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Most states and the federal government provide judges with legal representation when they are sued in their official capacity.[54] In 1977, the National Center for State Courts compiled data regarding state judicial representation. Samuel P. Stafford summarized the results of the study as follows:

> [T]he data showed that the office of the attorney general serves as the official counsel for all but six states and one territory (The Virgin Islands have no provisions for legal representation). In the District of Columbia, corporation counsel handles legal representation of judges; in Kansas, local or private counsel provide legal representation; and in Montana, the Insurance and Legal Division. The legal department of the State Court Administrator's Office provides legal service for Pennsylvania judges; in South Dakota and Texas, judges challenged in their official capacity must choose a private attorney to represent them.
>
> With two exceptions, local or state funds cover the costs of official counsel for judges. In South Carolina, either state money or the state's liability insurance finances any judicial representation. In Texas, the individual judge is personally responsible for securing and paying for counsel.
>
> When substitute legal counsel is necessary, all but six of the states use private attorneys. The six exceptions are Illinois (special assistant), Kansas (attorney general when requested and if there is a conflict), Michigan (special or county attorney), Virginia (special counsel), and Wyoming (local or state bar association).
>
> Six states have provisions requiring individual judges to pay for any substitute counsel if the official counsel declines. In Louisiana, Missouri, Oklahoma, and Texas, the challenged judge is personally responsible for funding substitute counsel. In Michigan and New York, judges who prefer private attorneys as substitute counsel must personally assume all costs.[55]

Although legal representation for judges presently exists, there are numerous difficulties and conflicts when a public attorney represents a judgedefendant.[56] The tremendous workload facing every state and federal legal officer is readily apparent. The judge's defense must wait its turn or, if given priority, other work will be neglected. Consider also that due to the nature of government service by lawyers, the judge's defense will generally be in the hands of less experienced, though dedicated, attorneys. Surely an overworked, understaffed, and less experienced public legal office is not the best source for a judge's defense where his reputation and monetary liability are at stake.

The appearances of impropriety and judicial bias that may result from the subsequent appearance before the judge of an attorney who defended him presents a more subtle, but insidious problem.[57] This dilemma is not limited to the government's legal officers; it also applies to privately retained counsel.[58] But the problem is exacerbated because the government appears much more regularly before the court.

Finally, the governmental legal officer cannot serve as a true personal counsel to the judge. His duties are first and foremost to the public and not to the judge as a client. Clearly, the government's attorney has a different relationship with the client-judge than a private lawyer would. Moreover, there are significant practical and ethical considerations extant if the judge is damaged by malpractice. Such a relationship also can be rife with conflict of interest questions.

Footnotes

[54]. In the federal system the United States Attorney, or a member of his staff, usually represents federal judges sued in their official capacity.

[55]. Stafford, supra note 14, at 37.

[56]. Both federal and state courts have rejected challenges to the legality of representation of judges by public legal officers. See, e.g., *Weiss v. Bonsal*, 344 F.2d 428 (2d Cir. 1965); *Booth v. Fletcher*, 101 F.2d 676 (D.C. Cir.), cert. denied, 307 U.S. 628 (1938); *Moity v. Louisiana State Bar Ass'n*, 414 F. Supp. 180 (E.D. La. 1976); *Mundy v. McDonald*, 216 Mich. 444, 185 N.W. 877 (1921); *O'Regan v. Schermerhorn*, 25 N.J. Misc. 1, 50 A.2d 10 (1946); *Heath v. Cornelius*, 511 S.W.2d 683 (Tenn. 1974).

[57]. See Peskoe, supra note 51, at 162-63.

[58]. ABA STANDARDS § 4.17 commentary states:

> While the judge has an absolute right to counsel of his own choice at all stages of the proceeding, it is inappropriate for the judge, thereafter, to hear matters in which his counsel appears; at least until considerable time has passed between the commission proceedings and the appearance. When it happens, the judge should disqualify himself.