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Criminal Justice Act of 1964; State Malpractice Suit Against Appointed Counsel; Ferri v. Ackerman

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Criminal Justice Act of 1964 • State Malpractice Suit Against Appointed Counsel
Ferri v. Ackerman, 100 S. Ct. 402 (1979).

THE UNITED STATES SUPREME COURT in *Ferri v. Ackerman*[1] reversed the Pennsylvania Supreme Court[2] and held that an 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. In a unanimous opinion, the Court decided that the function of appointed counsel is more closely analogous to that of private retained counsel, who enjoy no immunity from malpractice prosecution than to that of judges and prosecutors who have traditionally been accorded immunity at common law.[3]

Pursuant to the Criminal Justice Act of 1964[4] and the Criminal Justice Act Plan for the United States District Court for the Western District of Pennsylvania,[5] a federal district court appointed attorney Daniel Ackerman to represent Francis Ferri, an indigent defendant, in a criminal trial.[6] After subsequent conviction, Ferri brought suit in a Pennsylvania state court for malpractice in Ackerman's conduct of the federal criminal trial.[7] The trial court dismissed the complaint on the ground that the defendant was immune from civil liability. The Superior Court of Pennsylvania affirmed the order of the lower court, and the Supreme Court of Pennsylvania affirmed the dismissal of the complaint, holding that attorney Ackerman was immune from civil liability.[8]

To determine the existence and scope of immunity protecting a participant in a federal procedure, the Pennsylvania Supreme Court felt constrained to look to federal law.[9] If the federal legislature has been silent as

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[1] 100 S. Ct. 402 (1979).

[2] 483 Pa. 90, 394 A.2d 553 (1978).

[3] Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Randal v. Brigham, 74 U.S. (7 Wall.) 523 (1868).

[4] Criminal Justice Act of 1964, § 2, 18 U.S.C. § 3006A (1976).

[5] Adopted pursuant to 18 U.S.C. § 3006A (a) (1976).

[6] United States v. Ferri, 546 F.2d 419 (3rd Cir. 1976).

[7] Petitioner alleges negligent acts on the part of the defense counsel in the management of the criminal defense at both the pretrial and trial stages. More specifically, petitioner amended his complaint to charge malpractice in respondent's failure to plead the three year statute of limitations for Internal Revenue Code offenses pursuant to 26 U.S.C. § 6531 (1976) as a defense. Because of this failure, petitioner alleges that he has been subjected to an additional ten years in prison and is seeking monetary damages.

[8] 483 Pa. 90, 394 A.2d 553 (1978).

[9] Howard v. Lyons, 360 U.S. 593 (1959); Chandler v. O'Brien, 445 F.2d 1045 (10th Cir. 1971); Garner v. Rathburn, 346 F.2d 55 (10th Cir. 1965).

to absolute immunity, the Pennsylvania Court held that federal standards would be judged by federal common law.[10]

Briefly outlining the history of the doctrine of common law immunity, the Pennsylvania Supreme Court found that immunity has been fully extended to state and federal judges[11] and then to both state and federal prosecutors.[12] *Barr v. Mateo*[13] extended immunity to federal employees and *Butz v. Economou*[14] allowed immunity to grand jurors. In *Brown v. Joseph*[15] and *John v. Hurt*[16] state public defenders were held to be immune from civil liability. The rationale for the doctrine is the public interest in the proper administration of justice (*i.e.* the necessity to free a judicial officer from apprehension about his personal liability in order that he exercise his best discretion in the public interest). The Pennsylvania Court held that this view is embraced by the federal system today[17] and that the immunity is absolute. Although immunity has been upheld as a bar to legal malpractice actions in federal appellate courts, the few state courts to decide the issue have denied immunity.[18]

Only two federal cases have discussed immunity of federally appointed criminal defense attorneys.[19] Both have affirmed the doctrine. Additionally, *Butz* has extended a qualified immunity to some federal executive officials under the rationale that "immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."[20]

The criteria established by the United States Supreme Court in *Butz* and *Imbler v. Pachtman*[21] for determining the applicability of the immunity doctrine are: (1) a case by case inquiry into the historical basis for immunity of the particular official at common law and, (2) the interests behind it. Although the requirement of government-sponsored de-

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[10] Howard v. Lyons, 360 U.S. at 597.

[11] Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Randal v. Brigham, 74 U.S. (7 Wall.) 523 (1868).

[12] Yaselli v. Goff, 12 F.2d 396 (2nd Cir. 1926); Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896).

[13] 360 U.S. 564 (1959).

[14] 438 U.S. 478 (1978).

[15] 463 F.2d 1046 (3rd Cir. 1972). *cert. denied*, 412 U.S. 950 (1973).

[16] 489 F.2d 786 (7th Cir. 1973).

[17] O'Bryan v. Chandler, 496 F.2d 403 (10th Cir. 1974); Garfield v. Palmeiri, 297 F.2d 526 (2nd Cir. 1962); Meredith v. Van Oosterhout, 286 F.2d 216 (8th Cir. 1960); Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896).

[18] Spring v. Constantino, 168 Conn. Supp. 563, 362 A.2d 871 (Super. Ct. 1975).

[19] Sullens v. Carroll, 446 F.2d 1392 (5th Cir. 1971); Jones v. Warlick, 364 F.2d 828 (4th Cir. 1966).

[20] 438 U.S. 478 (1978).

[21] 424 U.S. 409 (1976).

fense counsel for indigents accused of a crime is of relatively recent origin,[22] absolute immunity has been afforded to these attorneys by every federal appellate court considering the issue.[23] The United States Supreme Court, however, has chosen to view the role of appointed counsel as more closely analogous to that of private retained counsel who do not enjoy immunity from prosecution.

The narrow issue presented to the Court in the present case was whether federal law in any way pre-empts the freedom of a state to decide the question of immunity in accordance with its own laws. The specific inquiry was whether federal law requires a state to accept the defense of immunity.

The Pennsylvania Supreme Court, in relying on *Howard v. Lyons*,[24] held that the validity of the immunity claim must be judged by federal standards. If the federal legislature has not specifically granted the immunity, federal common law would provide the standard. In so holding, the Pennsylvania Supreme Court[25] looked to the authority for federally appointed defense counsel, the Criminal Justice Act.[26] The Court stated, "the very nature of a ruling of privilege requires reference to the law of the sovereign creating it for a determination of its nature and scope."[27]

Relying on *Howard* as a basis for applying federal standards, the Pennsylvania Supreme Court appeared to consider federal appointed counsel as "officers of the federal government acting in the course of their duties."[28] The United States Supreme Court rejects this categorization and finds that appointed counsel under the Criminal Justice Act do not become officers of the federal government.

The precise issue of whether court appointed counsel in a federal prosecution is deemed a federal official for purposes of granting immunity in a state malpractice case has never been addressed by an appellate court. However, several analogous situations offer guidance. Under the Federal Tort Claims Act,[29] it has been held that appointed counsel is not an "employee" of the United States.[30] Similarly, the only circuits to squarely address the issue have held that Criminal Justice Act appointees are private

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[22] Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938).

[23] Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972), *cert. denied*, 412 U.S. 950 (1973); Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977); Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973); Sullens v. Carroll, 446 F.2d 1392 (5th Cir. 1971); Jones v. Warlick, 364 F.2d 828 (4th Cir. 1966).

[24] 360 U.S. 593 (1959).

[25] 483 Pa. 90, 394 A.2d 553 (1978).

[26] Criminal Justice Act of 1964, § 2, 18 U.S.C. § 3006A (1976).

[27] 394 A.2d at 555.

[28] 360 U.S. at 597.

[29] The Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976).

[30] Jones v. Hadican, 552 F.2d 249 (8th Cir. 1977), *cert. denied*, 431 U.S. 941 (1977).

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individuals and are not "under color of law" for remedies based on the United States Constitution.[31] In *Bivens v. Six Unknown Federal Narcotics Agents*,[32] the Court held that federal question jurisdiction was available in bringing suit for damages for injury to a constitutionally protected interest. The Court did not, however, decide the question of whether the agents were immune from liability by virtue of their official position. Appointed counsel, also, are not considered to be "acting under color of state law" for a claim arising under 42 U.S.C. § 1983.[33] They are deemed independent private citizens, not controlled by the state in the carrying forth of their duties. Some circuits have accorded this independent status to public defenders as well.[34] The common theme of these decisions is that compensation by the government does not result in government control of the appointed counsel and that court appointed counsel is as much "private" as his retained counterpart. Similarly, a state action does not accrue merely because an attorney is an officer of the court.[35] He is not an employee or agent of the state, but is more nearly an independent contractor. Though the Criminal Justice Act recognized a need to compensate appointed counsel, it did not intend to make them federal officials. In *Howard* the defendant was a United States Naval Commander. His authority was derived from federal sources, and the resolution of his privilege of immunity directly affected the functioning of the federal government. In *Ferri*, appointed counsel is not deemed to be a federal official, nor is it sufficient that the tort arose during a federal legal proceeding.[36] The Erie Doctrine[37] dictates that except in matters governed by the United States Constitution or in other limited areas of strong federal concern,[38] the law to be applied is generally the law of the state.

Another line of analysis agrees that an analogy must be drawn due to the shortage of cases regarding immunity for appointed counsel but views the correct parallel as between the new position (court appointed counsel) and the positions existing at common law.[39] The pivotal question becomes whether appointed counsel is more analogous to judges and prosecutors or to retained counsel. The United States Supreme Court in *Ferri* finds it to be the latter.

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[31] Housand v. Heiman, 594 F.2d 923 (2nd Cir. 1979).

[32] 403 U.S. 388 (1971).

[33] 42 U.S.C. § 1983 (1976).

[34] Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978).

[35] Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972).

[36] The Court in *Ferri v. Ackerman*, 483 Pa. 90, 394 A.2d 553 (1978), states, "We are required to look to federal law in determining the immunity of a participant in a federal legal proceeding."

[37] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

[38] Miree v. DeKalb County, 433 U.S. 25 (1977); Bank of America Nat'l Trust and Sav. Ass'n v. Parnell, 352 U.S. 29 (1956); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[39] Wood v. Strickland, 420 U.S. 308 (1975).

If *Howard* is held inapplicable as pertaining only to "officers of the federal government", other federal interests must be found to support the application of a federal rule rather than state law. The Supreme Court looked to the enactment of the Criminal Justice Act and United States Supreme Court cases regarding the immunity of federal "officers" in the performance of their duties.

In considering the Criminal Justice Act of 1964, the Court found no specific grant of immunity. In *Tenney v. Brankhove*[40] the Supreme Court concluded that silence by Congress would imply its intent to retain the existing common law state of affairs. Indeed, Congress, being made up largely of attorneys, was undoubtedly aware of malpractice liability but chose not to specifically adopt immunity. Therefore, it was not the Congressional intent to abrogate the common law malpractice action in this Act. In fact, looking closely at Congressional intent in framing this act, the Court is further convinced of Congress' strong desire to have appointed counsel retain their autonomy and independence from the government as well as their civil liability for tortious conduct.[41] It was the legislative intent that assigned counsel be free from political influence and government control. Sole loyalty was to be owed to the client. Appointed defense counsel must have "exactly the same duties, and burdens, and responsibilities as the highly paid, paid-in-advance criminal defense lawyer."[42] Legislative history reveals a desire to compensate, but not to federalize appointed counsel.[43] It was for this reason that the House view of the Act prevailed over the Senate view,[44] and a public defender system was not included in the original

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[40] 341 U.S. 367 (1951).

[41] 110 CONG. REC. 18558 (1964) (remarks of Rep. Moore): The Senate Bill, in addition to authorizing the appointment of private counsel, would have empowered the federal government to establish federal public defender offices in any or all of the judicial districts throughout the country. This would have had the effect of placing the administration of justice totally in the hands of the federal government. An individual, accused of a crime, would have been tried before a federal judge, prosecuted by a federal district attorney, and defended by a federal public defender. Thus, the total right of a fair trial and to the preservation of one's right to liberty would be solely dependent upon men appointed by the federal government and compensated out of the Federal Treasury. This condition could easily have led to the establishment of totalitarian justice with the well-known unfairness and inequities found in totalitarian states. In addition, this condition could have severely undermined the duties and responsibilities of members of the bar who I believe are under an obligation to defend individuals, even those without funds and even (those) charged in an unpopular cause. The burdens of preserving a healthy society have been gradually eroded in recent years through too great a dependence.

[42] Burger, *Counsel for the Prosecution and Defense - Their Roles under the Minimum Standards,* 8 AM. CRIM. L.Q. 6 (1969).

[43] Private citizens are often the recipients of federal funds but are not immune from tort liability. (e.g. physicians and hospitals under Medicaid 42 U.S.C. § 1396).

[44] "The provision was deleted due to the doubts raised in the House about the propriety of placing the defense of criminal suspects in the control of the Government since the Government was also responsible for prosecutions." H.R. 1546, 91st Cong., 2d Sess. (1970).

Act.[45] In summary, the United States Supreme Court finds nothing in the purpose, the language, or the history of the Act that dictates that any state must accept the defense of immunity in a state malpractice action.

Looking to other United States Supreme Court cases that might support immunity for Criminal Justice Act appointees, the Court recognizes that even without a specific statutory grant of immunity, this privilege has been extended to various federal officers.[46] The immunity is characterized as incidental to the office. Many have argued that an appointed, government-funded defense attorney must also be accorded this privilege as an incident of his office and necessary to the performance of his official duties. The American Bar Association Standards Section 1.1(a) advances the theory that the judge, the prosecutor, and the defense counsel are a tripartite entity operating for the efficient administration of justice.[47] "Counsel for the accused is an essential component of the administration of criminal justice."[48] Lower courts have concluded that this tripartite entity exists for the public interest, and each part of the triangle must have equal immunity to function effectively. Indeed, it is argued that identically the same policy considerations for according immunity to the judge and prosecuting attorney exist in favor of the defense counsel. The Court in *Imbler* stated, "attaining the system's goal of accurate determination of guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence."[49] Though it is true that defense counsel's "function" is different from that of judge or prosecutor, this is not the test. Clearly the judge's function is different from the prosecuting attorney's and yet both enjoy immunity as an incident of their federal office.

In the *Ferri* decision, the Court draws an important distinction in the meaning of the term "federal officer". Justice Stevens writes, "[I]n a sense a lawyer who is appointed to represent an indigent defendant in a federal judicial proceeding is also a federal officer."[50] The Court then goes on to distinguish between the nature of counsel's responsibilities and those of other officers of the court. The prosecutor and the judge are public servants who are full scale public officials owing their loyalty to the public interest. As

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[45] The 1970 Amendments to the Criminal Justice Act, Pub. L. No. 91-477, § 1, 84 Stat. 916, subsequently created a public defender system but opted for a "mixed system" of private attorneys and public defenders. The public defenders were to supplement but not replace private counsel.

[46] Howard v. Lyons, 360 U.S. 593 (1959) (Referring to U.S. Naval Captains); Spalding v. Villas, 161 U.S. 483 (1896) (Referring to the Postmaster General).

[47] AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION [(Approved Draft, 1971), § 1.1(a)].

[48] *Id.*

[49] 424 U.S. at 426.

[50] 100 S. Ct. at 408.

such, society has a great interest in providing these officials with an atmosphere in which they can operate fearlessly and impartially without fear of retaliation or harassment. The Court, however, refuses to include federally-funded, appointed counsel as part of an equilateral triangle. The Court finds a "marked difference" in the nature of counsel's responsibilities. Defense counsel, whether appointed or retained, must be a zealous, partisan advocate. His duty is to serve the individual interest of the defendant. It is not a public duty. The Court refuses to view appointed counsel as a government employee, official, or advocate. Appointed defense counsel must remain independent of government interests and, indeed, must zealously oppose the government in litigation. Appointed defense counsel must assume the posture of a private citizen in the practice of his profession. The parallel is drawn not between prosecutor and defender, but between appointed counsel and private retained counsel. The Court feels that it is through this approach that the vitality of the adversary system can best be transmitted to indigent defendants. The Court refuses to extend the umbrella of federal immunity less the administration of criminal justice be placed totally in the hands of the federal government. What defendant could approach trial with confidence knowing he was to be prosecuted, judged, and defended by government officials?

In an issue that is heavily laden with policy questions and social considerations, the Supreme Court in *Ferri* has adopted a conservative stance and a restrained position. The Court has narrowed its inquiry to the pragmatic confines of what present federal law now provides. Constitutional questions, social policy, and balancing of interests are not determinative. Procedural aspects such as choice of law and interpretation of federal common law form the basis for the Court's decision. The most outstanding mandate of *Ferri* is the strong position of the United States Supreme Court that appointed defense counselors are private and independent of any cloak of governmental control. The Court appears to reject the view that the judge/prosecutor/defense counsel are a trinity operating for the public good. Rather, it holds firmly to the view that the role of an appointed defense counsel is that of a private, non-official adversary to the government position, who is loyal solely to the indigent client.

While by-passing strong arguments of public policy, the Supreme Court is not oblivious to their existence or their merit. The door is clearly left open for change through legislative action. The Court asserts that the legislature can specifically accord immunity when it is convinced by empirical data and social observation that this has become necessary.[51] At this point,

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[51] "Without reaching any question concerning the power of Congress to create immunity, we hold that federal law does not now provide immunity for a court appointed counsel in a state malpractice suit brought by his former client." 100 S. Ct. at 410 (1979).

however, the rationale for this change appears to the Court to be somewhat speculative, and the imperative of expanded immunity has not been proven.

In appraising the societal effects of immunity for court appointed defense counsel, there is general agreement that the paramount question is whether the policy will result in more effective legal representation of the poor or whether it will encourage incompetence. Does the fear of malpractice liability evoke a higher standard of care and professionalism, or does it place constraints on appointed defense counsel which inhibit his best efforts on behalf of his client? Some maintain that to the conscientious dedicated attorney, immunity would make little difference. On the contrary, to the uncaring and incompetent, immunity would provide a blanket of protection. Judge Learned Hand has stated his opposite opinion in *Gregiore v. Biddle,* that the threat of civil liability "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[52] The United States Supreme Court in *Butz* and *Imbler* has rejected the idea that immunity causes a dereliction of duty. Indeed, the question arises that if immunity leads to lessening standards of performance, should it even be accorded to judges and prosecutors? In a brief of the National Legal Aid and Defender Association as amicus curiae in *Ferri,*[53] the Association asserts that absolute immunity should not be afforded to judges, prosecutors, or defense counsel whether retained or appointed. It is the Association's contention that all of the above can be expected to exercise sound discretion in spite of potential tort liability. Also, making judges and prosecutors liable to suit would be one check on the abuse of power which, in practicality, cannot be reached by impeachment or election procedures.

The greatest single concern of the Court in recognizing the future potential for legislative action in this area is ensuring that competent counsel remain willing to serve indigent defendants notwithstanding lower remuneration and civil liability. Attorneys appointed under the Criminal Justice Act face lower fees, often less than 25 per cent of similar private cases, and in some cases their effort is not reimburseable at all. To this must be added the costs of increased malpractice insurance. It is no secret that many public defenders and appointed private defenders are saddled with case loads far in excess of their private counterparts. Given these circumstances, there is concern that the supply of competent counsel for this important function of the criminal justice system would dry up. As detrimental as this would be to the recruitment of full-time public defenders, its effect on the acquisition of part-time defense attorneys would be staggering.[54]

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[52] 177 F.2d 579 at 581 (2nd Cir. 1949), *cert. denied,* 339 U.S. 949 (1949).

[53] Brief of National Legal Aid and Defender Association, Ferri v. Ackerman, 100 S. Ct. 402 (1979).

[54] Minns v. Paul, 542 F.2d 899 (4th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977).

Others contend that the supply of available defense attorneys is not likely to dissipate as long as there is adequate compensation and malpractice insurance. The answer, then, is not a counter-productive policy of immunity, but to provide higher salaries and better working conditions to those representing indigent defendants.

Some observers assert that the practical realities surrounding appointed defense counsel differ markedly from those of retained counsel and that these differences militate in favor of immunity for appointed but not retained counsel.[55] Defendants who hire their own counsel may select whomever they chose and are free to substitute whenever they wish. The indigent client cannot choose or substitute, and court appointed defense attorneys can generally not decline or withdraw.[56] The fact that the client has chosen his own counsel reflects confidence in his choice. On the other hand, clients often exhibit a general suspicion and mistrust of government appointed attorneys. Frequently, these lawyers must represent a hostile, uncooperative client after a retained atorney has withdrawn from the case. Since the attorney/client relationship is strained from the beginning,[57] the defendant may be quick to retaliate against his lawyer when an adverse decision is reached. On occasion a defendant is venting his anger at the whole judicial system by bringing a malpractice suit against his lawyer. This problem is compounded by the low education level of many indigent defendants who do not understand the technicalities of a judicial proceeding and the emotionally charged atmosphere of a criminal courtroom. Misunderstanding, distrust, and defensiveness often erupt into charges of malpractice or attorney incompetence. The financial status of the client can, itself, restrain the caliber of defense that the appointed counsel is able to provide, leading again to inevitable bitterness in the client and retaliation against the attorney.

In view of the less than ideal circumstances surrounding the defense of indigent clients, exposing a court appointed attorney to malpractice liability can divert his defense of the client to self-protection. He may be forced to consume more of the justice system's scarce resources than necessary to insulate himself from personal liability. He might be persuaded, against his better judgment, to accede to his client's wishes in structuring the tactics of the defense. He may feel it necessary to call an inordinate number of witnesses. *U.S. General Inc. v. Schroeder* aptly describes the "chilling effect" on an attorney's zealous defense when he must also be concerned with self-protection: "[I]f an attorney must work in constant fear of civil liability, it is the rights of the public that will suffer. Any such threat of liability visits an obvious chilling effect upon an attorney's en-

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[55] *Id.*

[56] AMERICAN BAR ASSOCIATION, *supra* note 47, at 176, 234, 275-277.

[57] Casper, *Improving Defender-Client Relations*, 34 NLADA BRIEFCASE 114 (1977).

thusiasm to vigorously defend his client's position."[58] An attorney concerned over his own potential malpractice liability might be induced to present arguments that are actually prejudicial to the defendant. Indeed, the irony of malpractice litigation is that it compels an attorney to argue lack of merit in a case he once advocated![59] Certainly there would be a dampening effect on an attorney's acknowledgement of his own mistake in the presentation of the case. This admission is often critical in obtaining a new trial or post-conviction relief for the client.[60] A further diversion of time, effort, and resources occurs when government appointed attorneys must remain vulnerable to defending themselves regarding cases decided years ago. This time and effort is better spent in the defense of other indigent clients.

After considering whether there may be a differing need for immunity between appointed and retained counsel, society must examine whether there is also a distinction between appointed counsel and prosecutors and judges. The Supreme Court has held that there is. The first distinction made is that appointed counsel is not a full-time government employee. He runs his own private practice, has an outside income, and makes his own business decisions. Clearly he is liable for malpractice in cases arising under his private practice. It is certainly conceivable, given that government compensation is not competitive with private practice, that a busy attorney would be induced to allocate more time and resources to the private sector of his practice. Offering a further inducement, immunity from civil liability regarding only the indigent portion of his clientele, would be counter-productive to effective assistance of counsel for the indigent clients.

The second and more important distinction is made as to the nature of defense counsel's duties and those of judge and prosecutor. Defense counsel serves his client in an undivided way. His responsibilities are not primarily to the public, as are judge and prosecutor's. He functions as an advocate of his client and an adversary of the government. Theoretically, it is far less likely that this function will subject a defense counsel to a retaliatory suit by his client. Others argue strenuously that this is not so in reality. The identical policy considerations which result in immunity for judges and prosecutors (*i.e.* the concern that harrassment from unfounded litigation will divert an attorney from his public duties and the exercise of his best judgment) are equally applicable to appointed defense attorneys.[61] *Walker v. Kruse* states, "The reasoning which provides immunity for various

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[58] 400 F. Supp. 713, 717 (E.D. Wis. 1975).

[59] In many jurisdictions in order to prevail in a malpractice action, plaintiff must prove that, but for the attorney's negligence, the plaintiff would have been acquitted. It is, therefore, not inconceivable that an attorney, anticipating the potential of a malpractice suit by an uncooperative client, could attempt to cover this risk by actually seeking evidence of his client's guilt.

[60] Johnson v. United States, 328 F.2d 605 (5th Cir. 1964).

[61] 424 U.S. at 422, 423.

public officials . . . is also applicable to the performance by private citizens of public services which play such a significant role in the administration of justice."[62]

Even though the circustances in which appointed and retained counsel serve have apparent dissimilarities, the United States Supreme Court finds that these differences are not overriding. Likewise, even though much of the same rationale for supporting immunity for judges and prosecutors applies to appointed counsel, the Court finds the dissimilarities are greater.

In balancing the interests involved in the question of immunity, legislative and judicial lawmakers must consider more than the interests of the individuals involved. The government itself has an important interest in a full and fair trial and a reliable determination of guilt or innocence. It is arguable that this is the highest priority and that the judge, prosecutor, and defense counsel must be immunized to uphold the government's interest in the integrity of the judicial process. In this regard, the focal point shifts from whether one is a federal "official" to whether one is functioning in a judicial proceeding. *Robichaud v. Ronan* restates this criteria for immunity as whether the tortious acts were committed "in the performance of an integral part of the judicial process."[63] The United States Supreme Court in *Ferri* does not accept this strong emphasis on vindicating the government's interest by removing liability from all participants in a judicial proceeding.

Although the Court in *Ferri* did not discuss the issue, a basic question arises as to the overall necessity for allowing civil damages as a remedy for a criminal defendant. Proponents of immunity argue that the defendant would not be left without other adequate relief for attorney malpractice. Reversal on appeal[64] or federal habeas corpus[65] relief for ineffective assistance of counsel[66] are available to him. Courts have been more willing to hear claims of ineffective assistance where counsel was appointed than where counsel was privately retained. On the contrary, there is speculation that courts will be somewhat restrained in finding for an accused when they are aware that their decision may result in an appointed counsel being made to answer in damages. This, then, would be self-defeating to the criminal defendant's cause as he may be denied post-conviction relief.

Opponents of the privilege of immunity argue strenuously that both remedies are necessary. Post-conviction relief does nothing to financially compensate the malpractice victim. It operates only as relief from the

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[62] 484 F.2d at 804, 805.
[63] 351 F.2d 533, 536 (9th Cir. 1965).
[64] 28 U.S.C. § 2255 (1976).
[65] 28 U.S.C. § 2241 (1976).
[66] U.S. CONST. amend. VI.

criminal sentence, not as compensation for a tortious act. It also has little deterrent effect, direct or indirect, on incompetent or negligent attorneys as it imposes no financial sanction. In any case, a state is free to make available a civil remedy for the tort of legal malpractice. This should not be confused with collateral relief in a criminal case as they are not mere alternatives.[67]

Similar arguments can be made in favor of limiting a cause of action for malpractice in lieu of judicial sanctions and professional discipline available against an incompetent attorney. This remedy could be more objectively applied as it would be imposed by those better informed of the strains of the profession and the intricacies of presenting a criminal defense. There would be less room for purely vindictive suits and a more fair evaluation of the merits of the claim. Though these remedies are available and are being increasingly invoked, their overall effectiveness has not been impressive. Some argue that a defendant has no financial incentive to seek such disciplinary measures. Others counter that many charges are, in fact, filed with bar councils but are dismissed as meritless claims. In any case, judicial and professional discipline do not provide financial relief to the victim and appear to be supplemental rather than alternatives.

Certainly the question of immunity for court appointed counsel reveals the tension existing between the scenario of the lawyer as an "alter ego" of his client and the view of the lawyer as an "officer of the court."[68] In many cases the line between proper and improper conduct is difficult to ascertain. Proponents of immunity for court appointed counsel argue that the threat of exposure to personal liability will color an attorney's judgment of ethical considerations in close cases and will thereby reduce the integrity of the judicial system.

The United States Supreme Court in *Ferri* does not choose to deal with federal constitutional issues in determining respondent's liability for malpractice though constitutional questions do arise. Justice Roberts, in dissenting from the Pennsylvania Supreme Court decision, raises the question of equal protection and a double standard based on wealth. "Those who cannot afford private counsel are denied a remedy for inadequate representation which is apparently available to those who can afford privately retained

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[67] It is interesting in the present case to note that petitioner filed no petition for collateral relief from the ten year additional sentence which he alleges is due to respondent's negligence in handling the defense. This additional ten year sentence will not accrue until a current twenty year sentence is served. If petitioner were to file for collateral relief from the ten year sentence and prevail, he would eliminate any damage to himself whatever. He would also have no grounds for a cause of action against respondent. If, however, he is unsuccessful and the court finds respondent not negligent, this holding might form the basis for a collateral estoppel defense in the malpractice action.

[68] Timberlake, *The Lawyer as an Officer of the Court*, 11 VA. L. REV. 263 (1924).

counsel. Furthermore, the denial of such a remedy must be viewed as establishing a lower standard of care for appointed counsel."[69]

While it is true that there is no constitutional right to sue for malpractice, it is also true that if this right is granted, it cannot be arbitrarily applied without violating the principle of equal protection. *Griffin v. Illinois* states, "There can be no equal justice where the kind of trial a man gets depends on the the amount of money he has."[70] It is also arguable that denying a criminal the right to sue his court appointed attorney denies him fundamental rights inviting the "close scrutiny" of the courts. It must then be demonstrated that a compelling state interest is at stake in denying these rights.[71] One such fundamental right is the effective assistance of counsel.[72] If, as Justice Roberts suggests, granting of immunity leads to a lower standard of care for appointed counsel, this fundamental right may be in jeopardy for indigent clients. On the contrary, it has been asserted that allowing immunity does not inevitably lead to a lower standard of care.[73] The remedy of a malpractice action is not constitutionally mandated, and, furthermore, removing liability for court appointed defense counsel could well be justified as rationally related to a legitimate government objective. The argument that prohibiting a state malpractice action to an indigent defendant effectively denies him the fundamental right of access to the courts invites a similar response. The immunity doctrine merely precludes one form of remedy, and there is no constitutional right to any particular form of remedy. Notwithstanding the problem of potential federal constitutional violations, the United States Supreme Court does not appear to base its resolution of the *Ferri* case on constitutional grounds.

The issue of immunity in general, and more specifically, the issue of immunity for court appointed legal counsel is pervasive with questions of social and legal policy. The ramifications on the criminal justice system are undeniable. Yet the Supreme Court in *Ferri* has adopted a restrained position in sweeping with a narrow brush over these issues. The Court does not deny the possibility that its decision will be legislatively overruled. On the contrary, it seems to encourage a protracted look at the problem by the Congress. The matter will, however, be left to the legislature to change. In this analysis, it is the historic role of defense counsel as an independent, partisan advocate of his client that is upheld by the Court. The concept of any form of coalition, actual or perceived, with the government which robs the indigent defendant of an unfettered defense is odious to the Court and

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[69] 483 Pa. at 100, 394 A.2d at 559.

[70] 351 U.S. 12, 19 (1956).

[71] Loving v. Virginia, 388 U.S. 1 (1967).

[72] M.E. Mann v. Richardson, 397 U.S. 759 (1940).

[73] Butz v. Economou, 438 U.S. 478 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976).

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against public policy. It is fidelity to this traditional view that is upheld. There are, however, overtones that the Court is cognizant of the possibility of being sound in theory but unrealistic in practice. Should this become apparent, the Court has left the door ajar for change.

SANDRA J. BRANDA