STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

August 30, 1977

ATTORNEY GENERAL OPINION NO. 77- 287

Mr. Ira R. Kirkendoll
District Defender
424 South Kansas Avenue
Topeka, Kansas 66601

Re: Immunity--Public Defenders--Liability

Synopsis: A public defender who is appointed pursuant to K.S.A. 22-4517 does not hold any immunity of public officers from liability for acts performed in providing defense services to accused persons, and is exposed to the same professional liability for acts and omissions in the representation of such persons as a privately retained attorney.

* * *

Dear Mr. Kirkendoll:

As Public Defender for the Third Judicial District of the State of Kansas, you request my opinion concerning the professional liability of yourself and your staff. As you indicate, the legislature has refused to appropriate funds to be expended for professional liability insurance for your office, and until recently, members of your staff have provided such insurance for themselves. However, recently some members have suggested that it is not necessary to maintain such insurance on the ground that they may not be liable under state law for official acts done in the performance of their duties.

K.S.A. 46-901 provides that the State of Kansas, boards, commissioners, departments, bureaus and institutions thereof, and all committees, assemblies and groups by whatever designation authorized by constitution or statute to act on behalf of the state shall be immune from liability and suit "on an implied contract

or for negligence or any other tort, except as is otherwise specifically provided by statute." This immunity does not extend to individuals. *Kern v. Miller*, 216 Kan. 724, 533 P.2d 1244 (1975). In that case, the court set out the general rule of immunity thus:

> "As a general rule it has been stated that public officers, when performing the duties imposed upon them by statute and exercising in good faith the judgment and discretion necessary therefor, are not liable personally in damages for injuries to private individuals resulting as a consequence of their official acts." 216 Kan. at 728.

The court reported the rule set out in *Gresty v. Darby*, 146 Kan. 63, 68 P.2d 649 (1937) thus:

> "It is the general rule of law that state or municipal officials, performing the duties imposed upon them by statutes creating their respective offices and prescribing their duties, and exercising in good faith the judgment and discretion necessary therefor, are not liable personally in damages for injuries to private individuals resulting as a consequence of their official acts." 146 Kan. at 65.

In order to claim the immunity of a public official, the public defender must in fact be an official of the state or of its subdivisions. In *Espinoza v. Rogers*, 470 F.2d 1174 (10th Cir. 1972), the court considered a claim against a Colorado public defender under 42 U.S.C. § 1983. The court rejected the claim, stating thus:

> "It is well settled that in order for a defendant to be liable under the federal Civil Rights Act he must have acted under color of state law to cause the denial of a federally protected right. . . . The Colorado office of State Public Defender derives its existence from Colorado statutes. . . .

> These statutes in no way attempt to control or otherwise influence the professional judgment of a lawyer employed as a public defender. Additionally, a Colorado Public Defender's professional duties and responsibilities toward his clients are identical in all respects to any other Colorado attorney whether privately retained or court-appointed.
>
> Therefore, we hold that an attorney does not act under color of state law simply because he has accepted employment as a Colorado Public Defender." 470 F.2d at 1174-1175. [Citations omitted.]

In *Ex parte Hough*, 24 Cal.2d 522, 150 P.2d 448 (1944), a habeas corpus proceeding, the petitioner contended that the public defender, holding a position created by statute much like our own, was an officer of the county, and represented the state in the prosecution of criminal actions in the same light and to the same extent as the district attorney or any other official of the state or county connected with the prosecution of criminal cases. The court reviewed the statute and dismissed the contention thus:

> "Under this statute when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court. The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were it not so his client would not be afforded the full right 'to have the Assistance of Counsel for his defense' which the Constitutions, both state and federal, give to one accused of crime. . . . With such plenary powers given a public defender when appointed

> to defend one accused of crime, it necessarily follows that no act of his in advising his client or in defending the latter upon the charge against him can be considered in any different light than if such act were performed by an attorney regularly employed and retained by the defendant." 150 P.2d at 451-452.

See also People v. Cole, 152 Cal.App.2d 71, 312 P.2d 701 (1957). In *United States ex rel. Reid v. Richmond*, 277 F.2d 702 (2nd Cir. 1960) and *State v. Reid*, 146 Conn. 227, 149 A.2d 698 (1959), the courts rejected the argument that the public defender, being appointed by the court and paid from public funds, in any way represented the state in the defense of an accused.

In short, a public defender who is appointed and serves pursuant to K.S.A. 22-4517 does not represent the State of Kansas, or the judicial district, in his or her relationship with an accused. The public defender does not hold that position as an officer of the State of Kansas, of the judicial district or county in which he or she serves. Thus, in my judgment, the public defender does not share in the general immunity of public officers as outlined in *Gresty v. Darby, supra*, and is exposed to the same professional liability for acts and omissions in the representation of an accused as does a privately retained attorney.

Yours truly,

Curt T. Schneider

CURT T. SCHNEIDER
Attorney General

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