



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

January 9, 1997

Jim Ryan
ATTORNEY GENERAL

FILE NO. 97-001

COUNTIES:
Authority of State's Attorney
to Represent County in Civil Cases

Honorable James W. Glasgow
State's Attorney, Will County
14 West Jefferson Street
Joliet, Illinois 60432

Dear Mr. Glasgow:

I have your letter wherein you inquire regarding the extent of the authority of the State's Attorney to control the representation of the county and its officers with respect to tort claims pending against them. For the reasons hereinafter stated, it is my opinion that the exclusive authority to defend the county and county officers when sued in their official capacity is vested in the State's Attorney. Neither the county board nor any other county officer has the authority to retain counsel or to expend public funds to employ private counsel for such purposes, unless such counsel is designated by the State's Attorney to assist in carrying out his or her duties, or appointed by the court to serve as a Special State's Attorney in accor-

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dance with section 3-9008 of the Counties Code (55 ILCS 5/3-9008 (West 1994)).

You have stated that a local law firm has been employed to represent the county and its officers in 13 pending cases. Recently, you directed the firm to transfer the cases to other counsel, but the firm has declined to do so without the concurrence of the county board. The firm contends that sections 1-206 and 9-107 of the Local Governmental and Governmental Employees Tort Immunity Act (hereinafter referred to as "Tort Immunity Act") (745 ILCS 10/1-206, 9-107 (West 1994)) authorize the county board, rather than the State's Attorney, to control the defense of tort claims against the county.

Section 3-9005 of the Counties Code (55 ILCS 5/3-9005 (West 1994)) provides, in part:

"Powers and duties of State's attorney.

(a) The duty of each State's attorney shall be:

* * *

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

* * *

"

The phrase "all actions and proceedings" clearly includes tort claims filed against the county and against county officers in their official capacity.

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In Ashton v. County of Cook (1943), 384 Ill. 287, the issue was whether attorneys with whom the county board had contracted for the collection of delinquent taxes and penalties could lawfully be paid for their services pursuant to the contract. Responding to the plaintiffs' argument that the county's statutory duty to take and order suitable and proper measures for the prosecution of all suits necessary to enforce collection of taxes authorized the contract, the court observed:

" * * *

* * * The direction in section 33 [of the Counties Act of 1874, now see 55 ILCS 5/1-6003 (West 1994)], that the county board shall take and order suitable and proper means for the prosecution of suits brought to enforce the collection of taxes, evidently means that the board, as the governing agency of the county in charge of expending the county's funds, has the duty of meeting the expenses necessarily incurred in such litigation. * * *

* * *

(Ashton v. County of Cook (1943), 384 Ill. 287, 298.) "

The court then concluded:

" * * *

The law is well settled that when the constitution or the laws of the State create an office, prescribe the duties of its incumbent and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds for the purpose of performing the duties which were imposed upon such officer.

(Fergus v. Russel, 270 Ill. 304; Stevens v. Henry County, 218 Ill. 468; Hope v. City of

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Alton, 214 Ill. 102.) The contracts of employment under which appellants claim were ultra vires and void.

* * *

Ashton v. County of Cook (1943), 384 Ill. 287, 300. "

In addition to Ashton v. County of Cook, there are numerous reported cases holding that a county has no authority to employ an attorney to perform duties which the State's Attorney is obligated to perform. (See Abbott v. County of Adams (1919), 214 Ill. App. 201, 206 (county board contract with "county" attorney ultra vires); Wilson v. County of Marshall (1930), 257 Ill. App. 220, 224-25 (suit against defaulting treasurer to recover on bond could be prosecuted only by state's attorney); People v. Wilkinson (3d Dist., November 15, 1996), No. 3-95-0775 (county board member's acceptance of reimbursement for legal fees incurred while in official capacity without first having attorney appointed as Special State's Attorney was act in excess of lawful authority).) Opinions of the Attorney General have reached the same conclusion. (See 1983 Ill. Att'y Gen. Op. 1 (private counsel cannot be employed to perform a duty of a State's Attorney without court appointment); 1975 Ill. Att'y Gen. Op. 12 (county board has no authority to employ independent legal counsel to advise the Zoning Board of Appeals); 1973 Ill. Att'y Gen. Op. 18 (county board has no authority to employ counsel to advise it on the establishment of a public building commission); 1925 Ill. Att'y Gen. Op. 64 (county board has no authority to

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employ an attorney to perform the duties of a State's Attorney); 1927 Ill. Att'y Gen. Op. 469 (county board has no authority to employ an attorney to collect back taxes).) The only exception is in cases in which a Special State's Attorney is appointed by the court because of a conflict of interest on the part of the State's Attorney or one of the other reasons specified in section 3-9008 of the Counties Code.

The law firm which has refused to relinquish the county's cases relies upon sections 1-206 and 9-107 of the Tort Immunity Act for the proposition that the county board, rather than the State's Attorney, has authority to manage the county's tort liability program and to employ attorneys to represent the county pursuant thereto.

Section 9-107 authorizes a local public entity to levy a tax annually for the purpose of paying settlements or judgments and the cost of protecting itself from liability for tort claims. Section 1-206 defines the term "local public entity". Clearly, the county is a local public entity, for purposes of the Act, while a State's Attorney is not. Funds raised pursuant to the tax may be used "to pay the operating and administrative costs and expenses, including the costs of legal services and wages and salaries of employees in connection with defending or otherwise protecting itself against any liability or loss * * *". Section 9-107 thus gives the county board, rather than the State's Attorney, control of the funds raised by the tax. It does not pur-

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port, however, to authorize the county board to retain counsel to carry out the duties specifically vested in the State's Attorney.

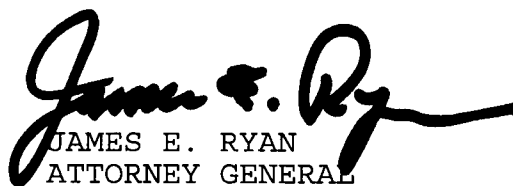
This argument is clearly analogous to that which was rejected by the court in Ashton v. County of Cook, and is no more persuasive now. The county board, as the governing agency of the county, clearly has the duty to provide for payment of the expenses necessarily incurred in tort litigation. It may use funds raised pursuant to section 9-107 to meet those expenses. Section 9-107 does not, however, authorize the county board to pay fees or expenses to attorneys other than the State's Attorney and those designated by the State's Attorney to assist him in carrying out his duties (55 ILCS 5/4-2003 (West 1994)), or those appointed by the court pursuant to statute.

In conclusion, it is my opinion that the State's Attorney possesses the exclusive authority to control the defense of all tort claims filed against the county and county officers in their official capacity, except in cases in which he or she is disqualified from acting and in which the circuit court has appointed a Special State's Attorney pursuant to section 3-9008 of the Counties Code. The county board has no authority to retain other counsel or to pay for the services of attorneys who are not duly designated by the State's Attorney or appointed by the court. Consequently, it is clear that a State's Attorney may terminate the authority of any attorney previously designated to represent the county in tort litigation, and, in conjunction

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therewith, direct the attorney to transfer the files relating to that litigation to another attorney who has been properly designated.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Ryan", with a long horizontal flourish extending to the right.

JAMES E. RYAN
ATTORNEY GENERAL