stolen by another from his custody unless the loss was sustained because he failed to exercise due care.

This section will make clear that the common law rule of absolute liability for money stolen from the custody of a public employee does not apply unless some other statute imposes such absolute liability.

902.80. This section and the following sections relating to indemnification of public employees should be included in a separate article.

The word "alleged" was inserted before "negligent or wrongful act or omission" in two places in this section.

The section was also revised to read "..., 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. Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages."

As so revised, the section was approved.

902.85. This section was approved as drafted.

902.90. This section was approved as drafted.

902.95. This section was approved as drafted.

SCHEME TO BE USED IN ARTICLES COVERING SPECIFIC AREAS OF LIABILITY

The Commission considered the extent to which provisions included in articles covering specific areas of liability should duplicate general provisions relating to liability. It was agreed

that in considering specific articles consideration should be given to whether the general provisions adequately covered a matter that is also covered in the article relating to a specific area of liability.

A suggestion that the provisions covering specific areas of activity be phrased in terms of whether or not a particular act is or is not a discretionary act was not adopted. A suggestion that the various specific discretionary acts be enumerated under Section 902.30 was not adopted.

ARTICLE 4. POLICE AND CORRECTIONAL ACTIVITIES

A motion to add to Article 4 a provision comparable to Section 906.05 was made but not adopted. Commissioner Bradley requested that he be recorded as voting in favor of the motion.

904.05. This section was deleted because Section 902.15, as revised by the Commission, sets an appropriate standard to apply to jails, detention and correction facilities.

A motion was adopted that a provision be added to Article 4 to the effect that "Subject to the provisions of Section 902.15, neither a public entity nor a public employee is liable for injury proximately caused by its failure to establish or maintain jail facilities, police protection service, correctional facilities etc.,--in effect a broad description of all the activities that fall in the police and correctional field."

904.10. A motion to delete this section was not adopted.

A motion to approve this section in substance was not adopted.

The section was revised as follows and approved as revised:

A public entity and an employee of a public entity is liable for injury proximately caused by the intentional and unjustifiable interference by such employee acting in the scope of his employment with any right of an inmate of a jail or other detention facility to obtain judicial determination or review of the legality of his confinement.

904.15. The word "injury" was substituted for "damages" in this section. As thus revised, the section was approved.

904.20. This section was revised to substitute "an escaping or escaped prisoner" for "escaping prisoners" and as thus revised the section was approved.

The Commission discussed whether provisions relating to supervision of prisoners, etc., should be added to Article 5. It was concluded that the law governing negligence of public employees would adequately cover the situations not covered specifically by the proposed statute.

The Commission discussed the relationship of 904.15 and 904.20 to 902.15. The Commission declined to add "notwithstanding Section 902.15" unless a statute exists which would apparently require more than Section 904.15.

ARTICLE 6. FIRE PROTECTION

906.05. The phrase "Notwithstanding Section 902.15" was

inserted at the beginning of this section. As thus revised, the section was approved.

906.10. The phrase "Notwithstanding Section 902.15" was inserted at the beginning of this section and the word "sufficient" was substituted for "adequate." As thus revised, the section was approved.

906.15. The phrase "Notwithstanding Section 902.15" was inserted at the beginning of this section and the word "negligent" and the phrase "by negligence" were deleted. As thus revised, the section was approved.

906.20. This section was deleted. The imposition of liability for "gross negligence" was not acceptable to the Commission. The imposition of liability for "wilful misconduct" was thought to cover so few cases that it was not desirable to retain the section if it were limited to wilful misconduct. The Commission concluded that a complete immunity (except for vehicle torts) should be provided.

906.25. It was noted that, in view of the previous action of the Commission, the liability covered by this section is only vehicle torts. Moreover, under the Commission's recommendation relating to liability under agreements between public entities, the law would require equal contributions by public entities (determined by dividing the number of public entities involved by the total liability). However, the cases covered by 906.25 might include cases where there was no "agreement."

A motion to impose liability upon the public entity that was negligent and to make the other entity immune from liability was adopted. The entities should be authorized to determine by agreement which entity would be ultimately liable.

906.30. This section became unnecessary in view of the action taken on Section 906.25.

906.35. This section is based on an existing statute-- Section 1957 of the Government Code. The clause "unless such damages are proximately caused by the wilful misconduct of such member or employee" is not in the existing law but is based on the research consultant's recommendation.

A motion to authorize any employee of a public entity acting in the scope of his employment to transport or arrange for transportation as provided in this section was adopted. The immunity provision was also approved.

AMENDMENTS AND REPEALS

The Commission made no changes in the amendments and repeals contained in the draft statute attached to Memorandum No. 54(1962).

TEXT OF RECOMMENDATION

The Commission discussed the basic approach that should be taken in drafting the recommendation relating to tort liability of public entities and public officers and employees.

Commissioner McDonough suggested that the recommendation be drafted

so that it clearly states that the proposed legislation is a stopgap measure in large part, designed primarily to provide additional time to permit study during 1963-64 so that appropriate legislation may be proposed in 1965. He stated that he believes the recommendation should indicate that the general liability statute is only a temporary solution to deal with problems we have not studied specifically. None of the other members of the Commission agreed with Commissioner McDonough that the legislation proposed by the Commission will be merely a temporary expedient. They expressed the view that the legislation to be recommended in 1963 will contain a sound framework of basic principles to govern governmental tort liability, although problems of detail may remain.

It was suggested that the nature of the general statutory scheme proposed by the Commission be indicated early in the text of the recommendation.

It was suggested that the recommendation contain a discussion (early in the text of the recommendation) of the elements of the problem involved in sovereign immunity--the balancing of the right of an injured plaintiff to recover against the right of government to govern.

Vehicle Ownership and Operation Recommendation

The Commission considered Memorandum No. 45(1962) and the draft of the tentative recommendation attached thereto.

It was suggested that consideration be given to including the proposed legislation relating to vehicle torts in the proposed general

liability statute. It was pointed out that the provisions are now in the vehicle code and that a number of existing sections in the vehicle code are related to the proposed vehicle liability statute. It was agreed that when the final general liability statute is drafted the question as to whether the vehicle torts statute should be included in the general liability statute will again be considered.

The Commission considered the proposed statute. Proposed Section 17002 was amended to insert at the beginning: "Notwithstanding any other statute, charter provision, ordinance or regulation,". As thus amended, the proposed statute was approved.

The Commission considered whether the words "or maintenance" should be added to Section 17001 after "operation". It was noted that the only reason for the existence of Section 17001 is to make the public entity liable in cases where the employee would not be liable because a public employee operating an emergency vehicle is immune (by statute) from liability for negligence, although under existing Section 17001 the public entity is liable. If it were not for this statutory employee immunity, the general liability statute would be adequate to make the public entity liable. The Commission determined not to change the language of the proposed statute. to include "maintenance."

The Commission considered whether the ownership liability provision should apply to any case where a private person is subject to ownership liability. The staff is to investigate whether ownership liability exists for private persons operating vessels and aircraft or other means of

transportation. A motion was adopted that public entities should be liable to the same extent as private persons for ownership liability where vessels and aircraft are operated with the consent of the owner.

The tentative recommendation (including the draft statute) was approved, as revised, for distribution to interested persons for comments and suggestions.

Counsel Fees in Actions Against Public Entities and Public Officers
and Employees

The Commission considered Memorandum No. 53(1962) and the attached tentative recommendation relating to counsel fees in actions against public entities and public officers and employees.

A motion that the Commission make no recommendation relating to counsel fees to the 1963 session was not adopted.

After considerable discussion, it was determined that the votes of four or more members of the Commission could not be obtained to approve the tentative recommendation for distribution. Accordingly, it was determined to defer consideration of this tentative recommendation until a subsequent meeting.

Payment of Tort Judgments Against Dissolved Local Public Entities

The Commission considered Memorandum No. 37(1962) and the attached tentative recommendation relating to payment of tort liabilities of dissolved entities.

The Commission first considered the draft statute and took the

following actions:

741.1. In subdivison (d) of this section, the words "be liable" were deleted and "have been liable" were inserted. It was suggested that the staff consider whether the last three lines of the subdivison can be made more concise.

741.2. The word "statute" was substituted for the word "law" in this section.

741.3. The word "statute" was substituted for the word "law" in this section. A provision should be added to the statute to provide that any asset that remains unsold after the payment of all liabilities reverts to the county in which the asset is located.

741.4. The last sentence of this section was revised to read: "A successor public entity may be compelled by a writ of mandate to perform any act required by this article."

741.5. Consideration should be given to splitting this section into two or more sections.

741.6. The first portion of the second paragraph of this section was revised to read: "For the purpose of levying and collecting taxes pursuant to this authority, territory which was formerly included within a local public entity but was excluded therefrom prior to the dissolution of such entity . . .".

The tentative recommendation (including the draft statute as revised) was approved for distribution to interested persons for comments and suggestions.

Defense of Actions Brought Against Public Officers and Employees.

✓ The Commission considered Memorandum No. 47(1962) and the First Supplement to Memorandum No. 47(1962), relating to the defense of actions brought against public officers and employees.

The Commission first considered the draft statute contained in the tentative recommendation previously distributed and took the following actions:

991.1. The Commission considered the extent to which a defense should be provided for administrative proceedings brought against a public officer or employee. The Commission determined that a public entity should have discretionary authority (as under 991.4) to defend at the expense of the public entity an administrative proceeding brought against its officer or employee where the public entity itself did not initiate or bring the proceeding.

The definition of action or proceeding is to be redrafted to make clear that where the situation is one where the public entity has taken an appeal from a proceeding where the public entity is attempting to remove, suspend or otherwise penalize its own employee, the public entity need not provide the employee with a defense.

991.2. The Commission considered the comments on this section but made no change in the section as contained in the tentative recommendation.

A motion to add to the statute the language of the tentative recommendation relating to prosecution by the public entity of a counter

claim, cross complaint or cross action by the employee against the plaintiff in the action being defended by the public entity failed to be adopted because the vote was evenly divided on the question.

A motion to delete the second paragraph of Section 991.2 was made but was not adopted.

991.3. The Commission considered the comments on this section and added the following subdivision to the section:

(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.

This provision is intended to cover cases of legal ethics that might arise under the proposed statute. A conflict of interest might arise where an employee and his superior are charged with negligence and both blame the other. The public entity might find a conflict of interest exists where each employee tells a different story.

The addition of subdivision (c) (set out above) would not, however, prevent the employee from recovering a reasonable counsel fee from the public entity because Section 991.6 gives the employee that right and the only cases where the employee is not entitled to recover a reasonable counsel fee are where the employee was not within the scope of his employment or where the employee was guilty of actual fraud, corruption or actual malice.

After considerable discussion, the Commission concluded that the public entity should not be given a right to determine in every case whether or not it wished to defend an action or proceeding against its employee.

The Commission considered who makes the determination under Section 991.3. It was concluded that the governing body of the public entity would make the decision unless that authority is delegated to some other body or person. No change was made in the tentative recommendation in response to the comments that suggested that consideration be given to this matter.

The Commission considered a suggestion of the State Bar Committee that a determination to defend or not to defend should not be admissible in any action or proceeding against the employee or former employee. After consideration, the Commission determined that the following provision should be added to the statute:

Except as otherwise provided in Section 991.6, 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.

991.4. The Commission considered the comments concerning this section. No changes were made in this section.

991.5. After the word "purpose" in the third line of this section, the following was added: "or may purchase insurance which requires that the insurer defend the action or proceeding". The remaining sentences of this section are to be adjusted in view of the addition made to the section.

991.6. The Commission considered a suggestion of the State Bar Committee that recovery of reasonable attorney's fees could be ordered

by the court in the action in which the employee is sued under certain circumstances. The Commission declined to add the suggested provision to the statute. The action for attorney's fees will ordinarily involve a different issue than the main action--the main action involves the issue of whether the employee was negligent; the action for attorney's fees involves the issue of whether the employee was in the scope of his employment or was guilty of bad faith, corruption or malice. To join these issues would confuse the plaintiff's case. If the issue is to be separately tried, should not the provisions relating to jury trial, pretrial conferences and discovery be available to the public entity and the employee under appropriate circumstances--the order to show cause procedure is not a good one to deal with the action for attorney's fees.

In response to a suggestion from the State Bar Committee, the Commission substituted the words "the action or proceeding" for the word "it" in the sixth line of this section.

Insurance Coverage for Public Entities and Public Officers and Employees

The Commission considered Memorandum No. 48(1962) and the First Supplement thereto, and a letter from the Department of Finance, all relating to insurance coverage for public entities and public officers and employees.

The Commission adopted a suggestion of the Department of Finance that a provision be included in the proposed statute to place the substance of the recommended statute on insurance as Section 11007.4 to

apply to the State and the recommended statute as drafted would be limited in its application to local public entities. This action was taken so that other provisions in the Government Code applying to purchase of insurance by the State would be applicable to the purchase of insurance covering potential tort liabilities.

The Commission then considered the specific provisions of the draft statute contained in the tentative recommendation previously distributed for comments and took the following actions:

990.1. No change was made in this section.

990.2. The Commission adopted in principle the following provision to be added to this section:

(c) Purchase protection against the expense of defending against claims against the public entity or its employees, whether or not liability exists on such claims.

Some question was raised as to the phrase "purchase protection against" in the provision set out above. The staff is to consider revising the language to make it more consistent with subdivisions (a) and (b), so that the additional subdivision might read: "Insure against the expense . . .".

It was suggested that the language be referred to the Department of Finance and the Department of Public Works for comments after it has been drafted.

In subdivision (b) the words "to persons or property" were inserted after "damages".

990.3. The Commission determined that this section should be retained so that it is clear which public entity has authority to insure judicial officers--it is not clear whether the county is the public entity which is the employer of the judicial officers listed in this section.

After "damages" the words "to persons or property" were inserted.

990.4. No change was made in this section. The Commission determined not to require that self-insurance be funded; since insurance is not required there should not be a requirement that self-insurance be funded.

990.5. No change was made in this section.

990.6. The Commission substituted the following section for the section contained in the draft statute:

990.6. Where a statute, charter provision, ordinance or regulation, other than this chapter, authorizes or requires a public entity to insure against the liability or the liability of its employees:

(a) The authority provided by this chapter to insure does not affect such statute, charter provision, ordinance or regulation.

(b) Such statute, charter provision, ordinance or regulation does not limit or restrict the authority to insure under this chapter.

Joint self-insurance. The Commission considered a suggestion from Mr. Lewis Keller, Associate Counsel, League of California Cities, and added the following provision to the draft statute:

Two or more public entities, by a joint powers agreement made pursuant to Article 1 (commencing with Section 6500) of

Chapter 5 of Division 7 of Title 1 of the Government Code, may provide insurance authorized by this chapter by any one or more of the methods specified in Section 990.4.

The staff was directed to check with Mr. Keller to determine whether the authority under this section should be restricted to an agreement between two or more public entities entered into in accordance with the Joint Powers Act.

Workmen's Compensation Benefits

The Commission considered Memorandum No. 49(1962) and the first supplement thereto, relating to workmen's compensation benefits for persons required or requested to assist law enforcement officers.

Scope of statute. The Commission considered whether workmen's compensation protection should be provided to persons who are requested or required to assist fire control officers. After discussion, it was determined that such persons should be provided the same protection as persons who are requested or required to assist law enforcement officers. The language used to effectuate this decision should be the same in substance as the language used in the statutes relating to persons assisting law enforcement officers.

Section 3365. After "posse comitatus" the words "or power of the county" were added.

Before "he is serving or assisting" the word "that" was added.

It was noted that one case upheld the action of the Industrial Accident Commission in awarding workmen's compensation to a person

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who at the request of a deputy sheriff (who wanted to investigate an accident) flew the deputy in a private plane which crashed.

The words "express or implied" were deleted. The purpose is not necessarily to prevent compensation in case of an implied request, but rather to avoid giving emphasis to implied requests.