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ATTORNEY GENERAL
STATE OF ILLINOIS

April 25, 1991

FILE NO. 91-021

TORT LIABILITY:
Immunity of Probation Officers

Honorable Joan C. Scott
State's Attorney, Fulton County
County Courthouse
Lewistown, Illinois 61542

Dear Ms. Scott:

I have your letter wherein you inquire regarding the potential liability of probation officers for acts committed in the performance of their official duties. Specifically, you pose the following questions:

1. To what extent is a probation officer immune from liability in the performance of his or her duties supervising probations?

2. To what extent is a probation officer immune from liability in the supervision of public service work clients?

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3. In the event that a probation officer is sued for acts committed in the scope of his or her official duties, is the Attorney General of the State of Illinois or a county State's Attorney responsible for representing the probation officer? And,

4. In a lawsuit based upon libel, if a probation officer is held liable for damages and attorney's fees, who or what entity is responsible for the payment of the damages?

It is generally recognized that public officers and employees, who are charged with the responsibilities of carrying out the complex process of government, must not be unduly hampered, deterred, or intimidated in the discharge of their duties by the possibility of personal liability for acts committed within the scope of those duties. So as not to "dampen the ardor of public officials", and in recognition of the need for preserving independence of action without deterrence or intimidation by the fear of personal liability and vexatious lawsuits, public officials are immune from tort liability for certain conduct. (Harlow v. Fitzgerald (1982), 457 U.S. 800, 102 S. Ct. 2727, 2732; Galvan v. Garman (5th Cir. 1983), 710 F.2d 214, 216, cert. denied, 466 U.S. 949, 104 S. Ct. 2150 (1984); Restatement (Second) of Torts § 895 D, comment b (1979).) Not all acts of public officials are protected by immunity, however, and not all acts of public officials which are protected by immunity carry the same degree of immunity. The functions of each officer and the circumstances surrounding each activity must be examined and analyzed

in order to determine if there is immunity and, if so, what degree of immunity applies. (W. Prosser and W. Keeton, The Law of Torts 1056 (1984).) Consequently, in order to determine the level of immunity protecting a probation officer in the execution of his official duties, it is necessary to undertake a functional analysis of the position. Ray v. Pickett (8th Cir. 1984), 734 F.2d 370, 372.

It is well established that a judge of a court of general jurisdiction enjoys absolute immunity from liability for damages in suits emanating either under the common law or under section 1 of the Civil Rights Act of 1871 (42 U.S.C.S. § 1983 (Law. Co-op. Supp. 1985) [hereinafter referred to as "section 1983"]) and that a judge is not deprived of such immunity even if an action is erroneous, malicious, or in excess of the judge's authority. (Stump v. Sparkman (1978), 435 U.S. 349, 98 S. Ct. 1099, 1105; In re Mason (1965), 33 Ill. 2d 53, 57; In re McGarry (1942), 380 Ill. 359, 365; Restatement (Second) of Torts § 895 D (1979.) The rationale for extending absolute immunity to judges is to ensure that a judge is free from the harassment of private litigation when conducting his official business; the presence of an appeal is available to remedy judicial errors. Ashbrook v. Hoffman (7th Cir. 1980), 617 F.2d 474, 476.

The absolute immunity from liability which is applicable to the judiciary has also been extended to nonjudicial

officers, when exercising quasi-judicial powers. (People ex rel. Schreiner v. Courtney (1942), 380 Ill. 171, 179.) As was stated in Ashbrook v. Hoffman (7th Cir. 1980), 617 F.2d 474, 476:

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> Other nonjudicial officials whose official duties have an integral relationship with the judicial process have also been held to have absolute immunity for their quasi-judicial conduct. * * * The same policies which underlie the grant of absolute judicial immunity to judges justify the grant of immunity to those conducting activities intimately related to the judicial process. [Citations.] On one hand is the policy that an official making quasi-judicial discretionary judgments should be free of the harassment of private litigation in making those judgments. [Citation.] On the other hand a nonjudicial officer who is delegated judicial duties in aid of the court should not be a 'lightning rod for harassing litigation' aimed at the court. [Citation.] Thus, if 'acts, alleged to [be] wrongful, were committed by the officer in the performance of an integral part of the judicial process,' [citation], then the officer is absolutely immune from suit.
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> Whether particular officeholders have quasi-judicial absolute immunity for their acts depends on an analysis of the nature of the activities in which the officeholder engages and the relationship of those activities to the judicial process. * * *
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> (Emphasis added.)

The application of absolute immunity to nonjudicial officers when exercising judicial functions is generally described as derivative, in that the immunity would not exist except for the

direct connection to the court. Acevedo v. Pima County Adult Probation Department (Ariz. S. Ct. 1984), 690 P.2d 38, 40; see also Harlow v. Fitzgerald (1982), 457 U.S. 800, 102 S. Ct. 2727.

Certain functions and duties of probation officers have been recognized as being quasi-judicial in nature, and as having an integral relationship with the judicial process. For example, the preparation and submission of a pre-sentence report to the court for use in sentencing has been held to be an activity intimately associated with the judicial phase of the criminal process. Consequently, a probation officer who prepares and submits a pre-sentence report is cloaked with absolute immunity even though the report may be inaccurate or incomplete. Maynard v. Havenstrite (5th Cir. 1984), 727 F.2d 439, 441; Spaulding v. Nielsen (5th Cir. 1979), 599 F.2d 728, 729; Burkes v. Callion (9th Cir. 1970), 433 F.2d 318, 319, cert. denied, 403 U.S. 903, 91 S. Ct. 2217 (1971).

Furthermore, it has been suggested that actions undertaken by a probation officer which are necessary to carry out and enforce the conditions of probation imposed by the court are quasi-judicial in nature, thus cloaking a probation officer with absolute immunity. (See, Acevedo v. Pima County Adult Probation Department (Ariz. S. Ct. 1984), 690 P.2d 38, 41.) In Richardson v. Grundel (1980), 85 Ill. App. 3d 46, the plaintiff-victim of a burglary perpetrated by a juvenile offender brought suit against a juvenile probation officer of

Knox County. The juvenile had been placed on probation for the commission of the burglary. As a condition of his probation, the juvenile offender was ordered to "make restitution by arrangement with his probation officer". After more than one year elapsed without the collection of restitution, the plaintiff-victim complained against the probation officer for money damages caused by the probation officer's "failure to enforce an Order of the Juvenile Court pursuant to his duties". The trial court dismissed the complaint for failure to state a cause of action, and the appellate court affirmed, holding that a probation officer was entitled to immunity for his judicial or discretionary duties:

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> [The defendant], as the director of juvenile court services of Knox County, was appointed by, works under the supervision of, and serves at the pleasure of the chief judge of the Ninth Judicial Circuit (Ill. Rev. Stat. 1979, ch. 37, par. 706-5(2)). It is clear, therefore, that the defendant, as well as other juvenile probation personnel, are judicial officers. (See also Ill. Rev. Stat. 1979, ch. 37, par. 706-1.) Pursuant to section 6-1(2)(c) of the Juvenile Court Act (Ill. Rev. Stat. 1979, ch. 37, par. 706-1(2)(c)), the juvenile offender was placed under the guardianship of the defendant. In addition, the juvenile was ordered to pay restitution by arrangement with his probation officer. (Ill. Rev. Stat. 1979, ch. 37, pars. 705-2(4) and 705-3(2)(1).) The probation officer is vested with power to supervise the collection of such restitution by section 6-1(2)(g) of the Juvenile Court Act. Ill. Rev. Stat. 1979, ch. 37, par. 706-1(2)(g).
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> It is the long-standing law of this State

> that a judicial officer will not be held liable for an act done by him in the exercise of his judicial functions, if the act is within the scope of his jurisdiction. (People ex rel. Munson v. Bartels (1891), 138 Ill. 322, 328, 27 N.E. 1091; cf. People ex rel. Scott v. Briceland (1976), 65 Ill. 2d 485, 502, 359 N.E.2d 149.) Official action is judicial where it is the result of judgment or discretion:
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> > 'An officer will be regarded as being clothed with judicial or quasi-judicial functions, when the powers confided to him are so far discretionary that he can exercise or withhold them according to his own judgment as to what is necessary and proper. Where the question is one of opinion merely, * * * the discretion exercised cannot be disputed.
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> > But where the duty imposed on an officer is purely ministerial, he will be held liable for an injury to another which results from his failure to perform it, or from his performance of it in a negligent or unskillful manner. Official duty is ministerial when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it, prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion.' (People ex rel. Munson v. Bartels (1891), 138 Ill. 322, 328, 27 N.E. 1091.)
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> * * * "
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> Richardson v. Grundel (1980), 85 Ill. App. 3d 46, 47-48.

The court reasoned that, since the amount and conditions of payment were not determined by the court, the probation officer was vested with the court's discretion to determine these matters, and, therefore, the probation officer not civilly liable to the victim of the juvenile's offense.

On the other hand, where a probation officer's functions are not judicial or adjudicatory in nature, but instead are administrative, supervisory, or investigative, several courts have held that a probation officer is cloaked only with qualified immunity, as distinguished from absolute immunity. It should be noted that absolute immunity defeats a suit at the outset, provided that the official's actions are within the scope of the immunity. Qualified or good faith immunity, however, is an affirmative defense which must be pleaded by a defendant official, and shields the official performing nonjudicial, discretionary functions from liability if his conduct does not violate clearly established rights which a reasonable person would have know. Qualified immunity is not available to an official if he knew or reasonably should have known that the action he took within the scope of his responsibility would violate the rights of the plaintiff, or if the official took the action with the malicious intention to cause another injury. Harlow v. Fitzgerald (1982), 457 U.S. 800, 102 S. Ct. 2727, 2736-37; Ray v. Pickett (8th Cir. 1984), 734 F.2d 370, 371; Galvan v. Garmon (5th Cir. 1983), 710 F.2d 214, 215, cert. denied, 466 U.S. 949, 104 S. Ct. 2150 (1984).

In Galvan v. Garmon (5th Cir. 1983), 710 F.2d 214, cert. denied, 466 U.S. 949, 104 S. Ct. 2150 (1984), the court held that a probation officer who mistakenly caused the arrest and incarceration of a person on probation was entitled to

assert qualified immunity in a section 1983 suit. The court held that when a probation officer causes the arrest of an individual, the probation officer is not performing an act intimately related to the judiciary, and accordingly, is only entitled to qualified or good faith immunity for discretionary acts. Similarly, in Ray v. Pickett (8th Cir. 1984), 734 F.2d 370, the court held that where it was claimed that a probation officer intentionally falsified a report to a parole commission to secure a parole violator's warrant, the probation officer was not performing a judicial function. Consequently, the probation officer was entitled only to qualified immunity. (See also Acevedo v. Pima County Adult Probation Department (Ariz. S. Ct. 1984), 690 P.2d 38, wherein the court held that the supervision of a probationer was not an activity intimately associated with the judiciary; since Arizona did not recognize qualified immunity, the court held that a probation officer was not shielded from liability in the supervision of a probationer.)

Lastly, it is well established that where a public officer performs purely ministerial functions, he does not enjoy the protection of any immunity. Richardson v. Grundel (1980), 85 Ill. App. 3d 46, 47.

Accordingly, with respect to your first question, it is my opinion that in the exercise of quasi-judicial functions as described above, a probation officer is cloaked with absolute immunity from civil liability for suits sounding in common

law tort or emanating under section 1983. For those discretionary functions which are nonjudicial in nature, it is my opinion that a probation officer is protected by qualified or good faith immunity, and for purely ministerial acts, it is my opinion that a probation officer enjoys no immunity from civil liability.

A caveat should be added at this juncture. In Pulliam v. Allen (1984), 466 U.S. 522, 104 S. Ct. 1970, the Supreme Court of the United States held that, in an action under section 1983, judicial immunity is neither a bar to prospective injunctive relief against a judicial officer nor a bar to the award of attorney's fees under the Civil Rights Attorney's Fees Awards Act (42 U.S.C.S. § 1988 (Law. Co-op. Supp. 1985)). Consequently, even though a probation officer may be cloaked with absolute immunity from liability for his quasi-judicial functions in a section 1983 action, it appears that an award of attorney's fees may be entered against a probation officer under certain circumstances.

Your second inquiry relates to the extent of immunity a probation officer enjoys in the supervision of public service work clients. As you know, sections 5-6-3 and 5-6-3.1 of the Unified Code of Corrections (Ill. Rev. Stat. 1989, ch. 38, pars. 1005-6-3, 1005-6-3.1) authorize a court to order an offender on probation, conditional discharge or supervision to perform reasonable public service work. Both subsection

5-6-3(g) and 5-6-3.1(g) (Ill. Rev. Stat. 1989, ch. 38, pars. 1005-6-3(g), 1005-6-3.1(g)) provide as follows:

> "(g) Neither the State, any unit of local government, nor any official or employee thereof acting in the course of his official duties shall be liable for any tortious acts of any person placed on probation who is given any public service work as a condition of probation, except for willful misconduct or gross negligence on the part of such governmental unit, official, or employee."

Therefore, it is my opinion that, except for willful misconduct or gross negligence, a probation officer is statutorily immune from liability for acts arising out of the supervision of public service work clients.

You next inquire whether the Attorney General or the local State's Attorney is responsible for representing a probation officer if the probation officer is sued for acts committed in the scope of his or her official duties. Section 4 of the Attorney General Act (Ill. Rev. Stat. 1989, ch. 14, par. 4) provides that it is the duty of the Attorney General:

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> Third -- To defend all actions and proceedings against <u>any state officer</u>, in his official capacity, in any of the courts of this state or the United States.
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> * * * "
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> (Emphasis added.)

Section 3-9005 of the Counties Code (Ill. Rev. Stat. 1989, ch. 34, par. 3-9005) imposes upon each State's Attorney the duty:

" * * *

(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.

* * * "

(Emphasis added.)

Probation officers in the State of Illinois are appointed by the chief judge of each circuit from lists of qualified candidates supplied by the Administrative Office of the Illinois Courts. (Ill. Rev. Stat. 1989, ch. 38, pars. 204-7, 204-8.) Furthermore, the chief judge, or another judge designated by the chief judge, possesses general administrative and supervisory authority over the court services or probation department. (Ill. Rev. Stat. 1989, ch. 38, par. 204-5.) The Illinois Supreme Court and the Administrative Office of the Illinois Courts have been given extensive authority to develop uniform standards and programs relating to the provision of probation services. (Ill. Rev. Stat. 1989, ch. 38, pars. 204-7, 204-8.) While the compensation paid to probation officers is initially paid by the county (Ill. Rev. Stat. 1989, ch. 38, par. 204-6), the State of Illinois reimburses the county up to 100% of the salary of certain probation officers. Based upon these attributes, it is clear that probation officers are not county officers. Rather, they are officers of the court which appoints them. (See People v. Whealan (1934), 356 Ill. 328, 333; Shea v. Sweitzer (1918), 285 Ill. 465, 468;

People ex rel. Gauss v. C.,B.& Q. R.R. Co. (1916), 273 Ill. 110, 112; People v. Kavinsky (1980), 91 Ill. App. 3d 784, 793; Richardson v. Grundel (1980), 85 Ill. App. 3d 46, 47; see also People ex rel. Bier v. Scholz (1979), 77 Ill. 2d 12, 17.) Accordingly, like clerks of the circuit court (see Drury v. County of McLean (1982), 89 Ill. 2d 417, 419-24), it is my opinion that probation officers are nonjudicial members of the judicial branch of State government. (Accord, County of Kane v. Carlson (1987), 116 Ill. 2d 186, 203-4, wherein the Supreme Court concluded that probation officers are State, not local, employees, for purposes of the Illinois Public Labor Relations Act (Ill. Rev. Stat. 1989, ch. 48, par. 1601 et seq.)) As such, both the Attorney General and the local State's Attorney have the authority to represent a probation officer in the event that he or she is sued for acts committed in the performance of his or her duties. The authority of the Attorney General extends to all courts of the State of Illinois and the United States, while the State's Attorney is authorized to defend a probation officer only in proceedings brought in the county in which the State's Attorney serves.

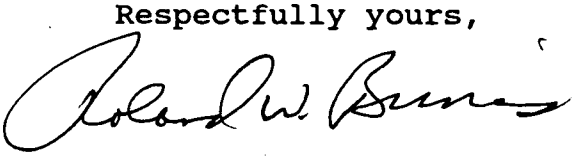
In most circumstances, it would be appropriate for the State's Attorney to undertake representation of a probation officer in cases filed in the county in which the probation officer serves, since these cases will generally relate back to

matters in which the State's Attorney has already been involved. If suit is brought against a probation officer alleging the deprivation of a civil or constitutional right arising out of the performance of his duties, however, under section 2 of the State Employee Indemnification Act (Ill. Rev. Stat. 1989, ch. 127, par. 1302) the Attorney General possesses the primary duty to represent the probation officer. Of course, if a probation officer desires representation by the Attorney General and indemnification from the State of Illinois in such a suit, he or she must comply with all statutory prerequisites thereto.

Your final inquiry relates to damages for libel. It should be noted that, as a matter of public policy, certain types of defamatory statements are deemed privileged so that the person making the statement will be completely shielded from liability, even if the statement is made with malice. (Starnes v. International Harvester Co. (1986), 141 Ill. App. 3d 652, 653.) Complaints made to certain governmental entities have been held to be absolutely privileged from giving rise to defamation actions. (See Ritchey v. Maksin (1978), 71 Ill. 2d 470; Starnes v. International Harvester Co. (1986), 141 Ill. App. 3d 652; Thomas v. Petrulis (1984), 125 Ill. App. 3d 415; Harrell v. Summers (1961), 32 Ill. App. 2d 358.) Moreover, judges and other public officers performing judicial functions

are absolutely privileged from liability for publishing libelous or slanderous matter in the performance of their judicial functions, so long as the publication bears some relation to the scope of the officer's duties. (Restatement (Second) of Torts § 585 (1977); see generally Libco Corp. v. Adams (1981), 100 Ill. App. 3d 314; McCutcheon v. Moran (1981), 99 Ill. App. 3d 421.) Accordingly, it appears that the statements, writings and utterances of a probation officer made in his official capacity and in the performance of his quasi-judicial duties are privileged and should not expose a probation officer to financial liability. As with other State officers and employees, however, a probation officer may be personally liable for the publication of defamatory remarks made outside the scope of his duties. (See generally Hoffman v. Yack (1978), 57 Ill. App. 3d 744, 748.) The determination of whether the statements of a probation officer are made outside of the scope of his employment and official duties, and consequently may result in personal liability of a probation officer, is a factual question which will depend upon an examination of the surrounding circumstances in each case.

Respectfully yours,



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