State of California

Memorandum

To : Advice Files - Section 83105

Date : Feb. 20, 1985
File No. M-85-042

From : FAIR POLITICAL PRACTICES COMMISSION
Diane Maura Fishburn

Subject: Holding "Public Office"

Attached is a research memo on what constitutes holding "public office" within the meaning of Section 83105.

State of California

Memorandum

To : Barbara

Date : February 19, 198

From : FAIR POLITICAL PRACTICES COMMISSION
Diane

Subject: Your Research Request - Section 83105, Holding "Public Office"

QUESTIONS

1. Whether a contract city attorney holds public office within the meaning of Government Code Section 83105.1/

2. Whether a person who provides legal services to a city but is not the designated city attorney holds public office.

3. Whether a person who provides legal services to a special district or other local government agency other than a city or county holds public office.

CONCLUSIONS

1. A contract city attorney holds public office within the meaning of Section 83105.

2. A person who provides legal services to a city but is not the designated city attorney does not hold public office.

3. A person who provides legal services to a special district or other local agency does not hold public office unless the position of counsel to the district or agency is created by statute.

DISCUSSION

Section 83105 provides in part that "[n]o member of the Commission, during his tenure, shall hold or seek election to any other public office...." The Act does not define the term

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1/ All statutory references are to the Government Code.

"public office."[2] This section simply appears to codify the common law doctrine which prohibits the holding by any person of incompatible public offices. There have been numerous cases and opinions which attempt to define "public office" and distinguish it from an employment or independent contractual relationship.[3]

In Patton v. Board of Health, 127 Cal. 388 (1899), the court stated:

> It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public and are continuing and permanent, not occasional or temporary, such position

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[2] The Attorney General, in an indexed letter to former Commissioner Anthony Miller, concluded that "public office" in Section 83105 should be read in the ordinary sense. In a footnote to the letter, the Attorney General distinguished between "public office" and the statutorily defined phrase "public official":

> It has been suggested that the phrase "public office" is intended to be used in a manner corresponding to the statutorily defined phrase "public official": to with, to include ". . . every member, officer, employee or consultant of a state or local government agency." Section 82048. We disagree for the following reasons: (1) If such a correspondence was intended, it would have been set forth expressly in the definitions, compare section82023 ("elective office") and section 82020 ("elected officer"); (2) The phrase "public office" has a well established legal meaning; (3) It is unreasonable to assume that the people intended to preclude all state and local governmental employees - including secretaries, college professors, librarians, garbage collectors, etc. - from membership on the Fair Political Practices Commission.

[3] What constitutes public office has arisen in other contexts. Compensation and related issues may be resolved differently depending on whether a person is an officer or employee. In addition, Section 1090 (which prohibits financial interests in government contracts) originally applied only to public officers and not public employees so Section 1090 cases often determined whether a particular person held public office.

or employment is an office and he who occupies it is an officer.

In Coulter v. Pool, 187 Cal. 181, 186-187 (1921), the court elaborated on its earlier statement:

> The words "public office" are used in so many senses that it is hardly possible to undertake a precise definition of the meaning and purpose of the phrase which will adequately and effectively cover every situation.... Its definition and application depend not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed and other circumstances which manifest the true character of the position and make and mark it a public office, irespective of its formal designation.... The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. There are other incidents which ordinarily distinguish a public officer, such, for instance, as a fixed tenure of position, [and] the exaction of a public oath....

1. Whether a contract city attorney holds public office within the meaning of Section 83105.

In an opinion directly on point, the Attorney General concluded that a person who renders legal services to a city and who has been appointed city attorney of that city is a public officer even though the services are performed pursuant to a contract. 28 A.G. Ops. 362 (copy attached). The opinion cited People ex rel. Chapman v. Rapsey, 16 Cal. 2d 636 (1940), where the court held that the city attorney of a general law city is an officer of that city.[4/] The opinion went on to note the informal nature of the relationship between a city and the person appointed as city attorney in a number of the smaller cities in the state and that both the city and the attorney viewed their relationship as an independent contractual

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4/ A city attorney is not expressly designated in the statute as a public officer. Section 36505 states that a city council of a general law city "may appoint a city attorney...."

relationship. However, the opinion concluded that whenever "the person caring for the city's legal affairs has been appointed to the office of city attorney and taken the required oath...." that person is an officer of the city, whether or not there is a contract of employment. This was true even though a contract of employment is normally considered inconsistent with the holding of public office.

I could not find any more recent cases or opinions on this specific point, but there were no statutory changes or any other significant changes to the definition of "public office" which would affect the conclusion. In addition, the Rapsey case has been cited approvingly in many cases and opinions for its general definition of what constitutes public office. Thus, I have concluded that a person who is appointed to be a city attorney and takes the oath of office holds public office within the meaning of Section 83105 even if the services are performed pursuant to a contract.

I should also note that several cases and opinions have generally held that the deputies or assistants to a public officer are also public officers if they can exercise the power of that office.[5/] Although I did not find any authority which dealt specifically with assistant or deputy city attorneys, it would certainly be logical to extend the reasoning to these positions.

It is our understanding that when a law firm contracts with a city to provide legal services as the city attorney, one or more lawyers within that firm are usually designated and take the oath as city attorney or as assistant city attorney and are responsible for the city's daily legal work. These persons would thus be considered the officers of the city. However, other members of the firm who may be consulted or brought in to do a specific type of legal work are not officers of the city. See discussion below under question 2.

2. Whether a person who provides legal services to a city but is not the designated city attorney holds public office.

In the above cited Attorney General Opinion, great care was taken to distinguish between a person who actually held the

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5/ See, e.g. 2 A.G. Ops. 178 (1943) (deputy district attorneys and deputy county counsels and public officers); 59 Ops. A.G. 27 (1976); 63 Ops. A.G. 710 (1980).

office of city attorney (whether or not pursuant to a contract) and a person who contracted with the city to perform specific legal services. As to the latter, it was stated that the attorney who enters into such a contract does not become a public officer.[6] Thus, for example, if an attorney is retained by, or otherwise contracts with, a city to do a specific type of legal work or a specific piece of work for the city, the attorney does not become an officer of the city. Accordingly, an individual or firm who handles all of a city's litigation does not hold public office. Similarly, a member of a law firm which includes the city attorney does not become a public officer, or a deputy city attorney, simply by working on specific cases or other matters involving the city. It is also sensible to assume that, where a city already has a city attorney, other lawyers who contract with the city are not also holding that office.

3. Whether a person who provides legal services to a special district or other local government agency other than a city or county holds public office.

I did not find any cases or attorney general opinions directly on this point.[7] However, it does not appear that an attorney for a special district or local agency meets the general definition of an officer. Often special districts and local agencies utilize the services of the county counsel; however, they are usually authorized to contract for legal services. This authorization alone does not create a public office. In addition, a district counsel does not exercise any of the sovereign powers of government. Therefore, it is my opinion that the position of district counsel is not a public office unless the statutes authorizing the creation of the district expressly states that the district counsel is an

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6/ This distinction has also been made with respect to engineers. Brooks v. City of Gilroy, 219 Cal. 766 (1934). Raisch v. Sanitary Dist. No. 1, 108 Cal. App. 2d 878 (1952); cf. Schaefer v. Berinstein, 140 Cal. App. 2d 278, 291 (1956) (person appointed and sworn as part-time special city attorney for specific project is a public officer).

7/ In one opinion, the Attorney General's Office seemed to assume that the counsel of a special district is an employee, not an officer of the district. 46 A.G. Ops. 74 (1965). Also, in a 1949 opinion on conflict of interest, the Attorney General found no conflict when a district attorney received compensation from a public utilities district and a hospital district for legal services rendered. 13 A.G. Ops. 163.

officer of the district.[8] This is consistent with an interpretation of Section 83105 given to Commissioner Anthony Miller by the Attorney General's Office (copy attached). In that letter, the Deputy concluded that Section 83105 does not preclude a commissioner from rendering legal services to a public agency pursuant to a contract provided that the person is not otherwise a public officer.

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[8] I checked a few statutes on special districts. None of them designated the attorney for the district as an officer, and all of them authorized the district to contract for legal services. See, e.g. Public Utility Districts (Public Utilities Code Sections 16111 and 16034); Community Services Districts (Sections 61200, et seq.); see also, Joint Powers Agencies (Sections 6500, et seq., 6505.1, 6508).

Black's Law Dictionary defines *file* as follows:

"In practice. To put upon the files, or deposit in the custody or among the records of a court."

Prosecution has been defined and limited as embodying those proceedings prior to the rendition of judgment and not concerned with the proceedings which pertain to the enforcement of the judgment (*Lupton* v. *Chase National Bank of the City of New York,* 89 Fed. Supp. 393).

Hence, we conclude that the sections in question are concerned only with the process which reduces the individual's claim to judgment; that once the judgment has been rendered these provisions should no longer be applicable. These procedures no longer being applicable, then the general law as to procedure in justice and municipal courts should be available to the small claims judgment creditor, his attorney or assignee. Since it is common practice to allow attorneys to come forth in these proceedings and examine the judgment debtor in the justice and municipal courts, (*People* v. *McKamy,* 28 Cal. App. 196) the attorneys and assignees of a small claims judgment creditor should be entitled to initiate proceedings supplemental to execution in the same manner. An inquiry made on the part of this office of several small claim courts of the State reveals that the practice followed in those courts is in conformity with the conclusions stated above.

Opinion No. 56-258—December 26, 1956

SUBJECT: OLD AGE AND SURVIVORS INSURANCE—City attorney is employee for purposes of, under California Social Security Agreement, even though his services are intermittent and purportedly performed on contractual basis.

Requested by: BOARD OF ADMINISTRATION, STATE EMPLOYEES' RETIREMENT SYSTEM.

Opinion by: EDMUND G. BROWN, Attorney General.
William J. Power, Deputy.

The Board of Administration of the State Employees' Retirement System has presented the following questions:

1. Is the incumbent of the office of city attorney an employee for purposes of coverage under the California State Social Security Agreement entered into pursuant to section 218 of the Social Security Act?

2. Is a person who renders legal service to a city and who has been appointed city attorney of that city a public officer even though a contract for the performance of such services is entered into between the city and the attorney?

CONCLUSIONS

Our conclusions may be summarized as follows:

1. A city attorney is a city officer and an employee for social security purposes.

2. A person who has been appointed city attorney and has taken the requisite oath is a public officer even though his services are intermittent and are purportedly performed on a contractual basis and is an employee for social security purposes.

ANALYSIS

The board's inquiry is limited to attorneys of general law cities and while the same considerations may govern the status of attorneys of chartered cities, this opinion is confined to cities incorporated under general law.

There is no need to discuss the usual criteria used to establish whether a master-servant relationship exists. For social security purposes officers are classed as employees (42 USCA 418(b)(3)). If a city attorney is an officer of his city that is the end of the matter regardless of his status under common law rules.

That a city attorney of a general law city is an officer of that city is not open to question. In *People ex rel. Chapman* v. *Rapsey,* 16 Cal. 2d 636, the following language appears at page 639:

> "While it is true that the compensation and term of office of a city attorney of a city of the sixth class is fixed by the city council of such city, it is equally true that the duties of such attorney as prescribed by statute pertain to the public and are continuing and permanent, and we think it is clear that the office of city attorney of a city of the sixth class falls well within the definition of the term 'public office' as defined by this court in the leading case of *Patton* v. *Board of Health,* 127 Cal. 388 (59 Pac. 702), wherein this court said:
>
> "'It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public and are continuing and permanent, not occasional or temporary, such position or employment is an office and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed to be an office.'"

Authority for the appointment of a city attorney at the time of *Chapman* v. *Rapsey* was found in section 852 of the Municipal Corporations Act (Stats. 1883, p. 93, as amended) and the duties of the position were set forth in section 879 of that act. Authority for the appointment of city attorneys and the duties thereof are now found in Government Code sections 36505 and 41801 *et seq.,* respectively. A comparison of the Government Code sections with pertinent portions of the earlier act reveals no significant changes. A city attorney is, as he was at the time of *Chapman* v. *Rapsey,* an officer of a city under which he holds his appointment; as an officer he is an employee within the contemplation of the social security act.

In a number of the smaller cities of the state the relationship between the person appointed as city attorney and the city is of a very informal nature. An attorney is appointed at a modest retainer to render certain limited services, often he has no office in the city hall and he handles the affairs of the city as he does the affairs of his other clients. There is often an agreement between the city and the attorney as to just what services the city attorney is to perform and in many cases both the attorney and the city officials are prone to look upon the attorney as an independent contractor rather than as a member of the city government. Six communities (Antioch, Capitola, Davis, Los Altos, Los Banos and Pt. Hueneme) having old age and survivors insurance have been canvassed by the board and each has completed and returned a questionnaire dealing with the duties, remuneration and status of the person designated as city attorney. By and large the questionnaires indicate that the attorney is looked upon as an independent contractor, though in all cases he has been appointed as city attorney and has taken the oath of office prescribed by Government Code section 36507.

It is not necessary to inquire as to the extent to which a city could dispense with a city attorney and let its legal business be handled on a retainer basis. In all six communities the person caring for the city's legal affairs has been appointed to the office of city attorney and taken the required oath. That neither the attorney nor the city council look upon the appointment as the filling of an office is of no great consequence. It is the duties and powers vested in the appointee that fix his status (*People ex rel. Chapman* v. *Rapsey,* 16 Cal. 2d 636). There are certain powers and duties vested in the city attorney as a matter of law, such as recommending the amount of the bond of the treasurer and mayor (Government Code section 36518), giving written consent to the cancellation of city taxes (Revenue and Taxation Code section 4986.2), bringing actions to abate nuisances (Code of Civil Procedure section 731, Penal Code section 373a).

That the appointments made would vest in the attorneys of the six cities mentioned the authority to give the consent required by Revenue and Taxation Code section 4986.2 and the authority to abate nuisances, even though such matters were not mentioned in the purported contract, cannot be doubted. It is the law, not the agreement between the appointing power and the appointee, that is the measure of the responsibilities and authority of one named to a public office. (*Hackler* v. *Ward,* 105 Cal. App. 2d 615.) That the attorneys in question have such power stamps them as officers rather than independent contractors. They are the incumbents of an office created by law and are called upon to exercise a part of the sovereign power of the state. As officers they are then employees of the city for social security purposes.

A city may contract for the performance of certain legal services by a private attorney (Government Code 37103). An attorney entering into such a contract does not, because of the contract, become a city officer. This opinion is not concerned with such situations, rather it involves cases where an appointment as city attorney is superimposed upon whatever agreement there is between the attorney and the city.

EVELLE J. YOUNGER
ATTORNEY GENERAL

STATE OF CALIFORNIA

INDEXED LETTER

OFFICE OF THE ATTORNEY GENERAL

Department of Justice

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FEB 4 1976

IL 76 - 34

Formerly CV On. 75/339 IL

Commissioner Anthony Miller
Fair Political Practices Commission
1100 K Street
Sacramento, California 95814

Re: CV 75/339 IL.
Gov. Code § 83105 - Holding
Other "Public Office"

Dear Commissioner Miller:

You requested the opinion of this Office on the following questions:

1. Is "public office" as used in Government Code section 83105 limited to elective office?

2. Does this section preclude me from teaching an evening class on a part-time basis at a community college?

3. Does this section preclude me from accepting court appointments to represent indigent defendants and appellants before state courts?

4. Does this section preclude me from rendering legal services to a public agency pursuant to a contract with the public agency?

The conclusions are:

1. "Public office," as such phrase is used in Government Code section 83105, is not limited to elective office.

2. Government Code section 83105 does not preclude a Fair Political Practices Commission member from teaching an evening class on a part-time basis at a community college.

3. Government Code section 83105 does not preclude a Fair Political Practices Commission member from accepting court appointments to represent indigent defendants and appellants before state courts.

4. Government Code section 83105 does not preclude a Fair Political Practices Commission member from rendering legal services to a public agency pursuant to a contract.

ANALYSIS

The Political Reform Act of 1974, Government Code section 81000 et seq., 1/ was adopted by the voters on June 4, 1974, and went into effect on January 7, 1975. 2/ The initiative requires the registration and reporting of certain campaign committees, section 84100 et seq., limits campaign expenditures, section 86100 et seq., adds conflict of interest and financial disclosure provisions, section 87100 et seq., and revamps the law governing the State ballot pamphlet, section 88000 et seq. To administer these provisions, the initiative established a five member "Fair Political Practices Commission." §§ 83100, 83111.

In regard to members of such Commission, section 83105 provides:

> "Each member of the Commission shall be an elector. No member of the Commission, during his tenure, shall hold or seek election to any other public office, serve as an officer of any political party or partisan organization, participate in or contribute to an election campaign, or employ or be employed as a lobbyist. Members of the Commission may be removed by the Governor, with concurrence of the Senate, for substantial neglect of duty, gross misconduct in office, inability to discharge the powers and duties of office or violation of this section, after written notice and opportunity for a reply." (Emphasis added.)

The foregoing restrictions, including the prohibition against holding other public office, comprise standards which a Commission member must abide by during his or her tenure

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1. All section references are to the Government Code unless otherwise indicated.

2. Only Chapter 8 of the Act, dealing with the State ballot pamphlet, went into effect immediately. § 81016.

in office. Violation of any of these restrictions may be grounds for removal. § 83105.

I.

ELECTIVE OFFICE

The first question asks whether "public office" as such term is used in section 83105 is limited to elective offices. It is not.

The Act does not define the phrase "public office." See, §§ 82000-82055. However, such term has been the subject of numerous court opinions. Perhaps the best general definition is set forth in People ex rel. Chapman v. Rapsey, 16 Cal.2d 636 (1940), at pages 639-640:

> """The words 'public office' are used in so many senses that the courts have affirmed that it is hardly possible to undertake a precise definition which will adequately and effectively cover every situation. Definitions and application of this phrase depend, not upon how the particular office in question may be designated nor upon what a statute may name it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the nature of the position and mark its character, irrespective of any formal designation. But so far as definition has been attempted, a public office is said to be the right, authority, and duty, created and conferred by law—the tenure of which is not transient, occasional, or incidental—by which for a given period an individual is invested with power to perform a public function for public benefit."""

Basically, the court cases attempt to distinguish a "public office" from a "public employment." In 57 Ops.Cal. Atty.Gen. 303, 305-306 (1974), our Office listed many of such cases as follows:

> "Numerous California cases have discussed the difference between a public employment and public office. Cases in which a public office was held to exist included the following: Abbott v. McNutt, 218 Cal. 225 (1933) (county qualification board); Blodgett Co. v. Bebe Co., 190 Cal. 665 (1923) (county traffic policeman);

Coulter v. Pool, 187 Cal. 181 (1921) (county engineer); Patton v. Board of Health, etc., 127 Cal. 388 (1899) (city and county health inspector); Estrada v. Indemnity Ins. Co., 158 Cal.App.2d 129 (1958) (city police officer); Bennett v. Superior Court, 131 Cal.App.2d 841 (1955) (court clerk). Cases in which a public office was held not to exist include the following: Mott v. Horstmann, 36 Cal.2d 388 (1950) (city landscape architect); Spreckels v. Graham, 194 Cal. 516 (1924) (presidential electors); Main v. Claremont Unified School Dist., 161 Cal. App.2d 189 (1958) (city school superintendent); County of Marin v. Dufficy, 144 Cal.App.2d 30 (1956) (county physician); Risley v. Bd. of Civil Service Commrs., 60 Cal.App.2d 32 (1943) (city employees of bureau of power and light); Cleland v. Superior Court, 52 Cal.App.2d 530 (1942) (superintendent of county farm and hospital); Pacific Finance Corp. v. City of Lynwood, 114 Cal.App. 509 (1931) (contract engineer for city); Leymel v. Johnson, 105 Cal.App. 694 (1930) (school teacher); Foucht v. Hirni, 57 Cal.App. 685 (1922) (assistant to county treasurer). See also, 140 ALR 1076, 93 ALR 333, and 53 ALR 595."

As the foregoing indicates, the phrase "public office" has a generally established legal meaning. Inasmuch as the Act has not specifically defined the phrase, it must be concluded that its common and general meaning was intended.[3] It is well established that when words are employed or used which have been judicially defined, the words are to be similarly

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3. It has been suggested that the phrase "public office" is intended to be used in a manner corresponding to the statutorily defined phrase "public official;" to wit, to include ". . . every member, officer, employee or consultant of a state or local government agency." § 82048. We disagree for the following reasons: (1) If such a correspondence was intended, it would have been set forth expressly in the definitions, compare section 82023 ("elective office") and section 82020 ("elected officer"); (2) The phrase "public office" has a well established legal meaning; (3) It is unreasonable to assume that the people intended to preclude all state and local governmental employees - including secretaries, college professors, librarians, garbage collectors, etc. - from membership on the Fair Political Practices Commission.

construed in the new legislation. People v. Keith, 184 Cal.App. 2d Supp. 884, 886 (1960).

This being the case, it is clear that the judicial decisions referred to above have not confined their definition of "public office" to those that are elected. For example, in Coulter v. Pool, 187 Cal. 181 (1921), the court concluded that the appointive position of county engineer was a public office. In People ex rel. Chapman v. Rapsey, supra, the court held that the appointive position of city attorney was also a "public office." The same would seem to be true as to legislative definition; thus see section 1001.

Accordingly, it is our opinion that "public office," as such phrase is used in section 83105, is not limited to elective office.

II.

TEACHING AT COMMUNITY COLLEGE

The second question asks whether section 83105 precludes a Commission member from teaching an evening class on a part-time basis at a community college. It does not.

The legal issue is whether such a teaching position is a "public office."

In Leymel v. Johnson, 105 Cal.App. 694 (1930), the court held that a public high school teacher did not hold a public office. At page 699, the court made the following pertinent statement:

> "It would seem, therefore, that one of the necessary characteristics of a public officer is that he perform a public function for the public benefit and that in so doing he be invested with the exercise of some of the sovereign powers of the state. No matter how highly we regard the profession of teaching, we cannot conclude that the teacher is exercising some of the sovereign powers of the state in performing the arduous duties of his profession. . . . The art of teaching came into being with the human race and preceded the existence of the state. The aboriginal father and mother, out of their crude experiences of life, became the first teachers of their offspring and from this small beginning has developed the modern profession of teaching. . . . While the education of the youth of the land is a most important governmental duty and function, the teacher is not clothed with any of the sovereign powers of the three great divisions of government,

> the legislative, executive, or judicial, in performing the important duties of his employment. He is not, therefore, holding an 'office under this state.'"

In Martin v. Fisher, 108 Cal.App.34 (1930), the court, relying on Leymel v. Johnson, supra, said at page 39:

> "The position of a teacher in the public schools of California is not an office. It is an employment by contract made between the teacher and the district. . . ."

See also 9 Ops.Cal.Atty.Gen. 64, 66 (1947).

The foregoing cases clearly establish that a teaching position at a public school is not a "public office" but rather a public employment. Inasmuch as a teaching position at a community college clearly falls within this line of authority, it is not a "public office" as used in section 83105.

Accordingly, it is our opinion that section 83105 does not preclude a Commission member from teaching an evening class on a part-time basis at a community college.

III.

REPRESENTING INDIGENT DEFENDANTS

The third question asks whether section 83105 precludes a Commission member from accepting court appointments to represent indigent defendants and appellants before state courts. It does not.

Again, the resolution of this question turns on whether such an appointment constitutes a "public office."

It is well settled that an attorney at law does not occupy a public office. Cohen v. Wright, 22 Cal. 293, 315 (1863); Ex Parte Gregory Yale, 24 Cal. 242, 244 (1864); 7 Cal.Jur. 3d, Attorneys at Law, § 4, pp. 258-260 (1973). As the court said in In Re Galusha, 184 Cal. 697 (1921), at page 698:

> "While attorneys are, in one sense, officers of the court, they are in no sense officers of the state nor do they hold a 'public' trust. (Ex parte Yale, 24 Cal. 241, [85 Am. Dec. 62].) The adequate protection of public interests, as well as inherent

> and inseparable peculiarities pertaining to the practice of law, require a more detailed supervision by the state over the conduct of this profession than in the case of almost any other profession or business. This circumstance, however, does not alter the fact that attorneys are not public officers, but are engaged in a private profession pursued primarily for pecuniary profit. . . ."

Accordingly, it is clear that an attorney at law is normally viewed as pursuing a private profession and not as holding a public office.

The mere fact that a private attorney is reimbursed from public funds to provide his legal services to an indigent criminal defendant does not appear to change the essentially private nature of his activity in the absence of his formal appointment to the office of public defender pursuant to section 27700.

There are three primary methods whereby public funds may be disbursed by a county to attorneys for legal services rendered to indigent persons in criminal matters. First, a county may create the office of public defender pursuant to section 27700. Second, a county may provide for the rendition of public defender services by private contract. Phillips v. Seely, 43 Cal.App.3d 104 (1974). Third, the court may appoint private counsel to represent a criminal defendant pursuant to Penal Code section 987.2.

In Phillips v. Seely, supra, the court, among other things, held that a contract between a county and a private attorney whereby the attorney agreed to render the services normally performed by a public defender, did not create the office of public defender. As the court said at page 113:

> "Section 27700 of the Government Code provides in part as follows: 'The board of supervisors of any county may establish the office of public defender for the county.' (Italics ours.)
>
> "The duties of the public defender if the office is so established by the board, whether elective or appointive, are specially defined in Government Code section 27706.
>
> "The agreement of May 25, 1971, did not establish the office of public defender in Butte County but was merely a contract between

> the county and Warren, whereby the latter agreed to provide, with a few exceptions, the usual and customary public defender legal services enumerated in Government Code section 27706 to indigent persons in Butte County for an agreed sum of $12,500 per month." (Emphasis added.)

See also 58 Ops.Cal.Atty.Gen. 725 (1975).

If the comprehensive contract in Phillips v. Seely, supra, to perform all the usual and customary public defender services is not enough to create the office of public defender, then a fortiori the appointment to render similar services to an individual criminal defendant is not enough to create such an office. Accordingly, it is clear that the mere rendering of legal services to an indigent criminal defendant and the receiving of public funds for such services does not make the private attorney providing such services into a "public defender" or any other public official.

This being the case, it is our opinion that section 83105 does not preclude a Commission member from accepting court appointments to represent indigent defendants and appellants before state courts.

IV.

LEGAL SERVICES TO A PUBLIC AGENCY

The fourth question asks whether section 83105 precludes a Commission member from rendering legal services to a public agency pursuant to a contract. It does not.

Again, the resolution of this question turns on whether such a contract to provide legal services can create a "public office."

In 58 Ops.Cal.Atty.Gen. 725 (1975), our Office, relying in part on Phillips v. Seely, supra, concluded that a private attorney who contracted with a county to provide public defender services did not become a public officer. At page 728, we said:

> "California law is replete with cases reaffirming the general rule that a contract of employment is essentially inconsistent with the status of a public officer. Humbert v. Castro Valley County Fire Protection District, 214 Cal.App.2d 1 (1963); Main v. Claremont Unified School Dist., 161 Cal.App.2d 189 (1958);

Pacific Finance Corp. v. City of Lynwood, 114 Cal.App. 509 (1931); Nielsen v. Richards, 69 Cal. App. 533 (1924); Foucht v. Hirni, 57 Cal.App. 685 (1922).

"In Maine v. Claremont, supra, plaintiff was retained as district superintendent under a four-year contract pursuant to a motion of the governing board of the school district. He was subsequently discharged by the board and commenced a suit for reinstatement. The court, in discounting plaintiff's contention that he was a public officer and hence, could not be removed except by appropriate procedure stated at pages 198 to 199:

> "'Existence of a contract of employment is essentially inconsistent with the status of public officer. . . .
>
> "'Public officers are elected or appointed rather than employed.'

"Pacific Finance Corp. v. City of Lynwood, supra, involved a question of whether or not one appointed as city engineer to serve without compensation until a contract be drawn and approved was a public officer. In finding that a public office had not been created the court stated at page 514:

> "'To have a public officer, you must first have a public office, created by the Constitution, legislature, or some legislative body with delegated authority; an office that exists independently of the presence of a person in it. . . . A public officer is not the offspring of a contract. . . . If the services are contracted for, those serving are not officers. . . . If, however, the services are being rendered by those appointed to offices created by the legislature, those serving are officers.'

"Foucht v. Hirni, supra, presented the issue of whether one employed under section 4041c of the Political Code to assist a county treasurer for a temporary period was a county officer. In finding that the relationship was one of mere employment, the court concisely summarized the law in this area at pages 691 to 692:

> "'An employment, as distinguished from an office, is, as a rule, based upon a contract with the employee, defining his duties, fixing his compensation and determining the period of his employment. As a general rule, a duty or employment which arises out of a contract, and which is dependent for its duration and extent upon the terms of the contract, is not an office.'"

In 28 Ops.Cal.Atty.Gen. 362, our Office, relying on People ex rel. Chapman v. Rapsey, supra, concluded that an appointed city attorney is a public official for certain social security purposes. However, our Office was careful to distinguish the appointed city attorney from those private attorneys who contract to provide occasional legal services to a city. Thus, at page 364 we said:

> "A city may contract for the performance of certain legal services by a private attorney (Government Code 37103). An attorney entering into such a contract does not, because of the contract, become a city officer. This opinion is not concerned with such situations, rather it involves cases where an appointment as city attorney is superimposed upon whatever agreement there is between the attorney and the city."

Accordingly, it is clear that a mere contract to provide legal services to a public agency cannot create a "public office." Thus, it is our opinion that section 83105 does not preclude a Commission member from rendering legal services to a public agency pursuant to a contract.4/

Very truly yours,

EVELLE J. YOUNGER
Attorney General

Floyd Shimomura

FLOYD D. SHIMOMURA
Deputy Attorney General

FDS:ac

cc: All Commissioners

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4. The foregoing analysis applies to bona fide contract cases. Were, however, a person in fact retained by contract to fill the role of a public officer and the contract were simply adopted as a subterfuge to avoid a statutory prohibition, the courts would likely be guided by the substance rather than the form of the retention.