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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

May 4, 2005

Edwin E. Evans, General Counsel
State Budget and Control Board
P. O. Box 11608
Columbia, South Carolina 29211

Dear Ed:

On behalf of the Insurance Reserve Fund, you have requested an opinion as to "whether the IRF is authorized to provide general liability tort insurance to the employees of a defender corporation." Your concern is that the IRF may not be "statutorily authorized to provide the general liability tort coverage requested." By way of background, you provide the following information:

> [t]he IRF is authorized to provide general liability tort coverage to the *state* and *political subdivisions* and their employees as set forth in S.C. Code Ann. § 1-11-140(A) and (B) ....
>
> As it has been explained to the IRF, public defenders are typically employees, respectfully, of eleemosynary corporations known as a defender corporations. S.C. Code Ann. § 17-3-60. Ordinarily, a defender corporation is established by each county; however, nothing prevents the combined bars of two or more adjoining counties from jointly creating a defender corporation. S.C. Code Ann. § 17-3-60(i). For counties without public defender corporations, the defense of indigents is paid through the Office of Indigent Defense, although our inquiry relates only to defender corporations.
>
> The various related Attorney General opinions realize that a public defender corporation is a private corporation that does not exercise the power of the sovereign, and therefore is not part of the State. The opinions also recognize that a public defender is an employee of a defender corporation and not the state or county. In the attached sheet, I have listed some of the opinions that we have reviewed in advising the IRF.
>
> On behalf of the IRF, I request the Office of the Attorney General provide its opinion as to whether the IRF is authorized to provide general liability insurance to defender corporations.

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Request Letter

It is our opinion that the IRF is not so authorized.

Law / Analysis

S.C. Code Ann. § 1-11-140(A) and (B) provide as follows:

> (A) The State Budget and Control Board, through the Office of Insurance Services, is authorized to provide insurance for *the State,* its *departments, agencies, institutions, commissions, boards* and the personnel employed by the *State*, its *departments agencies, institutions, commissions* and *boards* so as to protect the State against tort liability and to protect these personnel against tort liability arising in the course of their employment.
>
> (B) Any *political subdivision* of the State including, without limitations, municipalities, counties, and school districts, may procure the insurance for itself and for its employees in the same manner provided for the procurement of this insurance for the State, its entities, and its employees. (emphasis added).

Thus, the issue presented is whether a defender corporation is the State or a department, agency, institution, commission, board or political subdivision thereof.

As you indicate in your letter, we have addressed the legal status of defender corporations on a number of occasions in a variety of contexts. In an opinion, dated April 5, 1995, for example, we noted that defender corporations are created pursuant to § 17-3-60 *et seq.* of the Code, which sets forth the procedure for establishing "public defender systems" in South Carolina. The 1995 opinion referenced an earlier opinion dated July 9, 1986, wherein we observed that "public defender corporations are not governmental entities but are eleemosynary corporations ...." Thus, in the 1995 opinion, we reiterated our conclusion, expressed earlier in the 1986 opinion, that members of the board of directors of the Darlington County Public Defender Corporation are not "officers" for dual office holding purposes.

And, in an opinion, dated April 5, 1982, we concluded that a position on the Lexington County Public Defender Agency, Inc. is not an office for dual office holding purposes. There, our reasoning was as follows:

> [t]he question of whether a position on the Board of the Lexington County Public Defender Agency, Inc. is an office under the Constitution is a more difficult one. This Office has expressed the opinion [previously that the position of Public Defender is not an office for dual office holding purposes. *See*, Opinion of February 9, 1971; Opinion of May 26, 1975; and Opinion of April 20, 1979 .... This result was reached on the basis that public defenders are employed by private eleemosynary corporations which the attorneys in the various counties of the State

> are given the discretion to establish. This result is supported by the recent U.S. Supreme Court case of *Polk County, et al. v. Dodson*, 50 Law Week 4077 (decided December 14, 1981). The question involved in that case was whether a public defender acts under color of law for purposes of an action under 42 U.S.C. § 1983. The Court held that in representing indigent defendants in a state criminal proceeding a public defender does not act on the state's behalf or in concert with it. This Office has further taken the position that "... if the public defender is not exercising any portion of the sovereign power of the state it is doubtful that the board and employees do also. 1977 Op. Atty. Gen. No. 77-100 .... Furthermore, an examination of § 17-3-60 of the Code of Laws of South Carolina, which is the statute providing for the creation of Defender Corporations, reveals that the board of directors of these corporations are given no duties involving the exercise of the sovereign power of the state. The only powers that they are specifically granted are those of selecting and dismissing personnel, receiving funds, and the ordinary and usual functions of boards of directors. Therefore, a member of the Board of Directors of the Lexington County Public Defender Agency, Inc. would not hold an 'office' for constitutional purposes.

Moreover, in our opinion of February 2, 1981, we concluded that "it is clear" that a Public Defender Corporation "is a private corporation and not an instrumentality of the State or a county [but] ... a private employer." *Op. S.C. Atty. Gen.*, Op. No. 77-100 recognized that there was considerable doubt as to whether public defenders or public defender boards or employees were entitled to any immunity, including sovereign immunity, because of the "independence of the board from state influence and control ...." Furthermore, we noted that it is doubtful that the public defender exercises any sovereign or governmental power. In addition, in *Op. S.C. Atty. Gen.*, Op. No. 3372 (August 28, 1972), we stated:

> [t]he relationship between the State of South Carolina and the public defender does not fulfill the common law requirements to establish an employer-employee relationship. The State does provide an appropriation for a defender corporation but it does not directly compensate the public defender as his compensation is set by the board of directors of the defender corporation. The board of directors of the defender corporation has the power to select and dismiss the public defender (Section 17-285[b]). As to the control of the public defender, while the statute limits the amount of compensation the public defender and the assistant public defender may receive (Section 17-285[f]) and also prohibits their representing persons charged with a criminal offense in their private practice if they are permitted to engage in private practice by their board of directors, (Section 17-285[e]) these restrictions or control are not in the opinion of this office sufficient to establish an employer-employee relationship between the public defender and the State of South Carolina. The essential common law elements are also missing when you examine the relationship between the public defender and the county, as is sustained by the enclosed opinion, in which it is concluded that an employee of the defender corporation is not a county

> employee. While the question presented in the opinion of August 18, 1970 concerns an insurance matter in relation to the defender corporation, the same conclusion must be reached as stated therein, insofar as the status of the public defender and whether or not he is in fact a county employee.
>
> The statute which creates the public defender system in the counties in the State of South Carolina is Section 17-285, Code of Laws of South Carolina (1962), 1971 Cum.Supp. [now § 17-3-60]. While the State provides the primary funding for the defender corporation, the counties in many instances supplement this appropriation and, of course, there is nothing to prevent or prohibit the corporation from seeking other sources of revenue or funding since they are an eleemosynary corporation and authorized to exercise all powers and duties conferred by statutory law on an eleemosynary corporation. It is apparent after an examination of the applicable statutes that the public defender is an employee of the defender corporation and that all of the essential common law elements of the relationship are present. In the opinion of this office, a public defender is an employee of the defender corporation and is not a state or county employee, He is essentially a local official whose activities are in some degree proscribed and prescribed by state statutes and rules of court.

The United States Supreme Court decision, *Polk County v. Dodson* 454 U.S. 312 (1981), referenced in the above-cited 1981 opinion, is also instructive here. In concluding that a public defender does not act "under color of state law" for purposes of the Civil Rights Act (42 U.S.C. § 1983), the Court concluded as follows:

> [f]irst, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, see *Moore v. United States*, 432 F.2d 730 (CA3 1970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(B), ABA Code of Professional Responsibility (1976). ....
>
> Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages. This Court's decision in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), established the right of state criminal defendants to the "'guiding

> hand of counsel at every step in the proceedings against [them].'" *Id.*, at 345, 83 S.Ct., at 797, quoting *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932). Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate. See, *e.g. Gideon v. Wainwright, supra; Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct.1173, 55 L.Ed.2d 426 (1978). At least in the absence of pleading and proof to the contrary, we therefore cannot assume that Polk County, having employed public defenders to satisfy the State's obligations under *Gideon v. Wainwright*, has attempted to control their action in a manner inconsistent with the principles on which *Gideon* rests.

454 U.S. at 313. It is evident that these considerations – that, by definition, a public defender should not be under the direction and control of the State – is one major reason a public defender corporation is created as a private corporation, rather than as a governmental entity.

We acknowledge that certain other of our previous opinions are not completely in accord with the general conclusion expressed in those opinions, discussed above. See, *e.g. Op. S.C. Atty. Gen.*, January 28, 1980 [Public Defender's Offices are agencies of the State and therefore 'employers' under § 9-1-10]; *Op. S.C. Atty. Gen.*, December 3, 1980 [for social security purposes the Public Defenders' are agencies of the State and therefore 'employers' under § 9-5-30] *Op. S.C. Atty. Gen.*, July 7, 1981 [public defenders and assistant public defenders may participate in the South Carolina Deferred Compensation Program]. It should be noted, however, that these opinions address precise questions regarding the status of public defenders for certain specific purposes. Moreover, the author of two of these opinions later concluded that Op. No. 3372 (1972) "expresses a more sound conclusion" in finding that a public defender is an employee of the defender corporation and is not a state or county employee. *See, Op. S.C. Atty. Gen.*, January 17, 1984. Thus, it is our opinion, and we reiterate herein this general conclusion that a public defender corporation is not a governmental entity, but an eleemosynary corporation.

With respect to the specific question of whether the Insurance Reserve Fund is authorized to provide general liability tort insurance to a defender corporation and its employees pursuant to § 1-11-140(A) and (B), a number of principles of statutory construction are pertinent to this inquiry. First and foremost, is the cardinal rule of statutory interpretation, which is to ascertain and effectuate the legislative intent, whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and such language must be construed in light of the statute's intended purpose. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999). Moreover, a statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Hay v. S.C. Tax Comm.*, 273 S.C. 269, 255 S.E.2d 837 (1979). In construing statutes, the words used must be given their plain and ordinary meaning

without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984).

Applying these rules of statutory construction, it is our opinion that the most reasonable interpretation of § 1-11-140 is that public defender corporations and their employees are excluded from the statute's reach. Applying the plain and ordinary meaning to the words used in § 1-11-140 – which authorizes the provision of insurance to "the State, its departments, agencies, institutions, commissions, and boards," as well as to any "political subdivision of the State" – we believe the General Assembly did not intend to include therein public defender corporations or the employees thereof. As discussed above, we have concluded, for various purposes, that these entities are not state or local agencies or governmental entities, but eleemosynary corporations. Furthermore, to conclude that a defender corporation is a state, local or other governmental entity for purposes of § 1-11-140(A) and (B) would be inconsistent with the need for defender corporations to remain independent of the State. See, *Polk County v. Dodson, supra.* [in holding that such entities do not act "under color of law."] We conclude that such reasoning applies here as well.

Conclusion

Of course, it is fundamental that the authority of a state agency "is limited to that granted by the legislature" by express statute or the necessary implication of an enactment. *Nucor Steel v. S.C. Public Service Comm.*, 310 S.C. 539, 426 S.E.2d 319 (1992). It is our opinion that § 1-11-140 does not authorize the Budget and Control Board, through the Insurance Reserve Fund, to provide general liability insurance coverage to Public Defender corporations and employees thereof. For purposes of the statute in question, we believe these entities are not state or local agencies or entities, but are private eleemosynary corporations.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an