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Ned J. Nakles

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I. Introduction

A time-honored maxim teaches us that the quality of a civilization can be determined by the treatment it accords to those accused of crime. If that is correct, civilization under the United States Constitution ranks among the highest in history.

Beginning with *Gideon v. Wainwright*[1] in 1963, a line of constitutional cases has assured counsel to virtually all indigent criminal defendants. With the advent of public defender systems and court-appointed counsel in both state and federal courts,[2] the quality of criminal defense has been increased to the point where some contend that an indigent gets better representation than one who can afford a lawyer.

Nonetheless, more and more criminal defendants are suing their own lawyers for money damages to compensate for alleged mistakes made in the course of a criminal defense. The actions are brought under the Civil Rights Act[3] or in state courts by alleging malpractice.

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*B.A. 1952, Washington and Jefferson College; J.D. 1956, University of Pittsburgh School of Law; 1956-58 Clerk to Chief Judge Austin Staley, United States Court of Appeals for the Third Circuit; Member, Westmoreland County and Pennsylvania Bars.

1. 372 U.S. 335 (1963).

2. The public defender system in Pennsylvania was created by the Public Defender Act of 1968, P.L. 1144, No. 358, *as amended*, PA. STAT. ANN. tit. 16, §§ 9960.1-.13 (Supp. 1976). On the federal level, each United States District Court has enacted plans for the appointment of counsel for indigent criminal defendants pursuant to 18 U.S.C. § 3006A (1970).

3. 42 U.S.C. § 1983 (1970). This section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

A defendant suing his lawyer pursuant to the Civil Rights Act confronts the problem of establishing action under color of law. Various courts have held that a public defender or court-appointed counsel does not act under color of law with respect to his actions on behalf of the criminal defendant. *See, e.g.*, Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973); Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973); *cf.* Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975) (investigator acting for public defender).

The success of a suit against a privately employed defense attorney under the Civil Rights

Nothing can be more discouraging to a criminal defense lawyer than to be sued by his own client after he has exerted every possible effort to protect that client. The criminal defense lawyer—whether privately employed, court-appointed or a public defender—must be given absolute immunity from civil liability for damages. Such immunity is necessary for the efficient administration of our criminal justice system. Moreover, a contrary rule would invite dissatisfied clients to initiate a multiplicity of suits based upon fancied wrongs. The very prospect of a lawsuit has the effect of inhibiting the lawyer in the exercise of judgment in the management of the defense.[4] The resultant harm falls on society and the defendant himself.

The rule of absolute civil immunity for the criminal defense lawyer is based upon historical precedent and strong public policy, and that immunity rule is the subject of this article.

II. Immunity for Persons Involved in the Judicial Process

Judicial immunity is a principle of long standing.[5] It has been said that subjecting judges to civil liability for their judicial actions would "contribute not to principled and fearless decision-making but to intimidation."[6] The Supreme Court reaffirmed judicial immunity as one of its doctrines:

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.'[7]

Judges enjoy the same immunity under Pennsylvania law.[8]

Other persons directly involved in the judicial process may receive

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Act is more doubtful as he is neither appointed by the court nor paid by the state. *See, e.g.*, Steward v. Meeker, 459 F.2d 669 (3d Cir. 1972); Dyer v. Rosenberg, 434 F.2d 648 (9th Cir. 1970).

Compare United States General, Inc. v. Schroeder, 400 F. Supp. 713, 716-17 (E.D. Wis. 1975) (immunity of attorney in civil action); Timson v. Weiner, 395 F. Supp. 1344 (S.D. Ohio 1975) (abuse of subpoena power).

4. In an 1888 Maryland case, Judge McSherry recognized the need to provide lawyers with immunity from defamation suits arising out of the course of litigation: "The liability to be sued is the thing which will fetter and trammel the counsel in the discharge of his duty quite as much as any apprehension of the consequences of such a suit." Maulsby v. Reifsnider, 69 Md. 143, 14 A. 505, 515 (1888).

5. The doctrine of judicial immunity is a product of the common law. Generally, it extends to acts performed with proper jurisdiction. *See* Ackerley v. Parkinson, 105 Eng. Rep. 665 (1815); Gorenvelt v. Burwell, 91 Eng. Rep. 1202 (1696); 1 STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND 94 (19th ed. 1928); 3 *id.* at 530.

6. Pierson v. Ray, 386 U.S. 547, 554 (1967).

7. *Id.* at 553-54.

8. *In re* McNair, 324 Pa. 48, 187 A. 498 (1936) (magistrate); Ross v. Rittenhouse, 2 Dall. 160 (Pa. 1792); Commonwealth v. Cauffiel, 79 Pa. Super. Ct. 596 (1922) (mayor); Nelson v. Wagner, 60 Dela. Cty. 608 (Pa. C.P. 1973) (district justice of the peace); Hardy v. Kirchner, 59 Lanc. 85 (Pa. C.P. 1964) (immune even if act deliberate and malicious); Cooney v. Greevy, 27 Pa. D. & C.2d 739 (C.P. Lycom. 1962) (even if malice or corruption alleged).

quasi-judicial immunity in their own right or they may enjoy immunity because they perform ministerial duties at the direction of the judge.[9] The correct test for the extension of immunity to various participants in the judicial system was stated in *Robichaud v. Ronan*:[10]

> The key to the immunity . . . is that the acts, alleged to have been wrongful, were committed by the officer in the performance of an integral part of the judicial process.[11]

Judicial immunity has been extended to cover virtually all persons acting in judicial proceedings: federal prosecutors,[12] state prosecutors under federal[13] and Pennsylvania law,[14] clerks of court,[15] parol boards,[16] probation officers,[17] court reporters,[18] public defenders,[19] court-appointed defense lawyers in federal criminal cases,[20] and state-appointed criminal defense lawyers.[21]

Together in the same courtroom, the judge, the prosecutor and the defense counsel perform separate but common functions in a joint effort to achieve substantial justice.[22] All should be entitled to the same protection from civil liability.

III. Immunity of Public Defenders and Court-Appointed Counsel

Several cases have considered and approved the extension to public defenders of immunity from liability under the Civil Rights Act.[23] In

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9. *Cf.* Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975).

10. 351 F.2d 533 (9th Cir. 1965) (held cause of action stated against county attorney where plaintiff alleged wrongful acts were ordinarily police functions).

11. *Id.* at 536.

12. *E.g.*, Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

13. Imbler v. Pachtman, 424 U.S. 409 (1976) (action under Civil Rights Act). *Accord*, Tyler v. Witkowski, 511 F.2d 449 (7th Cir. 1975); Barnes v. Dorsey, 480 F.2d 1057 (8th Cir. 1973); Fanale v. Sheehy, 385 F.2d 866 (2d Cir. 1967); Bauers v. Heisel, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967); Carmack v. Gibson, 363 F.2d 862 (5th Cir. 1966); Kostal v. Stoner, 292 F.2d 492 (10th Cir. 1961), *cert. denied*, 369 U.S. 868 (1962).

14. Cambist Films, Inc. v. Duggan, 475 F.2d 887, 888-89 (3d Cir. 1973); Hardy v. Kirchner, 59 Lanc. 85, 87 (Pa. C.P. 1964).

15. *E.g.*, Davis v. McAteer, 431 F.2d 81, 82 (8th Cir. 1970).

16. *E.g.*, Silver v. Dickson, 403 F.2d 642 (9th Cir. 1968), *cert. denied*, 394 U.S. 990 (1969); Robinson v. Largent, 311 F. Supp. 1032 (E.D. Pa. 1970).

17. *E.g.*, Friedman v. Younger, 282 F. Supp. 710, 715-16 (C.D. Cal. 1968).

18. *E.g.*, Brown v. Charles, 309 F. Supp. 817, 817-18 (E.D. Wis. 1970).

19. Waits v. McGowan, 516 F.2d 203, 205 (3d Cir. 1975); John v. Hurt, 489 F.2d 786, 788 (7th Cir. 1973); Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972); Morrow v. Igleburger, 67 F.R.D. 675, 681 (S.D. Ohio 1974); Reese v. Danforth, — Pa. Super. Ct. —, 360 A.2d 629 (1976) (affirming lower court holding of immunity of public defender). *Contra*, Spring v. Constantino, 362 A.2d 871 (Conn. 1975) (malpractice action against public defender).

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

21. *E.g.*, Minns v. Paul, 45 U.S.L.W. 2118 (4th Cir. Aug. 9, 1976); Joyce v. Gilligan, 383 F. Supp. 1028 (N.D. Ohio 1974).

22. Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

ABA STANDARDS RELATING TO THE DEFENSE FUNCTION § 1.1(a) (Approved Draft 1971) [hereinafter cited as DEFENSE FUNCTION].

23. Actions by criminal defendants against their own lawyers are frequently brought under the Civil Rights Act, which provides remedies for deprivation of constitutional rights by persons acting under color of state law. 42 U.S.C.A. § 1983 (1970). The sweeping language of the Civil Rights Act making "every person," subject to such liability has been held *not* to abrogate common-law immunity accorded to the actions of certain persons, especially those

Brown v. Joseph[24] a Pennsylvania criminal defendant sued the defense counsel who was employed by the public defender's office to represent him. In a well-reasoned opinion by Judge Aldisert, the Third Circuit concluded that "a county Public Defender, whose office is created under the Pennsylvania statute, enjoys immunity from liability," even under the assumption that he acts under color of state law.[25] In a similar case the Seventh Circuit illustrated the breadth of this rule of immunity:

> Assuming, however, that defendant could be deemed to be acting under color of state law [for purposes of § 1983 of the Civil Rights Act], and *allowing for the possibility that plaintiff's proof might demonstrate such incompetency as to amount to a deprivation of sixth amendment rights*, we think that, as a matter of law, defendant is immune from liability for damages, and plaintiff's complaint must fail.[26]

The rule of immunity has not been confined to actions under the Civil Rights Act. In *Walker v. Kruse*[27] a criminal defendant sued his court-appointed attorney alleging malpractice. Unsuccessful in state court,[28] he filed a diversity action in the federal district court, which dismissed the action. The circuit court affirmed:

> [T]here are strong reasons of policy which might persuade the Illinois courts to hold that a lawyer, who has been appointed to serve without compensation in the defense of an indigent citizen accused of crime, should be immune from malpractice liability. Requiring such lawyers to defend charges such as this can only make it more difficult for the Bar to discharge its professional responsibilities . . . . The reasoning which provides immunity for various public officials . . . is also applicable to the performance by private citizens of public services which play a significant role in the administration of justice.[29]

It is a salutory public policy that those accused of crime should have proper representation regardless of their station in life and regardless of their wealth or poverty. This policy is seriously undermined if defense counsel is subjected to potential tort liability for decisions made in the conduct of the defense. The cases that speak in terms of the "chilling

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involved in the judicial process. *See* Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (legislators); Pierson v. Ray, 386 U.S. 547, 554-55 (1967) (judges); Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecuting attorney). Consequently, many civil rights cases provide good authority for determining the immunity of specified officials from tort liability under common law inasmuch as an official who is immune at common law is also immune under the Civil Rights Act. *See* Imbler v. Pachtman, 424 U.S. 409 (1976).

24. 463 F.2d 1046 (3d Cir. 1972).

25. *Id.* at 1049; *accord*, Sullens v. Carroll, 446 F.2d 1392 (5th Cir. 1971); Jones v. Warlick, 364 F.2d 828 (4th Cir. 1966). *See also* O'Brien v. Colbath, 465 F.2d 358, 359 (5th Cir. 1972).

Similar results have been reached in Pennsylvania courts. *See* Reese v. Danforth, — Pa. Super. Ct. —, 360 A.2d 629 (1976) (affirming, without opinion, a decision in Lancaster County Common Pleas Court); Barto v. Felix, No. 76-1302 (Pa. C.P. Lanc., Sept. 15, 1976) (allegedly defamatory statement in press conference simply repeated statements in a brief filed in the action).

26. John v. Hurt, 489 F.2d 786, 788 (7th Cir. 1973) (emphasis added). *See also* Morrow v. Ingleburger, 67 F.R.D. 675, 681 (S.D. Ohio 1974).

27. 484 F.2d 802 (7th Cir. 1973).

28. *See* Walker v. Pate, 53 Ill. 2d 485, 292 N.E.2d 387 (1973).

29. 484 F.2d at 804-05 (citations omitted).

effect" of potential tort liability on the tactics of defense counsel fully understand the practical results of withholding immunity. To withhold immunity may tend to discourage skilled individuals from assuming defender roles; may inhibit the free and necessary exercise of professional discretion; and may create conflicts between the attorney's desire to protect himself and his mandate to represent the client.[30]

The role of the defense lawyer, perhaps more than that of the judge or the prosecutor, requires freedom of action. The defense lawyer must be unfettered in his vigorous and fearless defense of the accused. Often the courtroom climate is hostile to his efforts when he represents an unpopular client. As he exerts every effort to provide effective representation, he should not be called upon to measure his every word in relation to the personal consequences of a damage suit by his client.

> Innocence confides its vindication to his skill, and his fiercest conflicts are often the causes of the weak, the helpless, and the oppressed. . . . If he is to stop during each of the many occasions when he may thus be engaged . . . to measure each word . . . lest he incur the perils of a civil suit . . . his efficiency would be greatly diminished, and his usefulness most seriously impaired.[31]

These considerations historically gave rise to the general rule of immunity from defamation liability that has long been applied to attorneys acting on behalf of their clients in court.[32] In a recent Supreme Court case, support for more general tort immunity was found in the established rule of defamation immunity.[33] The Court ruled that a state prosecutor was absolutely immune from an action under the Civil Rights Act even though he may have knowingly used perjured testimony and deliberately withheld exculpatory information.[34] It is observed that in the law of defamation there is "an absolute privilege for any courtroom statement relevant to the subject matter of the proceedings,"[35] and that privilege exists even as to

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30. *See, e.g.*, John v. Hurt, 489 F.2d 786 (7th Cir. 1973); Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972); Ehn v. Price, 372 F. Supp. 151 (N.D. Ill. 1974).

A district court in Wisconsin recently held that an attorney might be liable for malicious use of garnishment proceedings because such liability in no way chills his duty to represent his client with zeal. But even there, the court recognized the public policy need for immunity for lawyers:

> Despite the foregoing, it is clear that as a general proposition, attorneys are held to be immune from civil liability under 42 U.S.C. § 1983, even if their clients are not. . . . The Court recognizes that this principle of immunity is grounded upon critical social considerations, for, if 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 the attorney's enthusiasm to vigorously defend his client's position. . . . The remedies guaranteed by the Civil Rights Act are not to be invoked so as to create a conflict between the attorney's duty to protect himself and to zealously represent his client. . . . As a matter of public policy, the attorney must not be placed in a position where he is to gamble on the outcome of a case, with his own personal liability hanging in the balance.

United States General, Inc. v. Schroeder, 400 F. Supp. 713, 717 (E.D. Wis. 1975) (citations omitted).

31. Maulsby v. Reifsnider, 69 Md. 143, 14 A. 505, 513 (1888) (dissenting opinion).
32. F. HARPER & F. JAMES, THE LAW OF TORTS § 5.22 (1956).
33. Imbler v. Pachtman, 424 U.S. 409 (1976).
34. 424 U.S. at 430.
35. *Id.* at 426 n.23.

deliberate publication of defamatory matter, regardless of intent, "belief in its truth or . . . knowledge of its falsity."[36]

IV. The Criminal Defense Lawyer Must be Free to Manage the Defense

Actions against criminal defense lawyers almost invariably arise from the claim that the lawyer refused to follow his client's instructions about questions to ask, witnesses to subpoena, or myriad other details in the management of the defense. The criminal defendant frequently has strong ideas about how the criminal case should be tried.[37]

The *ABA Standards Relating to the Defense Function*[38] explains the proper relationship of the client with his defense lawyer. The client, with the advice of his counsel, is to make the final decision on these matters only: whether to plead guilty; whether to take the stand; and whether to waive jury trial. In all other matters, the judgment of the defense lawyer is to control.[39] Not only is the defense lawyer to exercise his independent judgment, but "the defendant is bound by his lawyer's judgment with respect to the conduct of the defense."[40]

The Defense Function considered the fallacious view that the defense lawyer is to be simply a conduit for his client's wishes:

> It would be difficult to imagine anything which would more gravely demean the advocate or undermine the integrity of our system of justice than the idea that a defense lawyer should be simply a conduit for his client's desires.[41]

No civil action for damages ought ever to lie against a criminal defense lawyer for alleged acts relating to the exercise of his independent judgment. To the contrary, his position requires that he must exercise independent judgment for the sake of the client he represents.

The rule of absolute immunity from civil liability for the criminal defense lawyer is firmly implanted in the emerging case law.

V. The Criminal Defendant is Not Without Remedy

In civil matters, a lawyer's mistake can cause his client to lose money,

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36. RESTATEMENT (SECOND) OF TORTS § 586, comments *a* & *b* (Tent. Draft No. 20, 1974). *See also* Binder v. Triangle Publications, Inc., 442 Pa. 319, 324, 275 A.2d 53, 56 (1971) (dictum); Kemper v. Fort, 219 Pa. 85, 89, 67 A. 991, 993 (1907) (allegedly libellous matter in pleadings); F. HARPER & F. JAMES, THE LAW OF TORTS § 5.22 (1956); W. PROSSER, LAW OF TORTS § 114 at 778 (4th ed. 1971). *Cf.* RESTATEMENT (SECOND) OF TORTS § 652F (Tent. Draft No. 22, 1976) (applying § 586 immunity to invasion of privacy).

37. *See* quote, text at note 41 *infra.*

38. DEFENSE FUNCTION, *supra* note 22, § 3.1.

39. *Id.* § 5.2. *See* Commonwealth v. Boyd, 461 Pa. 17, 27-30, 334 A.2d 610, 615-17 (1975).

40. United States v. Meek, 388 F.2d 936, 940 (7th Cir. 1968).

41. DEFENSE FUNCTION, *supra* note 22, at 146. The commentary to the standards for the defense function states:

> The "alter ego" concept of a defense lawyer, which sees him as a "mouthpiece" for his client, is fundamentally wrong, unethical and destructive of the lawyer's image; more important to the accused, perhaps, this pernicious idea is destructive of the lawyer's usefulness. The lawyer's value to each client stems in large part from the independence of his stance, as a professional representative rather than as an ordinary agent.

Id. § 1.1, comment *c*, at 174.

and that loss can effectively be translated into a malpractice judgment against the lawyer. This may be the client's only remedy. A lawyer's mistake in a civil trial can hardly become the basis for a new trial—in fact, it is usually an obstacle to the grant of a new trial.

In criminal cases, on the other hand, the criminal defendant is not left without an adequate legal remedy. If the errors of defense counsel amount to ineffective assistance of counsel, the criminal defendant will be awarded a new trial. Further, "[v]indication of allegedly invaded federal rights may be asserted by direct appeal, by state post conviction remedies, and by federal habeas corpus petitions."[42]

Immunity from civil tort liability for the criminal defense lawyer does not mean that he operates outside the law and free of its rules. He is still subject to disciplinary procedures by bar associations, and to criminal process for actions amounting to crimes as defined by criminal statutes.[43]

In all judicial proceedings, judges, lawyers and witnesses are granted absolute, indefeasible immunity from defamation liability. The offended plaintiff is left without any remedy. The immunity principle is considered important enough to uphold even to the point of allowing injury without remedy. On the other hand, even if the criminal defense lawyer is accorded immunity, the criminal defendant's rights can be protected in a variety of ways, including a new trial.

VI. Conclusion

The criminal defense lawyer plays as important a role in our system of justice as the prosecutor and the judge. All are entitled to absolute immunity from civil liability. Common sense compels it. Case law requires it. Public policy justifies it.

Representation amounting to ineffective assistance of counsel can be adequately remedied by the grant of a new trial.

The public in general, and the criminal defendant in particular, will suffer from any rule that would cause the defense lawyer to gauge his conduct by the possibility that the client could sue him for damages if he were not satisfied with the outcome. The inhibiting effect it would have on the management of a criminal defense would far outweigh any social utility of allowing a civil action for damages against the criminal defense lawyer.

Under the present case law, no action for damages against a court-appointed defense lawyer should survive preliminary objections raising the issue of immunity. The same rule should apply to *all* criminal defense lawyers, appointed or retained.

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42. Brown v. Joseph, 463 F.2d 1046, 1049 (3d Cir. 1972).
43. *See* Imbler v. Pachtman, 424 U.S. 409, 429 (1976).