

**DIVISION CIRCULAR #23
(N/A)**

DEPARTMENT OF HUMANS SERVICES

DIVISION OF DEVELOPMENTAL DISABILITIES

EFFECTIVE DATE: July 18, 2003

DATE ISSUED: July 8, 2003

(Rescinds Division Circular 23, "Representation, Indemnification, Expungement of Arrest Records of Division Employees and Forwarding of Legal Papers" issued April 27, 1998)

I. **TITLE:** **Representation, Indemnification, Expungement of Arrest Records for Division Employees and Forwarding of Legal Papers.**

II. **PURPOSE:** To develop policies and procedures for staff of the Division to request representation, indemnification and expungement of arrest records in compliance with Administrative Order 3:01.

III. **SCOPE:** This circular only applies to present or former full-time or part-time employees of the Division in matters related to their employment. The Office of the Attorney General cannot represent private providers or their employees. Individual receiving services cannot be represented by the Office of the Attorney General.

IV. **POLICIES:**

- The Attorney General may provide representation, upon request, for an employee or former employee who is a named defendant in a civil or criminal action, which is employment related.
- When the Attorney General provides representation for an employee in a civil action, the State may also provide indemnification.
- When an employee is served with a summons, complaint or notices, an employee's ability to request indemnification is lost unless he/she forwards the papers with a request for representation within 10 calendar days.

- Indemnification is not available in any criminal case. Any employee convicted of a crime is solely responsible for any penalty imposed and for the payment of any fines.
- The State does not protect employees from the consequences of actions or omissions that involve intentional wrongdoing, actual fraud or malice, or the commission of a crime.
- The Attorney General's Office does not provide representation on any type of emergency basis for employees who are arrested or threatened with arrest after regular business hours. Employees are advised to make necessary private arrangements and notify their supervisor on the next working day.
- In instances where the Attorney General has denied representation in a civil action, the employee may later receive reimbursement for costs of counsel, court fees, settlement or damages if the employee establishes that he/she was entitled to such defense.
- State statutes and policies do not guarantee the reimbursement of the costs of private counsel. An employee who has retained private counsel in a criminal matter where an acquittal or dismissal has occurred may request the State to pay for all or part of the costs. Such a request must be approved by the Attorney General personally and by the head of the employing agency before payment will be made.
- Under certain conditions, the Attorney General may provide counsel to present or former employees in connection with the expungement of arrest records.

V. GENERAL STANDARDS:

- A. Definitions - For the purpose of this circular the following terms shall have the meaning defined herein:

"Administrative Head of the component" means the CEO of a developmental center, Regional Assistant Director (RAD), Regional Administrator (RA) or unit head.

"Administrative Practice Officer" (APO) means the Division staff member assigned as liaison to the Department's Office of Legal and Regulatory Liaison and the Office of the Attorney General.

“Civil action” means an action brought by an individual seeking money or damages as compensation for injury or loss resulting from an intentional or negligent act or omission on the part of the Division employee.

“Criminal action” means an action that results from a criminal complaint or a grand jury indictment, based upon alleged criminal conduct on the part of a Division employee.

“Expungement” means the process of destroying information - including criminal records - in files, computers, or other depositories.

“Indemnification” means to secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon him/her.

“Notice of Claim” means a letter, form, or other written document advising that a suit will be filed against the Division, component, and/or individual.

“Suit” means any legal proceeding in a court in which the plaintiff pursues a remedy for injury or loss of a right.

“Subpoena” means a command to appear at a certain time and place to give testimony (ad testificandum) and/or produce records (duces tecum) upon a certain matter.

“Summons and Complaint” means to notify a defendant that an action has been initiated against him/her and that he/she is required to answer to it at a time and place named.

- B. The Regional APO shall coordinate the submission of legal documents to the Office of the APO. The Regional APO will also be the contact person for the APO.
- C. An employee shall not request DAG representation when he or she receives a Notice of Claim, but the Notice of Claim shall be sent to the Regional APO, who will forward the Notice of Claim with a cover memorandum explaining the issue and supporting documents to the APO. DAG representation is not needed because the person making the claim must wait six months before initiating a suit.
- D. Most subpoenas do not require acknowledgment of service. When required, no employee is authorized to accept the subpoena on behalf of another.

- E. An employee shall accept a summons and complaint only if the employee is specifically named. No employee is authorized to accept a summons and complaint on behalf of another employee, the Division, the Department, or the State. The only exceptions to this prohibition are:
1. Commissioner's Office authorized personnel when the legal papers are to be served upon the Commissioner, Department, and/or State;
 2. The Division Director's Office authorized personnel when the legal papers are to be served upon the Director and/or Division; and,
 3. Human Services Police authorized personnel when the person to be served is an employee at a Department facility, which has a Human Services Police Unit component.
- F. If a summons and complaint is mistakenly accepted, the employee should contact the administrative head of the component or designee, who shall notify the APO immediately.
- G. Upon receipt of a summons, subpoena, notice of claim, or suit, an employee shall immediately notify his/her direct supervisor.
- H. Immediate action must be taken when an employee is served with a summons and complaint, pursuant to section VI. B.2. of this circular.
- I. When a suit is initiated, an employee may only request DAG representation where he/she is personally named.
- J. The employee should not assume he/she will be represented automatically if the Department, Division, or other employees are also named in the suit.
- K. All employee requests for DAG representation are to be processed through the APO. In all cases, the Office of the Attorney General makes the final determination of representation.
- L. The employee requesting DAG representation has a statutory obligation to permit the Attorney General to control the conduct of the litigation and to cooperate fully with the Attorney General in the preparation of the defense and presentation of the case (N.J.S.A. 59:10-3 and 59:10A-4).

- M. Whenever the Attorney General provides for the defense of a civil or criminal matter on behalf of an employee, the Attorney General has the right to control the defense.
- N. Staff shall comply with a subpoena without assistance by the Office of the Attorney General unless the administrative head of the component requests assistance. The administrative head may request assistance from the Office of the Attorney General through the APO where there is a basis to suspect that the judge will order the Division:
 - 1. To a specific action with which the Division cannot comply.
 - 2. To an action which appears to be in conflict with existing statute, regulation, or policy.

VI. **PROCEDURES:**

A. Subpoena

Upon receipt of a subpoena, the employee shall notify the administrative head of the component or designee. A copy of the subpoena shall be forwarded to the APO only when legal assistance is requested.

B. Civil Action

1. Notice of Claims

- a. Upon receipt of the Notice of Claim, the employee shall advise the Regional APO.
- b. Within 72 hours of receipt of the Notice of Claim, the Regional APO shall notify the Office of the APO by telephone. The Notice of Claim and a full description of the events involved in the claim shall be telefaxed or hand delivered to the APO.
- c. The APO shall forward the Notice of Claim to the Bureau of Risk Management. The name and phone number of the Division contact person for the Bureau of Risk Management shall be included in the information submitted by the APO.

- d. The involved components shall immediately begin copying reports, investigations, and any other supporting documentation surrounding the events of the claim. The supporting documentation shall be forwarded to the Bureau of Risk Management once an investigator has been assigned. Copies of the documents should not be sent to the APO unless requested.
 - e. The investigator for the Bureau of Risk Management will work directly with the Division's contact person during the investigation.
2. Summons and Complaint
- a. On the day the employee is served a summons and complaint, the employee shall notify the administrative head of the component, designee or the Regional APO, for immediate action.
 - b. The administrative head of the component, designee or the Regional APO shall notify the Office of the APO by telephone to advise of the receipt of the summons and complaint.
 - c. The summons and complaint, along with a brief typed summary of the events involved in the complaint shall be hand delivered or telefaxed to the Office of the APO the same day served. The summary must also state how the summons and complaint was served on the individual.
 - d. Within 72 hours, the "Request for Legal Representation" form (See Appendix A) for each named defendant and supporting documentation shall be forwarded to the APO. The request form shall be properly endorsed and completely filled in.
 - e. The APO shall forward the summons and complaint, and the request for representation to the Office of Legal, Policy and Legislative Affairs and the Office of Legal and Regulatory Liaison, either supporting or not supporting the request for representation, stating the Division's position as to whether or not the employee's actions:

- i. Were within the scope of his/her employment;
 - ii. Were not an act or omission because of fraud, willful misconduct, or actual malice; and
 - iii. Would not create a conflict of interest between the employee and the State. The request shall also explain any issues relevant to the Division.
- f. Copies of all documentation should be retained by the employee and the APO.
- g. The APO, shall notify the administrative head of the component, designee or the Regional APO of the Attorney General's determination of whether or not to provide representation. The administrative head of the component, designee or Regional APO will notify the employee.

C. Criminal Action

1. The procedure for requesting DAG representation in criminal matters is the same as that outlined in VI.B.2.
2. The provision of DAG representation in criminal matters is discretionary. The employee's request for DAG representation shall be reviewed with emphasis upon ascertaining whether the matter arose outside of or within the scope of the employee's duties, and the relationship of the charges to the operation of the Division and Department.

D. Expungement of Arrest Records

The procedures for the expungement of present or former employee's arrest record after being acquitted or having charges dismissed, are fully outlined in Administrative Order 3:01.

E. Foreclosure/Bankruptcy Documents

Within 72 hours of receipt, all foreclosure/bankruptcy documents shall be sent directly to the Division of Law, CN 116, Trenton, NJ 08625 by the Division's fiscal unit. A copy of the documents with a cover memo explaining the matter shall be sent to the Office of the APO.

F. Contracts with Outside Agencies

The Office of Legal and Regulatory Liaison will review contract language containing "hold harmless" provisions against DDD.

1. The administrative head of the component or designee shall review the contract to determine if the indemnification section of the contract contains "hold harmless" language.
2. The administrative head of the component or designee shall forward the contract with a brief summary of the purpose of the contract to the APO if "hold harmless" language is identified.
3. The APO shall request that the Office of Legal and Regulatory Liaison review the contract and advise the administrative head of the component.

James W. Smith, Jr.
Director

APPENDIX A

**DEPARTMENT OF HUMAN SERVICES
DIVISION OF DEVELOPMENTAL DISABILITIES
INTEROFFICE COMMUNICATION**

To: James M. Evanochko
Administrative Practice Officer

FROM: (Name of Employee)

DATE:

**SUBJECT: REQUEST FOR LEGAL REPRESENTATION
(Name of Case)**

I have been named as a defendant in the above named Civil/Criminal Action. At the time of the alleged incident, I was employed at **(Office or facility)** and was acting within the scope of my employment. I am requesting legal representation in this matter. Please process this request on my behalf.

Brief Summary of the Incident: _____

(Signature of Employee)
(Type employee's name)

Signature of Dir., RAD, RA, CEO, Unit Head
(Type name and Title)

APPROVED _____
DISAPPROVED _____

REASON FOR DISAPPROVAL, IF APPLICABLE:

Not within the scope of employment
 Fraud, willful misconduct and/or malice
 Defense of action would create a conflict of interest