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July 16, 1980

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ATTORNEY GENERAL OPINION NO. 80-154

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Re: State Departments; Public Officers, Employees--
Kansas Tort Claims Act--Professional Malpractice
Liability for Kansas Public Defenders

Synopsis: Public defenders are employees within the meaning of
K.S.A. 1979 Supp. 75-6102, in the performance of pro-
fessional services to their clients and are therefore,
within the provisions of the Kansas Tort Claims Act
and entitled to the indemnities, defenses and immunities
contained therein. Cited herein: K.S.A. 22-4512,
K.S.A. 1979 Supp. 22-4517, 22-4517a, 40-3401, 75-6101,
75-6102, 75-6103, 75-6104, 75-6105, 75-6108, 75-6109,
75-6111, 75-6115, United States Const., Sixth Amend.,
18 U.S.C.A. 3006A (Supp. 1979).

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Dear Sirs:

On behalf of your respective offices you have requested the legal opinion of the Attorney General as to the potential malpractice liability of the attorneys in the Kansas Public Defender Offices of the state in light of the Kansas Tort Claims Act and recent court decisions. Specifically, you ask if the case of Ferri v. Ackerman, _____ U.S. _____, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979), is determinative of this issue.

In Ferri, the United States Supreme Court declared that "[a]n attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by his former client." Syllabus of the Court.

For the reasons stated in the opinion of the Court, we do not feel the Ferri case is dispositive of the question you pose and is useful for our purposes only in that the dicta highlights some of the legal considerations involved in malpractice and immunity cases. Specifically, the issues considered in Ferri are distinguishable from the instant question in the following ways: (1) Ferri involved the interpretation of federal law [the federal Criminal Justice Act of 1964, 18 U.S.C.A. 3006A (Supp. 1979)] while your question turns on an interpretation of State law, primarily K.S.A. 1979 Supp. 22-4517 and 22-4517a, (2) Ferri was decided in part on the principles of judicial immunity, and while your question may involve the doctrine of judicial immunity, it encompasses other considerations including the Kansas Tort Claims Act; (3) Ferri dealt with malpractice suits against private counsel appointed by a federal court to represent indigent defendants and paid on a case by case basis, while we are now concerned with public defenders who are full-time, salaried state employees; (4) Ferri was a malpractice suit founded on Pennsylvania law, not Kansas tort law; and (5) Finally, Ferri did not deal with questions of indemnity by the State where liability attaches under the doctrine of respondeat superior. Thus, while we appreciate the relevance of Ferri v. Ackerman, we find other sources of law to be more germane.

Public defender offices are created, funded and staffed in accordance with K.S.A. 1979 Supp. 22-4517 and 22-4517a. In 1971, 22-4517 was added to Kansas law [L. 1971, ch. 121, §1] and was amended in 1976 with the addition of 22-4517a [L. 1976, ch. 169 §4]. Said sections are part of Article 45 which provides for appointment of private counsel to aid indigent defendants in criminal cases. Pursuant to these statutes, district public defenders and their deputies are

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appointed by the district courts of the state judicial districts. Operating budgets for these offices are established twelve (12) months in advance and expenses are paid in part from the aid to indigent defendants fund established pursuant to K.S.A. 22-4512. District public defenders and their deputies are to devote full time to the public defenders office and are expressly forbidden from engaging in the private practice of law. See K.S.A. 1979 Supp. 22-4517. As a consequence of this employment relationship with the courts of the state judicial districts, public defenders receive their salaries from the state and are entitled to the same benefits as other state employees, (e.g. health insurance, KPERS, etc.).

Whether the somewhat unique relationship which such persons have with the state of Kansas entitles them to common law or statutory immunities is a subject previously litigated in other jurisdictions. As noted earlier, Ferri v. Ackerman, refused as a matter of federal law, to extend judicial immunity to appointed counsel.

The Pennsylvania Supreme Court held in Reese v. Danforth, 406 A.2d 735 (1979), that public defenders were not entitled to immunity under the Pennsylvania law protecting "public officers." In short, the court determined public defenders to be independent contractors in the performance of the defense of an indigent defendant, and thus when sued for malpractice arising out of such defense, the public defender was not exercising the power of the state. The court focused on the analogy between the relationship of a private practitioner and client and that of the public defender and the indigent defendant.

Finally, in Spring v. Constantino, 362 A.2d 871 (1975), the Supreme Court of Connecticut held public defenders in that state to be subject to suit by indigent defendants alleging malpractice. The court specifically rejected argument by the public defender that he was entitled to judicial immunity, common law sovereign immunity covering public officials and Connecticut statutory immunity of public officials and employees. The court relied upon Connecticut case law which permits a person to be considered a servant as to some of his service, thus subjecting his principal to liability, and an independent contractor as to other aspects of that service where the principal would not be liable. Id. at 878. Thus the state of Connecticut was held not responsible to pay malpractice claims against public defenders because the state had no right to control the performance of the attorney-client aspects of the public defender's employment.

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Kansas courts have not addressed this specific question, nor are there Kansas cases recognizing the servant-independent contractor dual service doctrine relied upon in Spring v. Constantino, supra. Hence, within this jurisdiction the question you pose is a matter of first impression.

Because of the conclusion we reach with regard to the application of the Kansas Tort Claims Act, K.S.A. 1979 Supp. 75-6101 et seq., we do not elaborate extensively on the common law concepts of sovereign immunity and judicial or public official immunity.

The Kansas Tort Claims Act, K.S.A. 1979 Supp. 75-6101 et seq., was enacted by the 1979 Kansas Legislature (L. 1979 ch. 186, §§1-15). While the Act has the effect of waiving governmental immunity for the State of Kansas (75-6103), the Act permits immunity for the State in certain instances and, more importantly, extends this immunity to employees acting within the scope of their employment in such instances (75-6104). The law is clearly a legislative effort to codify the liabilities and immunities of state and local governments and their respective employees. Hence, our initial inquiry must be whether public defenders are employees within the meaning of the Kansas Tort Claims Act.

K.S.A. 1979 Supp. 75-6102(d) defines "employee" as meaning

"any officer, employee or servant or any member of a board, commission or council of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation, but such term shall not include an independent contractor under contract with a governmental entity. The term 'employee' shall include former employees for acts and omissions within the scope of their employment during their former employment with the governmental entity."

As previously noted, public defenders in this state are employed by the state on a full-time, salaried basis. They are hired and fired by the judges of the judicial districts. They are not paid on a case-by-case basis, and all overhead expenses are funded by the state. There can be little question that, outside of the attorney-client relationship, public defenders are employees of state government within the letter and spirit of the Tort Claims Act.

However, the definition of "employee" within the Act, specifically excludes independent contractor, thus a question remains whether

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the legislature intended persons, who are otherwise clearly employees of the state, to be considered as independent contractors in the performance of the attorney-client relationship.

Unlike Connecticut, we know of no Kansas cases recognizing the doctrine of dual service, that is, the legal concept that persons may be servants of a master for some purposes but independent contractors relative to other aspects of such service. Likewise, we ascertain nothing in the Kansas Tort Claims Act to suggest that the legislature intended to establish the dual service doctrine relative to governmental liabilities.

On the other hand, we cannot ignore the rationale of the Connecticut Supreme Court in Spring v. Constantino, supra, regarding the need for independence in the attorney-client relationship between public defender and the indigent defendant. There can be little question that the State has no right, and has expressed no desire, to control the preparation and presentation of the accused's defense by the public defender. Such interference would deny the accused his constitutional right to effective counsel and deny him the fair trial to which he is entitled under the Sixth Amendment to the United States Constitution. However, we do not believe the promise to indemnify the public defender acting within the scope of his employment constitutes an infringement upon the attorney-client relationship.

K.S.A. 1979 Supp. 75-6109 states in pertinent part: "a governmental entity is liable, and shall indemnify its employees against damages, for injury or damage proximately caused by an act or omission of an employee acting within the scope of his or her employment." Clearly the providing of legal representation for an indigent defendant in a criminal proceeding is within the scope of the employment for which the public defender is hired, trained and paid. And the goal of such employment is the effective representation of the accused. The interests of the state in protecting itself from tort liability are not in any sense contrary to the interests of the public defender in providing effective representation or the interests of the defendant in receiving a legal defense free from prejudicial error.

Clearly the courts, as seen in all the cases previously cited, have sought to protect the integrity of the attorney-client privilege and insure that the poor are afforded representation equal to that available to those who are able to retain their own counsel. We fail to see how the indemnification of the public defender encroaches upon these worthwhile goals. Indeed, it is interesting to note that

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the State of Connecticut amended its tort claims law following Spring v. Constantino, supra, providing specifically for "scope of employment" to include public defenders in malpractice cases : thus immunizing them as individuals and authorizing a claim to be filed with the state claims commissioner. See General Statutes of Connecticut, §4-165 (Revised 1979).

To further illustrate our belief that the Legislature intended to indemnify public defenders in malpractice suits brought by their clients, we call attention to the analogous situation involving medical malpractice claims against state employees and institutions providing health care. K.S.A. 1979 Supp. 75-6115 specifically exempts health care providers from the coverage of the Kansas Tort Claims Act with regard to the rendering a failure to render health care services. Health care providers employed by the state of Kansas must purchase malpractice insurance as other such providers in the private sector pursuant to K.S.A. 1979 Supp. 40-3401 et seq., the Health Care Provider Act.

No such exception was made for state-employed legal service providers, either public defenders or other state attorneys, including attorneys of this office who are called upon to defend other state employees in accordance with K.S.A. 1979 Supp. 75-6108. We believe if the legislature had intended legal service providers, employed by the state, to be excepted from the Kansas Tort Claims Act it would have so specified as it did for health care providers.

Having concluded that public defenders are included within the definition of employee under the Kansas Tort Claims Act, we dispense with a discussion of sovereign immunity and judicial immunity considered in the cases cited above. The remaining question is whether by the terms of K.S.A. 1979 Supp. 75-6104 the public defender is not subject to liability for certain activities listed therein. In pertinent part that section provides:

"A governmental entity or an employee acting within the scope of his or her employment shall not be liable for damages resulting from:

. . .

"(b) judicial function;

. . .

"(d) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty

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on the part of a governmental entity or employee, whether or not the discretion be abused."

Other subsections of 75-6104 are clearly unrelated to the functions performed by a public defender. In addition, even the above quoted subsections are not applicable to the public defenders.

In the case of "judicial functions," we do not believe that the legislature intended to exempt the public defender from liability for negligent acts. As the Supreme Court of the United States said in refusing to extend judicial immunity to appointed counsel,

"the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serve pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation. The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently. The primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his own client." (Footnotes omitted.) Accord, see Spring v. Constantino, supra at 875.

Regarding the exercise of discretionary powers the Pennsylvania Supreme Court in declaring public defenders subject to malpractice liability, said:

"Appellees, [public defenders] in this case, do not serve as public administrators with policy-making functions and the duty to act according to directives handed down to them by other public officials. [Citations omitted.] The scope of authority devolved upon them by statute is co-extensive

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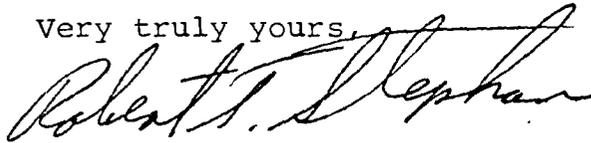
with that of a trained professional representing a client in a particular case, not that of an elected or appointed public official accountable to the community at large." Reese v. Danforth, supra, at 740.

We would observe that, based on the nature of the negligent act alleged, this subsection may be raised as a defense but ordinarily is not applicable as a blanket immunity in malpractice cases where the claim is based on a failure of counsel to perform a professional duty.

Finally, we note that the liability and indemnity of the state or the employee is limited by the terms of K.S.A. 1979 Supp. 75-6105 or by the terms of a contract for insurance purchased pursuant to K.S.A. 1979 Supp. 75-6111.

In summary, it is our opinion that public defenders are employees within the meaning of K.S.A. 1979 Supp. 75-6102, in the performance of professional services to their client and are therefore, within the provisions of the Kansas Tort Claims Act and entitled to the indemnities, defenses and immunities contained therein.

Very truly yours,



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RTS:BJS:phf