

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

JOHN K. VAN DE KAMP  
Attorney General

---

OPINION	:	No. 84-905
	:	
of	:	<u>JUNE 5, 1985</u>
	:	
JOHN K. VAN DE KAMP	:	
Attorney General	:	
	:	
ANTHONY S. DA VIGO	:	
Deputy Attorney General	:	
	:	

---

THE HONORABLE RALPH J. GAMPELL, DIRECTOR,  
ADMINISTRATIVE OFFICE OF THE COURTS, has requested an opinion on the  
following questions:

1. Is a retired judge sitting by assignment entitled to a defense provided by a public entity under the provisions of Government Code sections 995-996.6?
2. May a retired judge sitting by assignment be represented under the provisions of Government Code section 27647?
3. Is a retired judge sitting by assignment entitled to indemnification under the provisions of Government Code sections 825-825.6 for plaintiff's attorney fees and costs awarded in an action under the federal Civil Rights Act (42 U.S.C. § 1983)?

4. What public entity is required to provide such defense and indemnification for a retired judge sitting by assignment?

## CONCLUSIONS

1. A retired judge sitting by assignment is entitled to a defense provided by a public entity under the provisions of Government Code sections 995-996.6.

2. A retired judge sitting by assignment as judge of the superior, municipal, or justice court may be represented under the provisions of Government Code section 27647.

3. A retired judge sitting by assignment is entitled to indemnification under the provisions of Government Code sections 825-825.6 for plaintiff's attorney fees and costs awarded in an action under the federal Civil Rights Act (42 U.S.C. § 1983).

4. The state, in the case of a retired judge sitting by assignment as a supreme or appellate justice, and the county, in the case of a retired judge sitting by assignment as judge of a superior, municipal, or justice court, are required to provide such defense and indemnification.

## ANALYSIS

The initial inquiry is whether a retired judge sitting by assignment<sup>1</sup> is entitled to a defense provided by a public entity under sections 995-996.6.<sup>2</sup> Those sections prescribe the conditions and circumstances under which a public entity shall or may provide for the defense of an action or proceeding brought against an employee or former employee, in his official or individual capacity, on account of an act or omission in the scope of employment. (See 62 Ops.Cal.Atty.Gen. 611, 612-613 (1979).) A public entity may provide for such a defense by its own attorney, by employing other counsel, or through the purchase of insurance, and all of the expenses therefor are proper charges against the public entity which may not be recovered from the employee or former employee. (§ 996.)

Section 810.2 defines "employee" as including "... an officer, judicial officer as defined in Section 28 of the Elections Code, employee, or servant, whether or not compensated, but does not include an independent contractor." Section 28 of the Elections Code defines a "judicial officer" as "... any Justice of the Supreme Court, justice of a court

---

<sup>1</sup> A consenting retired judge may be assigned by the chair of the Judicial Council to any court. (Cal. Const. art. VI, § 6; cf. 59 Ops.Cal.Atty.Gen. 177 (1976).)

<sup>2</sup> All undesignated section references herein are to the Government Code.

of appeal, judge of the superior court, judge of a municipal court, or judge of a justice court." Thus, a judge is an "employee" within the meaning of the California Tort Claims Act (§§ 810-996.6) without regard to any technical distinction, which may be significant in other contexts (e.g., 64 Ops.Cal.Atty.Gen. 728, 741-742 (1981)), between a public officer and a public employee. (Cf. 66 Ops.Cal.Atty.Gen. 69, 71 (1983).) Hence, a judge is entitled to a defense under sections 995-996.6.

Similarly, a retired judge sitting by assignment, having judicial authority (*Western Sierra, Inc. v. Ramos* (1979) 97 Cal.App.3d 482, 486), and not as an independent contractor (cf. 66 Ops.Cal.Atty.Gen., *supra*, at 71-73), is entitled to a defense. In the opinion last cited it was concluded that a pro tempore workers' compensation referee had the same power, authority, judgment, and discretion, and exercised the same sovereign power of the state, as a permanent referee, and therefore enjoyed the same immunity. (*Id.*, at 73.) In like fashion, a retired judge when assigned voluntarily assumes the status of a regular judge and would necessarily be governed by those conditions that attach to the status and activities of an incumbent judge. (*Pickens v. Johnson* (1954) 42 Cal.2d 399, 407; *People v. Cahan* (1956) 141 Cal.App.2d 891, 899.) It is therefore concluded that a retired judge sitting by assignment is entitled to a defense provided by a public entity under sections 995-996.6.

The second inquiry is whether a retired judge sitting by assignment may be represented under the provisions of section 27647,<sup>3</sup> which provides as follows:

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

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

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

---

<sup>3</sup> The rights of an employee or former employee under the California Tort Claims Act 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. (§ 996.6.)

"(2) Any grand jury proceedings.

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

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

Section 27648 further provides:<sup>4</sup>

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

As noted above, an assigned retired judge assumes the status of, and is governed by the same conditions as, a regular judge. (*Pickens v. Johnson, supra*, 42 Cal.2d at 407.) Consequently, a retired judge sitting by assignment as judge of the superior, municipal, or justice court may be represented under the provisions of section 27647.

The third inquiry is whether a retired judge sitting by assignment is entitled to indemnification under sections 825-825.6 for plaintiff's attorney fees and costs awarded in an action under the federal Civil Rights Act (42 U.S.C. § 1983). Sections 825-825.6 prescribe the conditions and circumstances under which a public entity must indemnify an employee or former employee for a judgment, compromise, or settlement resulting from any claim or action against him for an injury arising out of an act or omission within the scope of employment. As previously determined in connection with the first inquiry, a judge, including a retired judge sitting by assignment, is an "employee" within the meaning of the California Tort Claims Act. Therefore, a retired judge sitting by assignment is entitled to indemnification under sections 825-825.6.

It is well settled under common law, as well as certain provisions of the California Tort Claims Act<sup>5</sup>, that a public officer acting in his judicial capacity is immune

---

<sup>4</sup> In addition, section 26524 provides:

"Upon request of any judge of the superior, municipal or justice court or constable, the district attorney shall appear for and represent the court or judge or constable if the court or judge or constable in his official capacity is a party defendant in any action."

The reference to district attorney includes county counsel. (§ 26529.)

<sup>5</sup> E.g., section 820.2:

from liability for acts performed within his judicial jurisdiction (*City of Santa Clara v. County of Santa Clara* (1969) 1 Cal.App.3d 493, 498; *Paddleford v. Biscay* (1971) 22 Cal.App.3d 139, 143; 66 Ops.Cal.Atty.Gen., *supra*, at 71), and such immunity was not abrogated by the Civil Rights Act (*Pierson v. Ray* (1967) 386 U.S. 547, 554; *Paddleford v. Biscay*, *supra*, at 144).

The present inquiry arises in the context of the recent decision of the Supreme Court in *Pulliam v. Allen* (1984) \_\_\_\_ U.S., \_\_\_\_ 104 S.Ct. 1970, 80 L.Ed.2d 565, holding that judicial immunity is no bar to injunctive relief under the Civil Rights Act and in connection therewith plaintiff's attorney fees and costs may be awarded.<sup>6</sup>

Attorney fees and costs awarded in an action under the federal Civil Rights Act are subject to the indemnification provisions of sections 825-825.6. In *Williams v. Horvath* (1976) 16 Cal.3d 834, 846-847 the court stated:

"Further support for this position can be found in the sparse case law dealing with indemnification under section 825.2 in section 1983 actions. In *Stanford Daily v. Zurcher* (N.D. Cal. 1973) 366 F.Supp. 18, the plaintiffs brought an action for injunctive and declaratory relief against police officers under section 1983. The plaintiffs were successful and moved for an award of attorney's fees as costs. In granting the motion the court stated: '[A]n award of attorney's fees as costs, at least in California, will not have the undesirable effect of hampering zealous law enforcement . . . . For it is the law in this state that there is a mandatory duty of the City Attorney, or the County Counsel to defend the policemen or the district attorney. Any judgment against the public official shall be paid by the public entity which employed the individual, provided that he was acting within the scope of his employment at the time. Cal. Gov't. Code 825 et seq. As such the action may proceed without any personal involvement on the part of the individual.' (*Id.*, at p. 25.)"

It is concluded that a retired judge sitting by assignment is entitled to indemnification under sections 825-825.6 for plaintiff's attorney fees and costs awarded in an action under the federal Civil Rights Act.

---

"Except as otherwise provided by statute, 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.

<sup>6</sup> See 42 United States Code section 1988.

The final inquiry concerns the designation of the public entity required to provide such defense and indemnification for a retired judge sitting by assignment. The term "public entity" includes, inter alia, the state, county, city, or district (§ 811.2) and, within the context of sections 825 through 825.6 and 995 through 996.6, refers to the employer of an individual (cf. *Williams v. Horvath, supra*, 16 Cal.3d at 847). Hence, we are inquiring as to what public entity *employs* a retired judge sitting by assignment.

We consider first the basic provisions relating to judges generally. California Constitution article VI, section 4, provides partially that "The Legislature shall prescribe the number of judges and provide for the officers and employees of each superior court." Article VI, section 5, subdivision (a), provides that the Legislature shall "prescribe" for each municipal court and "provide"<sup>7</sup> for each justice court the number, qualifications, and compensation of judges, officers, and employees. Section 19 of the same article provides in part that "The Legislature shall prescribe compensation for judges of courts of record."<sup>8</sup> (See §§ 68200, 68201—supreme and appellate justices; 68202—superior and municipal judges; 71600 -- justice court judges as regulated by the county board of supervisors.)

While the Legislature is constitutionally authorized to prescribe, or in the case of justice courts to provide for, the number and compensation of judges, it does not follow that they are employees of the state rather than of a local public entity. The employment status of a deputy marshal of a municipal court was considered in *Villanazul v. City of Los Angeles* (1951) 37 Cal.2d 718. The court stated in part (*id.*, at 722-723):

"It must be conceded at the outset that a municipal court is a part of the judicial system of the state, and the constitution or control of such courts, except only the question as to whether one shall be established in a given locality, is a state rather than a municipal affair. (*Wilson v. Walters*, 19 Cal.2d 111, 119.) It does not follow, however, that a municipal court is an agency of state government, as distinguished from county or city government, in the sense that a deputy marshal is a state employee. Justices' courts and police or city courts are part of the judicial system of the state (Const., art. VI, § 1; *People v. Foutz*, 27 Cal.2d 1; *Elder v. McDougald*, 145 Cal. 740; *People v. Cobb*, 133 Cal. 74), yet their local character is recognized and their attaches are either county or city officers and employees. (*Graham v. Mayor etc. of Fresno*, 151 Cal. 465; *Elder v. McDougald, supra*; *People*

---

<sup>7</sup> The use of the term "provide" with respect to each justice court, rather than "prescribe," indicates an intention to permit the Legislature to delegate the designated duties. (63 Ops.Cal.Atty.Gen. 151, 152 (1980).)

<sup>8</sup> All of the courts including supreme, appellate, superior, and 5/municipal, but excluding justice courts, are "courts of record." (Cal. Const., art. VI, § 1.)

v. *Cobb*, *supra*; *McClung v. Johnson*, 106 Cal.App. 264: *cf. Nicholl v. Koster*, 157 Cal. 416.) As stated in the *Cobb* case, 'It does not follow . . . from the peculiar nature of their offices, that justices of the peace or other judicial officers do not constitute a part of county or city government.' (133 Cal. at p. 77.)

"The fact that the Legislature created the office of deputy marshal and prescribed the duties and salary of the position does not fix the status of such a person as a state, rather than a county or city employee. The Legislature creates many and varied offices or positions of local government, with specified duties and salaries. (See Const., art. XI, § 5.) The clerk of a city justice's court comes within this category but is an officer of the county government. (*McClung v. Johnson*, *supra*.)

"The constitutional and statutory provisions authorizing and governing municipal courts, considered in connection with the purpose and effect of the establishment of such courts, lead to the conclusion that they have been impressed with a local character. . . ."

Again, the court observed that "The fundamental basis of the court, as fixed by the Constitution and statutes, indicates that essentially it is a creature of the county." (*Id.*, at 724-725.) Thus, it has been determined that officers and attaches of the municipal court may be considered for many purposes as employees of the county. (*Id.*; *Martin v. County of Contra Costa* (1970) 8 Cal.App.3d 856, 860; 67 Ops.Cal.Atty.Gen. 261, 270 (1981); 56 Ops.Cal.Atty.Gen. 41, 43 (1973); 56 Ops.Cal.Atty.Gen. 320, 325 (1973).) Such determination has been predicated upon an analysis of the responsibility and authority of the county with respect to the trial courts.

The salaries of judges of municipal and justice courts are paid by the counties in which the courts are situated out of the salary fund or general fund of the county. (§ 71220.)<sup>9</sup> Section 68206 provides:

"Of the annual salary of each superior court judge the county for which he is elected or appointed shall pay the amount prescribed below and the remainder shall be paid by the State.

"(a) Nine thousand five hundred dollars (\$9,500) for a county of 250,000 or more.

---

<sup>9</sup> In addition to their salaries, judges of municipal and justice courts are allowed their necessary expenses of travel when on the business of the court. (§§ 72003, 71605.)

"(b) Seven thousand five hundred dollars (\$7,500) for a county of more than 40,000 and less than 250,000.

"(c) Five thousand five hundred dollars (\$5,500) for a county of 40,000 or less."

The travel expense of a superior court judge, within the same district or to another district or to another city within the county for temporary attendance, is a charge against the treasury of the county to be paid out of the general fund. (§§ 69648, 69750.) When authorized by the board of supervisors, the necessary expenses of superior court judges for registration fees or dues for any convention, school, conference or meeting attended as members in their official capacity, or incurred in connection with making inspections of state agencies and institutions to which they are authorized to commit persons, are a charge against the treasury of the county to be paid out of the general fund. (§§ 69505, 69506.)

The travel expense of a judge assigned to a superior, municipal, or justice court in another county shall be borne by the county to which assigned. (§ 68542.) The travel expense of a judge of a municipal or justice court assigned to another court in the same county is paid by the county. (§ 68542.5.) The extra compensation and travel expenses of judges assigned to supreme and appellate courts are paid by the state. (§ 68543.) Generally, the compensation of an assigned retired judge is chargeable as provided by law with respect to that of the judge of the court to which he is assigned, and, when assigned to a county other than of residence, his travel expenses are paid by the state when assigned to the supreme or appellate courts and by the county when assigned to the superior, municipal, or justice court. (§ 68543.5; 38 Ops.Cal.Atty.Gen. 203 (1961).)

In addition to salaries and expenses, the board of supervisors is required to provide suitable rooms for holding the superior, municipal, and justice courts, for the chambers of the judges of these courts and for court attendants, together with sufficient attendants, heat, light, furniture, furnishings, equipment, stationery, supplies, and other personal property, for the rooms and chambers and for the transaction of the business of the courts; the expenses incurred are a charge against the county treasury to be paid out of the general fund. (§ 68073; and see § 71002.)

Upon request by a judge of a superior, municipal, or justice court in his county, the county counsel is authorized to represent such judge in all matters and questions of law pertaining to such judge's duties, except as otherwise provided; in the event of a conflict of interest, the judge is entitled to recover from the county such reasonable fees and costs incurred by the retention of his own counsel. (§§ 27647, 27648; 62 Ops.Cal.Atty.Gen., *supra*, 615; and see §§ 26524, 26529.) Further, the county may insure



any officer or attaché of its superior, municipal, or justice courts against liability for injury resulting from any act or omission in the scope of employment, and against the expense of defending any claim against such officer or attaché; the cost of such insurance is a proper charge against the county. (§§ 990.2, 990.6.)

Finally, judges of superior, municipal, and justice courts are elected in their counties or districts at general elections. (Cal. Const., art. VI, § 16, subd. (b).)

Based upon such considerations (cf. *Villanazul v. City of Los Angeles*, *supra*, 37 Cal.2d 718; 67 Ops.Cal.Atty.Gen. 519, *supra*), judges of the superior,<sup>10</sup> municipal, and justice courts are, in our view, for the purposes here considered, employees of the county, while those of the courts of review are employees of the state. Since a retired judge, when assigned, voluntarily assumes the status, and is governed by those conditions applicable to a regular judge (*Pickens v. Johnson*, *supra*, 42 Cal.2d at 407),<sup>11</sup> such a retired judge is, during the period of assignment to a superior, municipal, or justice court, an employee of the county. It is concluded, therefore, that the state, in the case of a retired judge sitting by assignment as a supreme or appellate justice, and the county, in the case of a retired judge sitting by assignment as judge of a superior, municipal, or justice court, are required to provide such defense and indemnification under sections 995-996.6 and 825-825.6, respectively.

\*\*\*\*\*

---

<sup>10</sup> We have previously stated without explanation that superior court judges are state officers. (4 Ops.Cal.Atty.Gen. 78, 82 (1944); and cf. 38 Ops.Cal.Atty.Gen., *supra*, 205.)

<sup>11</sup> The Legislature intended to place retired judges assigned to courts in the same position as active judges. (38 Ops.Cal.Atty.Gen., *supra*, 205.)

Prior to the General Election of November 8, 1960, the power to assign retired judges was contained in section 6 of the Judges' Retirement Act of 1937, which stated in part that such retired judges "shall be judicial officers of the state." (59 Ops.Cal.Atty.Gen., *supra*, 178.) In *Pickens v. Johnson*, *supra*, 42 Cal.2d at 407, the court considered this reference "as nothing more than making him eligible for assignment." In any event, the reference was not incorporated into the constitutional enactment (now art. VI, § 6).