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OFFICE OF THE ATTORNEY GENERAL  
State of California

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Attorney General

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| OPINION                    | : | No. 79-817       |
|                            | : |                  |
| of                         | : | December 7, 1979 |
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| GEORGE DEUKMEJIAN          | : |                  |
| Attorney General           | : |                  |
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| Warren J. Abbott           | : |                  |
| Assistant Attorney General | : |                  |
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SUBJECT: HIRING AND PAYMENT OF COUNSEL—When the Attorney General, due to a conflict of interest, authorizes a state agency to hire private counsel to represent a state officer or employee in an action involving a claim for damages under the California Tort Claims Act, that officer’s or employee’s agency is obligated to hire and pay such counsel.

Willard A. Shank, Chief Assistant Attorney General, has requested an opinion on the following question:

When the Attorney General, due to a conflict of interest, authorizes a state agency to hire private counsel to represent a state officer or employee in an action involving a claim for damages under the California Tort Claims Act, which agency, the Department of Justice or the officer’s or employee’s agency, is obligated to hire and pay such counsel?

CONCLUSION

When the Attorney General, due to a conflict of interest, authorizes a state agency to hire private counsel to represent a state officer or employee in an action involving a claim for damages under the California Tort Claims Act, that officer’s or employee’s agency, not the Department of Justice, is obligated to hire and pay such counsel.

## ANALYSIS

In a pending case in which an allegation of a violation of the civil rights of the plaintiffs for which damages are sought under the Federal Civil Rights Act (42 U.S.C. § 1983), both the Attorney General and the Lieutenant Governor have been named as defendants. After making a determination that a conflict of interest existed between representation of both himself and the Lieutenant Governor, the Attorney General granted consent to the Lieutenant Governor to retain private counsel to represent his interest in the litigation.<sup>1</sup> The question presented is whether the fees paid to the private counsel should be charged to the budget of the Department of Justice or that of the Office of Lieutenant Governor. As we will explain, because of the existence of the conflict of interest, the question of which agency should engage in the entire process of retaining, negotiating with and paying private counsel is necessarily presented. We conclude that no existing statute or legislative directive answers the question, but that long-time administrative practice and practical considerations require that the hiring of outside counsel and the payment of fees be done by the Office of the Lieutenant Governor and thus that the fees be charged to the budget of that office.

The California Tort Claims Act (Gov. Code, § 810 *et seq.*)<sup>2</sup> sets forth a comprehensive, substantive and procedural mechanism for the liability of public entities and employees and recovery of damages for injury. The State of California is a public entity covered by the Act (§ 811.2),<sup>3</sup> and the Lieutenant Governor and the Attorney General, as state officers, are public employees within the meaning of that Act. (§§ 810.2, 811.4.)<sup>4</sup> Further, a claim involving an allegation of a violation of a person's civil rights brought under the Federal Civil Rights Act is a claim, the defense of which is covered by the

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<sup>1</sup> This opinion assumes the validity of the determination that a conflict of interest did exist (see Rules of Professional Conduct, Rule 5–102) and the propriety of the consent given. (See Gov. Code, § 11040.)

<sup>2</sup> All unidentified section references are to the Government Code unless otherwise indicated.

<sup>3</sup> Section 811.2 provides:

“‘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.”

<sup>4</sup> Section 810.2 provides:

“‘Employee’ includes an officer, judicial officer as defined in Section 28 of the Education Code, employee, or servant, whether or not compensated, but does not include an independent contractor.”

Section 811.4 provides:

“‘Public employee’ means an employee of a public entity.”

California Tort Claims Act. (Cf. *MacDonald v. Musick* (9th Cir. 1970) 425 F.2d 373, 376–77; *Taylor v. Mitzel* (1978) 82 Cal. App. 3d 665, 670–71.)

Section 825 provides for indemnification of an employee of a public entity for a judgment arising out of a claim or action against the employee for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity.<sup>5</sup> Section 995 mandates, with exceptions not pertinent here, that the public entity provide for the defense of any civil action or proceeding brought against an employee of the entity, in his official or individual capacity, on account of an act or omission in the scope of his employment as an employee of the public entity.<sup>6</sup> (*Wright v. Compton Unified*

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<sup>5</sup> Section 825 provides:

“If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such 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 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.

“If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good faith cooperation, 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; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the entity nor to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

“Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages.”

<sup>6</sup> Section 995 provides:

“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.”

*School Dist.* (1975) 46 Cal. App. 3d 177, 183; see 57 Ops. Cal. Atty. Gen. 358, 359–360 (1974); § 996.4 (mandate lies if entity refuses to provide a defense.)

Section 996 authorizes the public entity to provide its own attorneys for the defense of the employee or to employ other counsel for that purpose. In the case of the State of California, the Attorney General represents state agencies. (Cal. Const., art. V, § 13; §§ 12511, 11042.) Thus, the Attorney General as the attorney for the state and for the Office of the Lieutenant Governor, would under sections 995 and 996, be obligated, in the absence of a conflict of interest, to provide a defense for the Lieutenant Governor against a claim of injury arising out of the scope of his employment by the state as Lieutenant Governor. Under sections 11040<sup>7</sup> and 996, given a conflict of interest in the Attorney General in representing the Lieutenant Governor in a particular matter, the Attorney General has authority to consent to the hiring of private outside counsel, at the expense of the state, to represent the Lieutenant Governor in that matter.

The only statute even remotely bearing on the question of which agency, the defendant employee's or the Department of Justice's, should pay for that outside counsel is section 11044 which provides:

“The State Board of Control shall determine and may at any time redetermine which funds, other than the General Fund, and which functions or activities of the Department of Water Resources supported by the General Fund, shall be charged with the costs of all legal services rendered by the Attorney General or his deputies or assistants to the function supported by any such fund. Such costs shall be fixed and determined by the Attorney General and shall be a charge against any funds so designated by the board. Reimbursements for such charges shall be credited to and in augmentation of the appropriation for the support of the Attorney General's Office from which the cost of said services was or will be paid.”

This section, of course, is a directive that costs for legal services rendered by the Attorney General for special fund agencies shall be a charge against and reimbursed from those special funds. (19 Ops. Cal. Atty. Gen. 142, 145 (1942); 9 Ops. Cal. Atty. Gen. 297, 299–301 (1948).) It, however, applies only to special funds, and it applies only to “. . . the costs of all legal services rendered by the Attorney General or his deputies or assistants to the function supported by any such fund. . . .” Services rendered by an outside, private counsel

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<sup>7</sup> Section 11040 provides:

“This article does not affect the right of any State agency or employee so employ counsel in any matter of the State, after first having obtained the written consent of the Attorney General.”

retained by a state agency would not appear to fit that category.

Section 11044, and its counterparts for other executive departments (§§ 11270–11275), requiring payment by special fund agencies of administrative costs for services by the Legislature and enumerated executive officers, would lead to the obvious conclusion that if the public employee being defended by outside counsel were employed by a special fund agency, that agency would pay for the counsel, to avoid a totally unnecessary double billing arrangement. Also, as we shall note below, the payment by the Department of Justice, with its attendant need for control, would exacerbate the conflict of interest which necessitated the hiring of outside counsel initially.

The office of the Lieutenant Governor, of course, is supported by the General Fund (see Stats. 1979, ch. 259 (Budget Act), item 44) and thus, legal services performed for that office by the Attorney General are charged against General Fund appropriations for the Department of Justice. For legal services to be provided by the Department of Justice for tort liability claims, the Legislature for fiscal year 1979–80 has appropriated approximately \$1.6 million from the General Fund and \$870,000 to be reimbursed from special funds. The \$1.6 million, of course, is for personal services of regular department attorneys, claims examiners, investigators, and expert witnesses, and does not include any funds for hiring private counsel.

The problem of authorizing a state agency to retain outside counsel to represent one of its employees in a tort claim is not new. For many years, when a conflict of interest has appeared, such as where the employee whose acts are the basis of a tort claim and which acts are also the basis of a disciplinary action against the employees by the agency which is represented by the Attorney General, and arising from the same acts which are the basis for the tort suit, or is the defendant in a criminal prosecution involving the same acts, the Attorney General has recognized the conflict and given written consent to the agency to hire outside counsel to represent the employee in the tort suit. The practice in all such cases, without exception, has been to require the state agency involved, whether supported by a special fund or the General Fund, to pay for such outside counsel from its own funds or to obtain such funds from the Department of Finance pursuant to section 28 of the Annual Budget Act or section 11006. In no case of which we are aware, has such counsel been paid for by the Department of Justice or charged to the General Fund appropriations of the Department of Justice.

A long standing practice of the department charged with the administration of laws, is persuasive as to their meaning. (*Richfield Oil Corp. v. Crawford* (1952) 39 Cal. 2d 729, 736; *County of Los Angeles v. Frisbie* (1942) 19 Cal. 2d 634, 643–644; *Yosemite Park & Curry Co. v. Dept. of Motor Vehicles* (1960) 177 Cal. App. 2d 448, 454.) Here, the Department of Justice, as the agency assigned the task of administering the state's

responsibility as a public entity under the California Tort Claims Act, has uniformly interpreted the Act to require the involved state agency to pay for outside counsel. The Legislature, through the budgetary process, must have been aware of this not infrequent practice, and be deemed to have approved it. (*California Welfare Right Organization v. Brian* (1974) 11 Cal. 3d 237, 241.)

We recognize that in the case of a General Fund agency, the payment of private counsel will come from the General Fund, and which budget is charged is not of great moment. There is, however, a more practical and important reason why the employee's agency should pay for the private counsel. The premise involved is that the Attorney General has a conflict of interest in representing the affected employee. If, however, the Attorney General were required to expend funds appropriated to the Department of Justice for the payment of outside counsel, he would also have a fiscal obligation to control and monitor such expenditures. This would, in our judgment, require review and approval of the employment contract as to both lawyer and compensation, and monitoring of time and billings. Such is antithetical to the concept that the state employee should have his own counsel, independent of and not under any control of the Attorney General whose conflict of interest necessitated the hiring of independent counsel. This control by the Attorney General would put the independent counsel in a position where of necessity his obligation of undivided loyalty to his client would be compromised in violation of his ethical duty. (See *Anderson v. Faton* (1930) 211 Cal. 113, 116; *Dettamanti v. Lompoc Union School Dist.* (1956) 143 Cal. App. 2d 715, 721-723.) Under these circumstances, it is our view that the entire process of selecting, negotiating for payment, control and contact and actual payment of outside counsel should be by the employee's agency and no part should be played by the office of the Attorney General.

In summary, under the circumstances presented where the State of California has an obligation to provide counsel to a state officer or state employee sued for damages pursuant to the California Tort Claims Act, and the Attorney General has authorized the state agency whose employee is sued to retain outside private counsel to represent the employee, we conclude that such counsel should be hired by that state agency and be compensated from funds appropriated to that agency and not those of the Department of Justice. Thus, in the particular context presented, outside counsel hired by the Office of the Lieutenant Governor to represent the Lieutenant Governor should be retained by and compensated from funds appropriated to the Office of the Lieutenant Governor. If these funds are inadequate, the Director of Finance has authority to augment those funds pursuant to section 28 of the Budget Act or section 11006.

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