Indigents and Their Right to Sue for Legal Malpractice: A Review of the Liability Exposure of Court-Appointed Counsel in Missouri

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INDIGENTS AND THEIR Right TO SUE FOR
LEGAL MALPRACTICE: A REVIEW OF THE
LIABILITY EXPOSURE OF COURT-APPOINTED
COUNSEL IN MISSOURI

Ferri v. Ackerman

In 1974 the United States District Court for the Western District of
Pennsylvania, pursuant to the Criminal Justice Act of 1964, appointed,
Daniel Ackerman to serve as counsel for Francis Rick Ferri. Ferri had been
charged in a nine-count indictment with conspiracy to construct and use a
bomb in violation of federal laws. Following a twelve-day trial, Ferri was
found guilty on all counts and was sentenced to thirty years in prison.

While his appeal from the criminal convictions was pending, Ferri
filed suit in the Pennsylvania Court of Common Pleas alleging malpractice
in Ackerman's representation in the federal criminal trial. The Pennsyl-
vania court, primarily applying federal law, dismissed the complaint, holding
that attorneys appointed to represent indigents in federal criminal
cases are immune from civil liability. Thereafter, the Pennsylvania Supreme
Court affirmed the order of dismissal exclusively applying federal law.

The United States Supreme Court granted certiorari. In a unanimous
decision, the Court held that there is no federal immunity for court-ap-
pointed attorneys from malpractice actions brought by their former clients
in state courts. In its analysis, the Supreme Court first reviewed the legis-
lative history of the Criminal Justice Act of 1964. The Act had been de-
digned to improve the quality of representation for indigent defendants in
federal criminal trials. The Court recognized that the congressional inten-
supporting the statute was to "minimize the differences between retained
and appointed counsel," and that "Congress intended all defense counsel

3. Ferri was charged with violating 18 U.S.C. §§ 2, 371, 844(i) (1976), and 26
4. The convictions were later summarily affirmed by the United States Court
   of Appeals for the Third Circuit in United States v. Ferri, 546 F.2d 419 (3d Cir.
   1976).
5. Ferri v. Ackerman, 483 Pa. 90, 93-94, 394 A.2d 553, 555 (1978). In finding
   federal immunity, the Pennsylvania Supreme Court relied upon the federal courts
   of appeals cases of Jones v. Warlick, 364 F.2d 828 (4th Cir. 1966), and Sullens v.
   Carroll, 446 F.2d 1392 (5th Cir. 1971). See also Walker v. Kruse, 484 F.2d 802 (7th
   Cir. 1973).
6. 100 S. Ct. at 410.
7. Id. at 406-07. See United States v. O'Clair, 451 F.2d 485, 486 (1st Cir.
   1971), cert. denied, 409 U.S. 986 (1972); United States v. Tate, 419 F.2d 131, 132
   (6th Cir. 1969); Tyler v. Lark, 472 F.2d 1077, 1080 (8th Cir. 1973), cert. denied,
to satisfy the same standards of professional responsibility and to be subject to the same controls. The Court concluded that Pennsylvania was not required, by virtue of the operation of the Criminal Justice Act, to grant immunity from a state malpractice claim to Ackerman. In resolving this question, however, the Court noted that Pennsylvania and other states could decide to extend immunity to court-appointed attorneys on the basis of state law.

The *Ackerman* Court found that the rationale for granting judicial immunity to judges and prosecutors was not applicable to a malpractice suit against a court-appointed attorney. The Court reasoned that while the duty of judges and prosecutors is to represent the interests of society as a whole in the effective administration of the criminal justice system, the primary duty of the court-appointed attorney is to protect the interests of his indigent client, a duty which closely parallels that of privately retained counsel. Moreover, the Court asserted its belief that the fear of a malpractice suit would operate as an incentive for court-appointed attorneys to perform their defense functions competently and carefully.

Having reviewed the congressional intent embodied in the Criminal Justice Act, and having rejected the arguments advanced by Ackerman in support of judicially imposed immunity, the *Ackerman* Court reversed the decision of the Pennsylvania Supreme Court. The case was remanded to Pennsylvania state court for trial.

The Criminal Justice Act of 1964 provides that "[e]ach United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representa-

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8. 100 S. Ct. at 407.
9. Id. at 406. Pennsylvania has, since *Ferri v. Ackerman*, decided not to extend malpractice immunity to court-appointed attorneys. See *Reese v. Danforth*, 486 Pa. 479, 406 A.2d 735 (1979), where the Pennsylvania Supreme Court explicitly rejected malpractice immunity, reversing a lower court's decision to direct a verdict in favor of two court-appointed attorneys sued for negligent representation based upon such an immunity. The court stated that "[i]t is inconsistent with our belief that the quality and extent of the services or ethical responsibilities of public defenders and court-appointed counsel should turn on or be affected by the source of their compensation, or the economic status of their clientele." Id. at 488, 406 A.2d at 740. The Connecticut Supreme Court reached a similar decision in *Spring v. Constantino*, 168 Conn. 563, 362 A.2d 871 (1975). In reversing a trial court's dismissal of a malpractice action against a public defender on immunity grounds, the court systematically rejected arguments favoring either judicial or sovereign immunity, and held that no statutory immunity had been created. The court reasoned that "[t]he source of his compensation is different but otherwise the relation of attorney and client is the same when a public defender appears for one accused of crime as would be the relation between privately employed counsel and client." Id. at 575, 362 A.2d at 878. Presently, *Reese* and *Spring* are the only two discoverable cases wherein state courts have specifically dealt with the question of malpractice immunity of court-appointed attorneys as a matter of state law. Missouri has not yet decided the issue, but in light of the fact that the only states which have ruled on this question have explicitly rejected such an immunity, it appears unlikely that Missouri would extend judicial immunity to court-appointed attorneys.
10. 100 S. Ct. at 408-09.
tion for any person financially unable to obtain adequate representation . . . .”11 In 1970 the Act was amended to include the following provision:

Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both: (1) attorneys furnished by a bar association or a legal aid agency; or (2) attorneys furnished by a defender organization . . . . 12

The 1970 amendments were a reflection of a congressional belief that the spirit of the Act would best be served if private attorneys were compelled to represent indigent defendants. By providing reasonable compensation to court-appointed attorneys, Congress intended to minimize differences in the quality of representation between privately retained and court-appointed attorneys. As the United States Court of Appeals for the Sixth Circuit has noted, “It seems obvious that the Congressional purpose in adopting this statute was to seek to place indigent defendants as nearly as may be on a level of equality with nonindigent defendants in the defense of criminal cases.”13

One result of the Act and its amendments is that an attorney who is a member of the federal bar in his district may now be required to take a certain number of indigent defense cases.14 Although the 1970 amendments increased the maximum compensation amounts to be paid to court-appointed attorneys to $1,000 for felony cases and $400 for misdemeanors, the hourly rates of $30 per hour for time in court and $20 per hour for time out of court are not competitive with fees charged by many privately retained attorneys.15 Thus, it is likely that at least some private attorneys are reluctant to accept federal court appointments to represent indigent criminal defendants.

Missouri attorneys may also be required to represent indigent defendants in state criminal proceedings. The Missouri Public Defender Act provides that “[i]n all judicial circuits where there is no public defender, members of the private bar shall be appointed as required or deemed necessary.”16 Although this provision does not generally apply to attorneys living in large urban areas where there is a locally provided public defender office, it requires attorneys practicing in small towns and rural

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12. Id. (emphasis added).
13. United States v. Tate, 419 F.2d 131, 132 (6th Cir. 1969). This congressional intent was not formulated in a vacuum. Rather, the United States Supreme Court decision in Gideon v. Wainwright, 372 U.S. 335, 344 (1963), which guaranteed indigents the right to counsel in criminal cases, laid the groundwork for the statutory provisions which were enacted in 1964.
16. RSMo § 600.056 (1978) (emphasis added).
areas to accept cases as they arise. In addition, attorneys in urban areas may be required to represent indigent defendants if the court determines that "no circuit public defender or his assistant is available or is otherwise disqualified."^{17}

Prior to January 1, 1979, the \textit{Ackerman} holding would have had relatively little impact upon the Missouri practitioner. Missouri's "civil death" statute prohibited any person incarcerated in an institution within the state department of corrections from filing any civil suit in Missouri state courts.^{18} Although the "civil death" statute was held to be inapplicable to persons incarcerated in federal institutions,^{19} apparently no cases were brought wherein federally incarcerated prisoners filed state malpractice actions against their court-appointed counsel. The "civil death" statute was repealed, however, effective on January 1, 1979, and replaced by Missouri Revised Statutes section 561.016. The new statute provides that "[n]o person shall suffer any legal disqualification or disability because of a finding of guilt or conviction of a crime or sentence on his conviction . . . ."^{20}

With the repeal of the "civil death" statute, there is no statutory provision preventing persons incarcerated in Missouri institutions from filing malpractice suits against their court-appointed attorneys. Furthermore, Missouri has not yet adopted, by court decision or statute, an immunity to insulate federal or state court-appointed attorneys from these suits.^{21} This status of Missouri law, viewed in conjunction with the holding in \textit{Ackerman} that there is no federal malpractice immunity for court-appointed counsel, indicates that the malpractice liability exposure of Missouri attorneys appointed under either the Criminal Justice Act or the Missouri Public Defender Act has been expanded. Nevertheless, the convicted indigent in Missouri faces substantial obstacles before he can recover civil damages in a malpractice action from court-appointed counsel.

The first hurdle the indigent must overcome is hiring counsel to prosecute his malpractice claim. Since the prospective plaintiff previously has been found to be indigent so as to qualify for court-appointed counsel during his criminal trial, it is doubtful that he can afford to hire a private attorney on any basis other than a contingent fee arrangement. Attorneys quite naturally are reluctant to accept cases on a contingent fee basis, unless they believe there is a reasonable chance of winning such a suit. Thus, the indigent should present his civil attorney with a set of facts which indicate that court-appointed counsel was \textit{clearly} negligent in defending against

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  \item \textsuperscript{17} RSMo § 600.075 (1978).
  \item \textsuperscript{18} RSMo § 222.010 (1969) (replaced by RSMo § 561.016 (1978)). Federal and state habeas corpus proceedings could have been brought by any person incarcerated in a Missouri correctional institution notwithstanding RSMo § 222.010 (1969) (replaced by RSMo § 561.016 (1978)).
  \item \textsuperscript{19} Hill \textit{v.} Gentry, 280 F.2d 88, 89 (8th Cir. 1960).
  \item \textsuperscript{20} RSMo § 561.016 (1978).
  \item \textsuperscript{21} See note 9 \textit{supra}.
\end{itemize}
the criminal prosecution. As one writer has noted, "[I]t is doubtful that an indigent or his retained attorney would be willing to bring suit unless it was justified and likely to result in recovery."22

Assuming that the indigent is able to retain counsel, he must then establish a prima facie case of legal malpractice. In Missouri, there is little case law to support an indigent plaintiff's action for malpractice based on negligent representation by his court-appointed attorney; this lack of precedent is directly attributable to Missouri's long-standing "civil death" statute.23 Neither the Missouri Supreme Court nor the United States Court of Appeals for the Eighth Circuit have specifically stated that court-appointed attorneys will be held to the same standards of professional conduct as privately retained attorneys. The United States Court of Appeals for the Third Circuit, however, held in Moore v. United States24 that "[w]hether an indigent is represented by an individual or by an institution, he is entitled to legal services of the same level of competency as that generally afforded at the bar to fee-paying clients."25 Chief Justice Warren Burger adopted a similar position in a 1969 address to criminal defense attorneys. Chief Justice Burger stated that "the defense counsel who is appointed by the court or is part of a legal aid organization, has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer."26

Analogizing from the standards set forth in malpractice actions in Missouri against privately retained counsel, the indigent plaintiff will have the burden of proof on three elements: negligence, causation, and injury.27 Regarding the negligence element, the indigent plaintiff must establish that the court-appointed attorney failed to represent him competently, and that the attorney did not meet the standard of care exhibited by the reasonably prudent attorney.28 As one writer has stated, "The basic standard for determining liability of the attorney to his client for malpractice is one of reasonableness, and is the same whether a proceeding is

23. See note 18 and accompanying text supra.
24. 432 F.2d 730 (5th Cir. 1970). See also West v. Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973); Goodwin v. Cardwell, 432 F.2d 521, 522 (6th Cir. 1970); United States v. Marshall, 488 F.2d 1169, 1193 (9th Cir. 1973).
25. 432 F.2d at 736.
27. See Roehl v. Ralph, 34 S.W.2d 405, 409 (Mo. App., St. L. 1935).
28. See In re Thomasson's Estate, 946 Mo. 911, 918, 144 S.W.2d 79, 83 (1940). See also Gardine v. Cottrey, 360 Mo. 681, 695, 250 S.W.2d 731, 739 (En Banc 1950); Laughlin v. Boatmen's Nat'l Bank, 163 S.W.2d 761, 765 (Mo. 1942).
civil or criminal, or whether counsel has been retained or appointed."\textsuperscript{29} Missouri attorneys are, however, held to demanding standards within the threshold of "reasonableness." As the Missouri Supreme Court noted in \textit{In re Thomasson's Estate}, "The very nature of the lawyer's profession necessitates the utmost good faith toward his client and the highest loyalty and devotion to his client's interests."\textsuperscript{30}

In carrying his burden on the causation element, the indigent plaintiff may be required to show that "but for" the court-appointed attorney's negligence, the plaintiff would not have been convicted at his criminal trial.\textsuperscript{31} This burden of proof will be difficult to sustain, especially if the court-appointed attorney argues that the indigent was guilty of the charges which resulted in his conviction. Furthermore, Missouri courts will rigidly examine the causation element in a suit for malpractice. In \textit{Roehl v. Ralph},\textsuperscript{32} the St. Louis Court of Appeals held that where an attorney failed to file a timely answer for his client, causing default in a suit on a $6,000 note, the client was required to show in a malpractice action "that he actually had a valid defense to the note which he might have supported by substantial evidence so as to have required its submission to the jury . . . ."\textsuperscript{33} The court concluded that absent such a showing, the malpractice claim "would therefore fail for want of the proof of the essential element of casual connection."\textsuperscript{34}

In completing a prima facie case, the indigent must establish injury. Most indigents will not be able to prove a loss of job-related income. Consequently, absent a showing of physical injury or mental distress resulting from incarceration, the indigent plaintiff will have little basis on which to state a claim for compensatory damages.\textsuperscript{35}

Because of the dearth of Missouri case law in this area, the legal principles and standards of proof to be applied by Missouri courts in malpractice suits against court-appointed attorneys have yet to be established.

\begin{footnotesize}
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\item \textsuperscript{29} Mallen, \textit{The Court-Appointed Lawyer and Legal Malpractice—Liability or Immunity}, 14 AM. CRIM. L. REV. 59, 60 (1976). See also cases cited in Annot., 53 A.L.R.3d 791 (1978).
\item \textsuperscript{30} 346 Mo. 911, 918, 144 S.W.2d 79, 83 (1940).
\item \textsuperscript{31} Causation analysis in civil malpractice cases may not be appropriate in criminal malpractice cases because of the relevancy of the client's actual guilt. See Kaus & Mallen, \textit{The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice"}, 21 U.C.L.A. L. REV. 1191 (1974). The authors point out that "the question we ask in civil malpractice cases—But for the malpractice, would the client have had a better result?—needs rephrasing in the criminal context: Should he have fared better than he did?" \textit{Id.} at 1204.
\item \textsuperscript{32} 84 S.W.2d 405 (Mo. App., St. L. 1935).
\item \textsuperscript{33} \textit{Id.} at 409.
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{See} Underwood v. Woods, 406 F.2d 910 (8th Cir. 1969), where the trial court granted judgment notwithstanding the verdict to two Missouri attorneys sued for malpractice by their former client. In affirming, the United States Court of Appeals for the Eighth Circuit placed determinative weight upon the plaintiff's failure to prove injury. The court said that "[c]linchingly, there is no proof of injury to the plaintiff due to any negligence of . . . [the defendants]." \textit{Id.} at 916.
\end{itemize}
\end{footnotesize}
It is clear, however, that Missouri courts take an exacting look at suits for legal malpractice, and will not likely uphold jury verdicts rendered in a plaintiff's favor to compensate him for generalized grievances against his court-appointed attorney. As one court has noted, "We do not believe that a lawyer may be held to be negligent in representing his client simply because the client does not agree with the manner in which he prepares and presents his case, either upon trial or on appeal."36

Because of the difficulties facing indigents in malpractice suits, indigent plaintiffs may pursue other options to recover damages from court-appointed counsel. One alternative might be found in 42 U.S.C. § 1983. Generally, the statute provides that any person who causes a violation of constitutional rights under color of state law is liable to the injured party for either injunctive relief or monetary relief or both.37 The indigent plaintiff, to state a cause of action under section 1983, must establish three elements: (1) a deprivation of a constitutional right, (2) causation, and (3) a defendant acting "under color of state law."38

As to the first element, the sixth amendment, which guarantees all criminal defendants the right to counsel, may be a source for imposing liability. The Supreme Court has interpreted this amendment as requiring the states and the federal government to provide counsel to indigent defendants.39 Clearly, de minimis misconduct by the attorney will not rise to the level of a violation of constitutional rights.40 The sixth amendment is violated, however, when the court-appointed attorney is negligent in performing his duties.41 As one commentator has noted, "The point is

36. Cardarella v. United States, 258 F. Supp. 813, 816 (W.D. Mo. 1966) (habeas corpus), aff'd, 375 F.2d 222 (8th Cir. 1967). Within the Eighth Circuit, the court-appointed attorney is apparently benefited by a presumption of competency. See Farr v. United States, 314 F. Supp. 1125, 1132 (W.D. Mo. 1970) (habeas corpus) ("There is a presumption of competency of court-appointed counsel and a showing must be made before that presumption can be overcome."); aff'd, 436 F.2d 975 (8th Cir.), cert. denied, 402 U.S. 947 (1971); Taylor v. United States, 332 F.2d 918, 922 (8th Cir. 1964) (habeas corpus); Kilgore v. United States, 323 F.2d 369, 372 (8th Cir. 1963) ("The fact of conviction does not militate against the presumption of competency which attends every such appointment."); cert. denied, 376 U.S. 922 (1964).
37. 42 U.S.C. § 1983 (1976) 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.
39. See note 13 supra.
41. McQueen v. Swenson, 493 F.2d 207, 217 (8th Cir. 1974) (habeas corpus) (the court stated that "the failure to make a reasonable investigation may amount to ineffective assistance of counsel"); Brown v. Swenson, 487 F.2d 1236 (8th Cir. 1973) (habeas corpus).
elementary that the right to counsel is hollow when counsel is not effective." Thus, the indigent who has suffered conviction and incarceration due to the negligence of his court-appointed attorney may establish deprivation of a constitutional right based on a violation of his sixth amendment right to counsel, or on a violation of his fourteenth amendment right to due process of law.

Proving that the court-appointed attorney caused a violation of the indigent's constitutional rights, the second element of a section 1983 suit, will present many of the same difficulties for the indigent plaintiff as proving causation in a malpractice suit. The indigent plaintiff may be required to show, just as in a state malpractice claim, that "but for" the conduct of his court-appointed attorney the indigent's constitutional rights would not have been violated. Again, the indigent plaintiff may have to rebut the court-appointed attorney's argument that the indigent was guilty of the criminal charges, and that even the most competent criminal defense attorney could not have prevented the indigent's conviction.

The third element of a section 1983 cause of action, that a defendant acted under color of state law, would preclude section 1983 suits from being brought against private attorneys appointed under the authority of the Criminal Justice Act, because those attorneys act under color of federal law, not state law. Section 1983 on its face imposes the requirement that the defendant act "under color of state law," and the statute has uniformly been held not to confer the power to sue federal actors.

Although it might appear that attorneys appointed under a state statute or plan providing for the defense of indigents act under color of law,

43. See West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973), where the court found a violation of West's fourteenth amendment due process rights and affirmed the district court's grant of habeas corpus relief. The court stated:
[We] must apply the same standard, whether counsel be court-appointed or privately retained. From the facts of this case it is plain that West's lawyer fell far short of this standard. West might just as well have had no lawyer. By his own admission West's attorney conferred with West for no more than an hour prior to trial, and perhaps for little more than five minutes. He conducted no investigation. At the trial he called no witness for the defense. . . . We hold that the district court was correct in finding that West's legal representation was so inadequate as to deny his constitutional rights.
Id. at 1033-34. See also Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972) (habeas corpus). Whether the adequacy of counsel standard applied in habeas corpus cases is identical to that applied in § 1983 cases is unclear. There are no discoverable cases wherein an indigent has recovered money damages from his court-appointed attorney in a § 1983 suit, but if representation is so inadequate as to deny constitutional rights in the habeas corpus context, it would appear that such representation might also deny constitutional rights for purposes of a § 1983 suit.
44. See notes 31-34 and accompanying text supra.
state law, there is considerable authority for the proposition that they do not. The rationale for this position is that the court-appointed attorney's primary duty is to represent his client and to contest the state's criminal charges against his client. Thus, after the attorney is appointed, he acts in an independent professional capacity free from state control. As stated by the United States Court of Appeals for the Third Circuit in \textit{Waits v. McGowan}, \textsuperscript{47} "Once the public defender undertakes to represent a defendant he acts thereafter as any attorney practicing as a member of the bar of the court." \textsuperscript{48}

The issue of whether court-appointed attorneys act under color of state law has arisen several times in courts sitting within the jurisdiction of the United States Court of Appeals for the Eighth Circuit. These courts have consistently held that court-appointed attorneys do \emph{not} act under color of state law. \textsuperscript{49} This position was endorsed by the federal court of appeals in \textit{Barnes v. Dorsey}. \textsuperscript{50} In \textit{Barnes}, the United States Court of Appeals for the Eighth Circuit affirmed the dismissal of a section 1983 action brought by an indigent plaintiff against an attorney appointed by a Missouri court to represent the indigent in a burglary case. The court of appeals approved the trial court's ruling that the attorney "'acted only in his performance of his duties as Court appointed counsel in representing plaintiff . . . . Such actions are not performed under the color of state law.'" \textsuperscript{51} This view was given further support in \textit{Harkins v. Eldredge}, \textsuperscript{52} where the same court affirmed the trial court's dismissal of an indigent plaintiff's section 1983 action against his attorney for allegedly mishandling a variety of legal matters. The court stated that "'[t]he conduct of counsel, either retained or appointed, in representing clients does not constitute action under color of state law for purposes of a § 1983 violation.'" \textsuperscript{53}

Although the Eighth Circuit's position represents the majority view on this issue, there is authority in decisions of the United States Courts of


\textsuperscript{47} 516 F.2d 203 (3d Cir. 1975).

\textsuperscript{48} Id. at 208.


\textsuperscript{50} 480 F.2d 1057 (8th Cir. 1973).

\textsuperscript{51} Id. at 1061.

\textsuperscript{52} 505 F.2d 802 (8th Cir. 1974). See also \textit{Glasspoole v. Albertson}, 491 F.2d 1090, 1091 (8th Cir. 1974).

\textsuperscript{53} 505 F.2d at 803.
Appeals for the Third and Seventh Circuits that court-appointed attorneys do act under color of state law. Nevertheless, in all of these cases, the courts have dismissed the indigent plaintiffs' actions on the ground that court-appointed attorneys have absolute immunity from section 1983 suits. For example, in Robinson v. Bergstrom, an indigent plaintiff brought a section 1983 action alleging that his court-appointed attorney was negligent in pursuing an appeal from a criminal conviction. The United States Court of Appeals for the Seventh Circuit stated that “[t]he fact that the Public Defender is a state instrumentality is sufficient to show state action.” The court, however, dismissed the lawsuit, holding that court-appointed attorneys are entitled to absolute immunity from section 1983 suits. The rationale for this view is that public defenders and court-appointed attorneys need immunity to exercise their professional discretion freely, an argument which has traditionally been made in support of immunity for judges and prosecuting attorneys.

Even if the indigent plaintiff could prove that the court-appointed attorney acted under color of state law and that the attorney is not entitled to absolute immunity from a section 1983 suit, there is considerable authority for the proposition that a claim for malpractice is, itself, not cognizable under section 1983. In Ehn v. Price, the United States District Court for the Northern District of Illinois dismissed an action for damages against a court-appointed attorney who had been appointed by an Illinois state court to appeal the plaintiff's criminal conviction. The federal district court found that the plaintiff's allegation of his attorney's incompetency reveals that plaintiff's alleged claim is for malpractice against his appointed counsel . . . . Clearly, such a claim is not based upon a deprivation of a right secured under 42 U.S.C. § 1983 and appears to be no more than a tort claim for malpractice which

55. 579 F.2d 401 (7th Cir. 1978).
56. Id. at 408.
57. Id. at 411.
60. 372 F. Supp. 151 (N.D. Ill. 1974).
absent diversity of citizenship, should not be entertained in a federal district court. 61

Given the current state of the law, section 1983 offers few advantages to the indigent plaintiff, when compared to a state malpractice claim. 62 There is reason to believe that the law in this area may change. 63 At present, however, it appears that indigent plaintiffs will have little success in

61. Id. at 153.
62. One major advantage of a § 1983 action is that attorney's fees are recoverable by virtue of 42 U.S.C. § 1988 (1976), whereas attorney's fees are not generally recoverable in a civil malpractice action. Section 1983 petitions may also be filed pro se and without payment of a filing fee if the plaintiff is indigent. Additionally, diversity of citizenship is not required in a § 1983 action, nor is the claim required to meet the $10,000 jurisdictional limitation if the jurisdictional counterpart of § 1983 is invoked. See 28 U.S.C. § 1343(3)-(4) (1976). Although the § 1983 plaintiff is entitled to nominal damages once deprivation of plaintiff's constitutional rights has been established, the United States Supreme Court has held that compensatory damages should not be awarded in a procedural due process case absent plaintiff's showing of compensable injury. See Carey v. Piphus, 435 U.S. 247, 264 (1978). For an excellent article regarding damages available under § 1983, see Love, Damages: A Remedy for the Violation of Constitutional Rights, 67 CALIF. L. REV. 1242 (1979).
63. The United States Courts of Appeals for the Third and Seventh Circuits have held that attorneys who work for a state's public defender office do act under color of state law when they are appointed to represent indigents in federal criminal trials. See note 54 and accompanying text supra.

Regarding the "under color of state law" requirement of § 1983, a distinction between private court-appointed attorneys and public defenders seems reasonable. Of critical importance is the fact that the state pays the salaries of its public defender attorneys and controls their assignments and workload. A similar argument also might apply where a legal aid society is under contract with the state to provide attorneys to represent indigents. See United States ex rel. McClain v. New York, 356 F. Supp. 988, 991 (E.D.N.Y. 1973), where the court held that "[s]ince it [Legal Aid Society] is under contract with a subdivision of the state to supply attorneys, it is acting under color of state law even though its individual attorney-employees are not." This holding was later reversed in Wallace v. Kern, 481 F.2d 621 (2d Cir. 1973).

Moreover, it appears that the basis for the distinction between private and public defender attorneys appointed under the Criminal Justice Act disappears if a state court appoints an attorney to represent an indigent in a state criminal trial. In the latter event, the state makes the appointment, pays for defense fees, and pays for necessary investigative work. See Bines, Remedyi ng Ineffective Representation in Criminal Cases: Departures from Habeas Corpus, 59 VA. L. REV. 927, 981 (1973) ("Surely the state fosters or encourages ineffective representation provided by appointed counsel and public defenders. Not only does the state pay for the defense, including all necessary support service; in fact, the accused has no right to choose the lawyer who represents him."). All of these factors support a finding of "under color of state law" when the indigent sues his court-appointed attorney under § 1983, despite the weight of authority to the contrary.

Furthermore, there is some reason to believe that the § 1983 immunity which has protected court-appointed attorneys, especially in the Third and Seventh Circuits, will be eroded. The Ackerman holding removes any federal malpractice immunity for court-appointed attorneys, and distinguishes the nature of the court-appointed attorney's responsibilities from those of other court officers. Given the Supreme Court's unwillingness to extend an absolute federal immunity from malpractice actions to court-appointed attorneys, and analogizing from the Ackerman rationale, it seems doubtful that the Court would uphold the extension of § 1983 immunity to court-appointed attorneys.
section 1983 suits against their court-appointed attorneys, given the unanimity among the eleven circuits in denying these claims.

As a final option, an indigent may institute disciplinary proceedings against his court-appointed attorney. The Missouri Supreme Court has recently held that "[n]eglect of duty to clients is sufficient for disciplinary action . . . . Discipline of an attorney may be effected by disbarment, suspension or censure."64 In contrast to a malpractice action or section 1983 suit, disciplinary proceedings do not offer the possibility of monetary damage awards to the indigent; such proceedings may, however, afford the indigent an opportunity to vent the anger and frustration that he may feel, and clearly, suspension or disbarment would penalize the court-appointed attorney by removing his means of livelihood.

The sanction of suspension or disbarment will not be imposed on the court-appointed attorney absent strong proof of negligence or misconduct. For example, in *In re Eldredge*,65 the Missouri Supreme Court reprimanded a court-appointed attorney who failed to file a timely appellate brief and petition for writ of certiorari, and who allegedly "failed to meet appointments made with appellant and failed to answer correspondence received from appellant."66 The court reasoned that "[h]aving considered the facts and circumstances of respondent's neglect . . . ., we conclude that justice would be served by administering a reprimand."67 As in legal malpractice suits, the Missouri Supreme Court apparently takes an exacting look at disciplinary proceedings instituted by indigents against their court-appointed attorneys.68 The standard to be applied in measuring an attorney's conduct for disciplinary purposes was set forth in *In re Kaemmerer*, where the Missouri Supreme Court stated that "[a]n attorney is not to be disciplined by the court though the purpose of his employment should fail if he has in good faith used in behalf of his client, such knowledge and skill as ordinarily had by attorneys."69

By denying federal immunity to attorneys appointed under the Criminal Justice Act, *Ferri v. Ackerman* improves the prospects for indigents bringing malpractice actions against their court-appointed attorneys. Given the substantial obstacles in proving malpractice in Missouri courts, however, it seems unlikely that court-appointed attorneys will be seriously

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64. *In re Alpers*, 574 S.W.2d 427, 428 (Mo. En Banc 1978). The disciplinary rules regarding Missouri attorneys are set forth in Mo. Sup. Ct. R. 4, DR 5.01-25. Institution of disciplinary proceedings does not preclude a later malpractice suit or § 1983 action. See Mo. Sup. Ct. R. 4, DR 5.25; *Janssen v. Guaranty Land Title Co.*, 571 S.W.2d 702, 706 (Mo. App., St. L. 1972). The indigent plaintiff may face collateral estoppel problems, however, if he uses more than one post-conviction remedy.
65. 530 S.W.2d 221 (Mo. En Banc 1975).
66. *Id.* at 222.
67. *Id.*
68. *See* note 36 and accompanying text *supra*.
69. 178 S.W.2d 474, 479 (Mo. App., St. L. 1944). See also *In re Oliver*, 285 S.W.2d 648, 655 (Mo. En Banc 1956) (misuse of funds held in fiduciary capacity was grounds for attorney's permanent disbarment).