



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 97-002

STATE MATTERS:
Tort Immunity for Pro Bono
Appellate Defenders

The Honorable William Cousins, Jr.
Appellate Court Justice, First District
160 North LaSalle Street
Chicago, Illinois 60601

Dear Justice Cousins:

I have your letter wherein you inquire whether attorneys who are appointed by the court pursuant to a pro bono representation program to substitute for the State Appellate Defender in representing defendants in criminal appeals should be considered State employees, for purposes of representation and indemnification under the provisions of the State Employee Indemnification Act (hereinafter referred to as the "Indemnification Act") (5 ILCS 350/1 et seq. (West 1994)). For the reasons hereinafter stated, it is my opinion that attorneys who are appointed by the court to represent criminal defendants on appeal in such a program will be considered "State employees", within the meaning of the Act, who are therefore entitled in appropriate

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circumstances to representation and indemnification by the State for claims for damages arising out of their duties as such.

You have stated that the executive committee of the Appellate Court, First District, is developing a pro bono representation program intended to reduce the number of unbrieffed criminal appeals currently pending before the court. Under the program, as proposed, private attorneys would be appointed by the court to substitute for the Office of the State Appellate Defender. Attorneys who have been approached to participate in the program have inquired whether, in the course of their representation, they would be entitled to the protections afforded by the Indemnification Act.

Section 2 of the Indemnification Act (5 ILCS 350/2 (West 1994)) provides that the State, through the office of the Attorney General, will defend a "State employee" in a civil action arising out of an act or omission occurring within the scope of his or her employment, unless the act or omission was intentional, wilful or wanton misconduct. Further, unless the court or jury finds that the conduct or inaction which gave rise to the claim was intentional, wilful or wanton misconduct, the State will indemnify the employee for any damages that may be awarded. Section 1 of the Indemnification Act (5 ILCS 350/1 (West 1994)) provides, in pertinent part:

"(a) The term 'State' means the State of Illinois, the General Assembly, the court, or any State office, department, division, bureau, board,

commission, or committee * * * or any other agency or instrumentality of the State. * * *

(b) The term 'employee' means any present or former elected or appointed officer, trustee or employee of the State * * * [and] individuals or organizations who perform volunteer services for the State where such volunteer relationship is reduced to writing * * *.

* * *

(Emphasis added.)

The sixth and fourteenth amendments to the Constitution of the United States require the State to provide counsel to indigent defendants in criminal cases. (Gideon v. Wainwright (1963), 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799.) The requirement that counsel be provided for indigent defendants extends to appeals as of right. (Anders v. California (1967), 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493.) With respect to appellate representation, a State agency, the State Appellate Defender, has been created to provide such services. (725 ILCS 105/1 et seq. (West 1994).)

For purposes of the Indemnification Act, the term "State" includes the court, as well as executive and legislative agencies. The term "employee" includes a volunteer who performs services for the State where the volunteer relationship is reduced to writing.


If the court, in writing, appoints an attorney to represent a defendant on a pro bono basis, and the attorney

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agrees to accept the appointment, or if the court and the attorney enter into a written agreement for the provision of pro bono services, the attorney will be providing volunteer services to the State in the context of a relationship which has been reduced to writing. In the circumstances you have described, the services will be provided in lieu of those of a State agency, the State Appellate Defender. Although the services may technically be rendered to the defendant, the provision of those services is the obligation of the State.

Therefore, it is my opinion that attorneys who are appointed in lieu of the State Appellate Defender to represent indigent defendants on appeal in criminal cases on a pro bono basis may be considered "State employees", for purposes of statutory rights to representation and indemnification under section 2 of the Indemnification Act, when the relationship is established by a written order or is otherwise reduced to writing.

Sincerely,


JAMES E. RYAN
ATTORNEY GENERAL