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FILE NO. S-814

OFFICERS:

State's Attorney's Duty to
Defend County Officers

Honorable John J. Bowman
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DuPage County
207 S. Reber Street
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Dear Mr. Bowman:

I have your letter in which you state in part:

The State's Attorney's Office of DuPage County has recently been called upon to defend County Officers wherein said County Officers have been sued in the Federal District Court for alleged violation of the civil rights of certain plaintiffs. The law suits are based in main on Title 42 United States Code, Sections 1981 and 1983. These suits name the County Officers as Defendants both in their capacity as an individual and as a County Officers.

Chapter 14, Section 5, Sub-section 4 reads as

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follows:

'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.'

It appears that this poses two (2) problems for the State's Attorney's Office:

- 1) Whether or not the State's Attorney can defend a County Official in his capacity as an individual.
- 2) Whether or not the State's Attorney can conduct the defense of a County Official when the venue of the action is in the Federal District Court located in a county outside of the county from which the State's Attorney has been elected.

* * *

Responding to your second question first, I direct your attention to section 5 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1973, ch. 14, par. 5) which states:

"§ 5. 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.

* * *

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The issue you have raised concerns the proper construction to be given to said section in light of the phrase "within his county". In resolving this issue, it is necessary to apply the following rules of statutory construction: A statute must be construed so as to ascertain and give effect to the intent of the General Assembly as expressed in the statute (Lincoln Nat'l Life Ins. Co. v. McCarthy, 10 Ill. 2d 489); in so construing a statute, a statute should be construed as a whole or in its entirety (Pliakos v. Illinois Liquor Control Commission, 11 Ill. 2d 456); and when two or more constructions may be placed upon a statute, those that produce absurd consequences (Dugan v. Berning, 11 Ill. 2d 353) or render the law difficult of operation (Ambassador, Inc. v. City of Chicago, 399 Ill. 359) or its administration impossible (Towers v. Schell, 3 Ill. App. 2d 358) should be avoided.

It goes without saying that the intention of the General Assembly expressed in section 5 of said Act, supra, is to provide for the defense, by state's attorneys, of actions brought against counties and county and state officers. As to

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actions against a county or its officers, construing said section as precluding representation by the state's attorney simply because the court in which an action is brought holds its sessions in another county, would result in absurd consequences: said parties would be without public representation, as the state's attorney is the only officer empowered to defend his county and its officers. Boghosian v. Mid-City National Bank of Chicago, 25 Ill. App. 2d 455.

The above construction cannot be defeated by the contention that when a county or its officers are sued in a court holding its sessions in another county, the state's attorney of said other county would defend the actions, for such a contention would result in difficulty of operation if not administrative impossibility. The following example will illustrate this point. DuPage County is one of ten counties which make up the Eastern Division of the United States District Court for the Northern District of Illinois. According to rule 2 of said court:

"Rule 2. Sessions of Court.

A. Regular and continuous sessions of the court shall be held at Chicago, in the Eastern Division of this district, on all business days

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throughout the year. * * *

B. No judge of this court shall hold a special session or sessions of the court at a location or locations other than the Dirksen Federal Building at Chicago, Illinois, in the Eastern Division, * * * without first having obtained permission from the Executive Committee, provided, however, that if an emergency matter arises at night, on Saturdays, Sundays or holidays, that the Emergency Judge may entertain motions or petitions away from said Dirksen Federal Building. In the event the Emergency Judge is not available, such motions and petitions may be presented to any judge within the Northern District of Illinois, Eastern Division."

Consequently, under the above mentioned contention, absent special sessions or sessions at other locations, the state's attorney of Cook County would be obligated to defend all actions brought against the other nine counties and their officers in said Federal court. The administrative operating difficulties that would result from such a burden, and the fact that a state's attorney is the only officer empowered to defend actions against his county and its officers, leads me to conclude that the General Assembly did not intend the phrase "within his county" to refer to actions brought against a county or its officers.

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Only when applied to state officers does the phrase "within his county" lead to a construction which avoids absurd consequences and reduces administrative operating difficulties. Precluding a state's attorney from defending a state officer sued in another county would not result in an extreme burden on a state's attorney of the other county or leave the state official without representation, since the Attorney General is empowered by section 4 of said Act (Ill. Rev. Stat. 1973, ch. 14, par. 4) to "defend all actions and proceedings against any state officer, in his official capacity, in any of the courts of this state or the United States."

Turning to your first question concerning whether or not a state's attorney can defend a county officer in his capacity as an individual, it should be noted that when the language of a statute is plain and unambiguous the statute must be held to mean what it plainly expresses. (Levinson v. Home Bond & Trust Co., 337 Ill. 241.) Section 5 of said Act, supra, is plain and unambiguous in restricting the state's attorney's duty to defend state and county officers to actions brought against them in their official capacities. I am, therefore, of the opinion that a state's attorney may not defend a county official in his capacity as an individual.

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In a portion of your letter not herein reproduced, you note that while the suits in question name the county officials in both their individual and official capacities, they often fail to specify whether the alleged acts of said officials are individual acts or official acts. You then request guidance concerning a method by which to make such a determination.

It appears clear that action taken by an official in his official capacity consists of action taken either under color of office or by virtue of office. (Greenberg v. People, 225 Ill. 174; People ex rel. Woll v. Graber, 394 Ill. 362.) Action taken by virtue of office consists of acts taken by the authority vested in a person as incumbent of a particular office, while action taken by color of office consists of acts unauthorized by an officer's position but done in a form that purports that the acts are performed by reason of official duty and by virtue of office. Black's Law Dictionary, 332, 1743, 4th Edition, 1968.

Consequently, in determining whether or not to defend a county officer, you must first examine the allegations

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in the body of the complaint and decide whether or not the actions alleged to have been taken correspond to either of the two above described definitions of "official capacity". Support for this procedure can be found in People ex rel. Woll v. Graber, 394 Ill. 362, a mandamus action brought by petitioner-U.S. attorney which sought a writ compelling respondent-Superior Court Judge to expunge from the records of his court an order directing petitioner to withdraw his appearance in behalf of defendant Johlle. Defendant Johlle, among others, had been sued by plaintiff-contractor for damages arising out of an alleged conspiracy by and between the defendants to cause a contract between plaintiff and the Navy Department to be terminated and forfeited.

The sole question for determination in Graber was whether the Attorney General of the United States had the unqualified right, as a matter of law, to appear in said case. The Federal statute provided that the Attorney General could send any officer of the Justice Department to any state to attend the interests of the United States in any suit pending in the courts of any state. (5U.S.C.A. §316.) Respondent did

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not dispute the right and duty of the Attorney General to exercise this power, but contended that it was the province of the court in which the action was pending to determine whether or not the interests of the United States were involved. Respondent further contended, as stated by the court at page 368, that:

"[I]t is apparent from the pleadings in the case in his court that the United States had no interest which can be affected or jeopardized by the pending litigation and that the alleged wrongful acts of the defendant Francis R. Johlle, if committed, were committed by him in his individual capacity and not in the performance of his duties as an employee of the United States; * * *

While the Supreme Court did not agree with respondent's contention as to the propriety of the court determining whether or not the United States was interested in the proceeding, it did indicate that examining the pleadings was the proper procedure for determining whether actions taken were individual acts or official acts, stating at page 373:

"Except that the plaintiff Scott has not in so many words alleged that the defendant Johlle acted in the line of his duty as an officer and agent of the United States, everything in both the original and the amended complaint shows that he did so. The pleadings will bear no other construction."

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After examining the allegations contained in the body of the complaint, you must next examine information available from other sources. This second step is necessitated by the possibility that based solely upon an examination of the complaint, the actions alleged to have been taken might appear to be purely individual acts or purely official acts, but when examined in the light of other information, might change complexion. For example, a complaint in a suit against a sheriff may allege criminal trespass to land and be void of any facts indicating that the entry was made in his official capacity, but when examined in light of other information, it may appear that the sheriff was serving a writ at the time of the alleged trespass and thereby was acting in his official capacity.

In conclusion, I am of the opinion that the phrase "within his county" as used in section 5 of said Act, supra, does not refer to actions and proceedings against the county from which a state's attorney is elected or its officers, and therefore, a state's attorney may defend actions brought against his county or its officers in courts holding sessions outside

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his county; that a state's attorney may defend actions brought against his county's officials only if they are brought against them in their official capacities; and that in determining whether an action is brought against a county official in his official capacity, a state's attorney should examine the pleadings in the case in conjunction with information available from other sources and decide whether the acts alleged to have been committed can be defined as acts taken by either color or virtue of office.

Very truly yours,

A T T O R N E Y G E N E R A L