CLARKSVILLE CITY COUNCIL
SPECIAL SESSION
APRIL 29, 2021

IMMEDIATELY FOLLOWING EXECUTIVE SESSION

AGENDA

1) CALL TO ORDER *Mayor Joe Pitts*

2) PRAYER *Councilperson Richard Garrett*

3) PLEDGE OF ALLEGIANCE *Councilperson Stacey Streetman*

4) ATTENDANCE *City Clerk*

5) HIRING OUTSIDE COUNSEL

1. **ORDINANCE 93-2020-21** (First Reading; Postponed April 1st) Amending the Official Code relative to hiring outside counsel *Councilperson Allen*

6) ADJOURNMENT

ORDINANCE 93-2020-21

AN ORDINANCE AMENDING THE OFFICIAL CODE OF THE CITY OF CLARKSVILLE , TENNESSEE, TITLE 6, "FINANCE AND TAXATION," CHAPTER 5, "BUDGETS, IMPLEMENTATION, AND ADMINISTRATION," SECTION 6-514(B), "INTERNAL SERVICE FUND," RELATIVE TO HIRING OUTSIDE COUNSEL

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CLARKSVILLE, TENNESSEE:

That the Official Code of the City of Clarksville, Tennessee, is hereby amended by deleting the existing language in Section 6-514(b) in its entirety and by substituting instead the following:

~~(b) The city attorney, and his/her assistants, shall be responsible for claims and litigation management, under the supervision of the city council, not otherwise inconsistent with his duties as city attorney as provided in the City Charter, or with state law of general application, to include the Tennessee Rules of Professional Conduct for attorneys. The city attorney shall have full authority regarding the determination as to whether to retain outside counsel, and the selection of outside counsel, with regard to all legal matters involving the city, to include defense of claims made or threatened against the city, and the city attorney shall make reports to the city council regarding same from time to time, or as otherwise directed by the mayor or city council.~~

(b) The city attorney, and his/her assistants, shall be responsible for claims and litigation management, under the supervision of the city council, not otherwise inconsistent with his/her duties as city attorney as provided in the City Charter, or with state law of general application, to include the Tennessee Rules of Professional Conduct for attorneys. Should the city attorney deem it necessary to retain outside counsel, the city attorney shall submit a request to the city council, which request shall state: the grounds for retaining outside counsel; the proposed scope of the outside counsel's employment; the city attorney's best estimate of the total cost of retaining outside counsel for the grounds stated; and the city attorney's best estimate of the total liability exposure presented to the City by any such matter in which outside counsel is involved. The city council, by majority vote, shall have full authority regarding the determination as to whether to retain outside counsel, and the selection of outside counsel, with regard to all legal matters involving the city, to include defense of claims made or threatened against the city. The city council, by majority vote, shall have full authority to apportion funding for retaining outside council. Should the cost of any such outside council retained exceed the estimate provided in the city attorney's request, the city attorney shall submit a report to the city council detailing the reasons for the cost overrun and the city attorney's best estimate of the total additional cost of such outside council. Additional funds for outside council shall be apportioned by the city council only after the city attorney submits such report and only upon majority of the city council. The city attorney shall provide the city council with a monthly report on the status of every matter in which outside council is involved, which report shall include: a running total of the cost of the outside counsel for each such matter; the city attorney's best estimate of the total liability exposure presented to the City by any such matter; and the city attorney's best estimate of the likelihood of success of each such matter.

POSTPONED: April 1, 2021 to Special Session or May 6, 2021
FIRST READING:
SECOND READING:
EFFECTIVE DATE:

That the Official Code of the City of Clarksville, Tennessee, is hereby amended by deleting the existing language in Section 6-514(b) in its entirety and by substituting instead the following:

(b) The city attorney, and his/her assistants, shall be responsible for claims and litigation management, under the supervision of the city council, not otherwise inconsistent with his duties as city attorney as provided in the City Charter, or with state law of general application, to include the Tennessee Rules of Professional Conduct for attorneys. The city attorney shall have full authority regarding the determination as to whether to retain outside counsel, and the selection of outside counsel, with regard to all legal matters involving the city, to include defense of claims made or threatened against the city, and the city attorney shall make reports to the city council regarding same from time to time, or as otherwise directed by the mayor or city council.

Amendment broken down into Sections to review.

Section 1

(b) The city attorney, and his/her assistants, shall be responsible for claims and litigation management, under the supervision of the city council, not otherwise inconsistent with his/her duties as city attorney as provided in the City Charter, or with state law of general application, to include the Tennessee Rules of Professional Conduct for attorneys.

- This is for the original ordinance. Did not see the need to change this but is up for discussion.

Section 2

Should the city attorney deem it necessary to retain outside counsel (could add an amount per case here) (If the city attorney needs additional funding……), the city attorney shall submit a request to the city council, which request shall state: (Example of the request that could be used are in the information packets provided Exhibit A)

- the grounds for retaining outside counsel; (ie: expertise, specialty, needed due for understaffing) (a suggestion would be to work with the purchasing department to ensure that we are practicing the best contracting procedures to ensure the City's best interests are a priority)

- the proposed scope of the outside counsel's employment (what will be their scope of practice as it pertains to our city and/or a particular lawsuit, Examples: Consulting, writing opinion letters, litigation for XYZ, preparing withness, What exactly are they being hired to do? What are authorities are we giving the outside counsel? Can they discuss a settle on our behalf, can they appear in court on our behalf or would that be an additional apportionment?)

- the city attorney's best estimate of the total cost of retaining outside counsel for the grounds stated; (how many hours will they be needed or retained for over what period of time, hourly rate and an estimated total cost. Example: a projection of 40 hours over the next 3 months at $450 per hour for a total projected cost $18,000)

- and the city attorney's best estimate of the total liability exposure presented to the City by any such matter in which outside counsel is involved. (What are we looking at with this lawsuit, what is a best estimate of where this case is headed, Is the internal costs starting to out weight a settlement, what are our options)

Section 3

The city council, by majority vote, shall have full authority regarding the determination as to whether to (A development of a city contract agreement for the outside attorney would be beneficial, this could be with the help of our purchasing department to ensure that we are contracting in a way that is not open-ended and unregulated)

- retain outside counsel,
- and the selection of outside counsel, with regard to all legal matters involving the city (this sentence may need changed and help is requested on changing the verbiage)
- to include defense of claims made or threatened against the city (this was added because there may be matter or threat against the city that the council would rather settle than to hire outside attorneys, the cost analysis and projected liability exposure would be key to this piece. The verbiage could change to reflect that more appropriately)

Section 4

The city council, by majority vote, shall have full authority to apportion funding for retaining outside council. (this is just an option, I think that if we give an allocation per case and then the City Attorney comes to us for more once that's depleted we should be able to apportion to prevent a run off of outside attorney fees)

Section 5

Should the cost of any such outside council retained exceed the estimate provided in the city attorney's request, the city attorney shall submit a report to the city council detailing the reasons for the cost overrun and the city attorney's best estimate of the total additional cost of such outside council. (this has been added because there should never be a surprise. In my opinion, there is no reason that we should have a bill for our outside attorney fees that went over the budgeted amount before it came back to the City Council for further allocation of funding. Example: If we have contracted with an outside attorney for 40 hours' worth of work and city attorney is going to need another

40 hours work that should be planned and approved by the City Council prior to the outside attorney working the hours. Verbiage can change to better reflect this intent)

Section 6

Additional funds for outside council shall be apportioned by the city council only after the city attorney submits such report and only upon majority of the city council. (once again there should never be a budget amendment needed because we over spent. It should be done prior to and planned accordingly)

The city attorney shall provide the city council with a monthly report on the status of every matter in which outside council is involved, which report shall include: (this is for data collection and for the city council to be able to stay abreast on each case that outside counsel is being used in. The report would not simply the funding but a short summary of the following;)

- a running total of the cost of the outside counsel for each such matter; (This is so that we stay abreast of the total cost that the city has spent in total to be able to alleviate sunk-cost bias and help us evaluate whether or not we are headed in the wrong direction. Example: Are we at the point where we are spending more on outside attorney fees than then it would cost to do something different?)

- the city attorney's best estimate of the total liability exposure presented to the City by any such matter; (What are our options in this case? Could we do a settlement offer or do we need to continue on this path? How much longer will we need outside counsel and are there any other options? Ex: hiring a staff attorney because this may take longer than expected and it would cost the city less. Cost-effectiveness vs. impact.)

- and the city attorney's best estimate of the likelihood of success of each such matter. What is our success rate vs the outside attorney fees. Will we spend more on attorney fees than that we would get in the lawsuit or that we would have to pay in the lawsuit? Would settling save us money in that long run rather than continuing to fight the case?

CITY OF CLARKSVILLE

YEAR-TO-DATE BUDGET REPORT

FOR 2020 13

	ORIGINAL APPROP	REVISED BUDGET	YTD EXPENDED	MTD EXPENDED	ENCUMBRANCES	AVAILABLE BUDGET	PCT USED
2230 Self-Insurance Fund							
GLIAB GENERAL LIABILITY							
4310 Official/Administrative	5,000	11,000	10,026.98	.00	.00	973.02	91.2%
4330 Other Professional Services	0	2,000	.00	.00	.00	2,000.00	.0%
4333 Legal Services	425,000	590,000	724,621.78	139,628.00	.00	-134,621.78	122.8%
4520 Premiums/Claims Paid	150,000	173,000	194,506.03	39,383.00	.00	-21,506.03	112.4%
TOTAL GENERAL LIABILITY	580,000	776,000	929,154.79	179,011.00	.00	-153,154.79	119.7%
TOTAL Self-Insurance Fund	580,000	776,000	929,154.79	179,011.00	.00	-153,154.79	119.7%
GRAND TOTAL	580,000	776,000	929,154.79	179,011.00	.00	-153,154.79	119.7%

** END OF REPORT - Generated by Matta, Laurie **

CITY OF CLARKSVILLE

YEAR-TO-DATE BUDGET REPORT

FOR 2021 13

	ORIGINAL APPROP	REVISED BUDGET	YTD EXPENDED	MTD EXPENDED	ENCUMBRANCES	AVAILABLE BUDGET	PCT USED
2230 Self-Insurance Fund							
GLIAB GENERAL LIABILITY							
4310 Official/Administrative	12,000	12,000	8,090.75	.00	.00	3,909.25	67.4%
4333 Legal Services	500,000	500,000	162,513.92	.00	38,360.90	299,125.18	40.2%
4520 Premiums/Claims Paid	300,000	300,000	104,143.86	.00	.00	195,856.14	34.7%
TOTAL GENERAL LIABILITY	812,000	812,000	274,748.53	.00	38,360.90	498,890.57	38.6%
TOTAL Self-Insurance Fund	812,000	812,000	274,748.53	.00	38,360.90	498,890.57	38.6%
GRAND TOTAL	812,000	812,000	274,748.53	.00	38,360.90	498,890.57	38.6%

** END OF REPORT - Generated by Matta, Laurie **

Tennessee Cities by Population

The data is from the US Census. Below are 425 Tennessee cities ranked 1 through 415 (*there are some ties*). You can copy and paste this list directly into your favorite spreadsheet program. Don't you just adore lovely numbers listed nicely in columns & rows? We do!

Looking for a list of cities, counties or zips in Tennessee?
Get a spreadsheet with the most current population, income, housing demographics and more for all cities, counties or zips in Tennessee. Learn more.

Rank	City	Population
1	Nashville-Davidson	687,488
2	Memphis	651,932
3	Knoxville	186,173
4	Chattanooga	179,690
5	Clarksville	152,934
6	Murfreesboro	136,366

7	Franklin	77,939
8	Jackson	66,870
9	Johnson City	66,515
10	Bartlett	59,102
11	Hendersonville	57,083
12	Kingsport	53,376
13	Collierville	50,086
14	Smyrna	49,552
15	Cleveland	44,595
16	Brentwood	42,407
17	Spring Hill	39,711
18	Germantown	39,193
19	Columbia	38,380
20	Gallatin	38,156
21	La Vergne	35,411
22	Mount Juliet	34,377
23	Cookeville	33,454
24	Lebanon	33,159
25	Morristown	29,782
26	Oak Ridge	29,037
27	Maryville	28,974
28	Bristol	26,852
29	Farragut	22,631
30	Shelbyville	21,591
31	East Ridge	21,168
32	Tullahoma	19,852
33	Springfield	17,092

34	Goodlettsville	16,870
35	Sevierville	16,743
36	Dyersburg	16,476
37	Dickson	15,447
38	Greeneville	14,942
39	Athens	13,851
40	McMinnville	13,695
41	Elizabethton	13,577
42	Soddy-Daisy	13,398
43	Portland	12,729
44	Lakeland	12,606
45	Middle Valley	12,061
46	Lewisburg	11,910
47	White House	11,843
48	Red Bank	11,745
49	Arlington	11,697
50	Crossville	11,545
51	Collegedale	11,275
52	Seymour	11,193
53	Lawrenceburg	10,877
54	Manchester	10,721
55	Millington	10,645
56	Martin	10,635
57	Union City	10,424
58	Hartsville/Trousdale County	10,231
59	Paris	10,043

60	Clinton	9,964
61	Brownsville	9,647
62	Alcoa	9,561
63	Atoka	9,241
64	Bloomingdale	9,175
65	Lenoir City	9,162
66	Fairfield Glade	8,985
67	Covington	8,857
68	Fairview	8,762
69	Winchester	8,706
70	Signal Mountain	8,539
71	Nolensville	8,390
72	Jefferson City	8,237
73	Humboldt	8,169
74	Harrison	8,121
75	South Cleveland	8,056
76	Ripley	7,947
77	Oakland	7,893
78	Lexington	7,848
79	Milan	7,672
80	Pulaski	7,643
81	Dayton	7,344
82	Fayetteville	7,034
83	Savannah	6,947
84	La Follette	6,857
85	Newport	6,848
86	Greenbrier	6,818

87	Church Hill	6,667
88	Green Hill	6,563
89	Lynchburg, Moore County	6,378
90	Millersville	6,350
91	Henderson	6,289
92	Pigeon Forge	6,229
93	Harriman	6,126
94	Munford	6,034
95	Kingston	5,927
96	Erwin	5,921
97	Eagleton Village	5,903
98	Sweetwater	5,873
99	Loudon	5,747
100	Tellico Village	5,671
101	Thompson's Station	5,456
102	Jonesborough	5,427
103	Rockwood	5,423
104	McKenzie	5,328
105	Mount Carmel	5,293
106	Lafayette	5,171
107	Dunlap	5,103
108	Bolivar	5,031
109	Sparta	4,937
110	Madisonville	4,920
111	Mount Pleasant	4,847
112	Smithville	4,711

113	Ashland City	4,680
114	Spurgeon	4,666
115	Whiteville	4,501
116	Coopertown	4,496
117	Pleasant View	4,480
118	Oliver Springs	4,468
119	Oak Grove CDP	4,458
120	Lake Tansi	4,441
121	Rogersville	4,437
122	Selmer	4,341
123	Harrogate	4,330
124	Tiptonville	4,272
125	Algood	4,228
126	Trenton	4,217
127	Medina	4,209
128	Louisville	4,133
129	Waverly	4,117
130	Livingston	4,032
131	Gatlinburg	4,004
132	Huntingdon	3,845
133	Oneida	3,700
134	Hohenwald	3,673
135	Wildwood Lake	3,639
136	Camden	3,582
137	Christiana	3,580
138	Unicoi	3,556
139	Centerville	3,540

140	White Bluff	3,517
141	Etowah	3,468
142	Jasper	3,403
143	Newbern	3,314
144	Somerville	3,238
145	Colonial Heights	3,177
146	Dandridge	3,157
147	Shackle Island	3,112
148	Blountville	3,102
149	Bean Station	3,086
150	Decherd	3,058
151	South Pittsburg	3,051
152	Dresden	2,940
153	Brighton	2,928
154	Westmoreland	2,874
155	Monterey	2,840
156	Dyer	2,791
157	Park City	2,790
158	Woodbury	2,784
159	Sale Creek	2,781
160	Waynesboro	2,745
161	Kingston Springs	2,741
162	Bells	2,736
163	New Tazewell	2,730
164	Tusculum	2,726
165	Apison	2,723

166	Clifton	2,666
167	Pegram	2,597
168	Coalfield	2,580
169	Pine Crest	2,541
170	Maynardville	2,526
171	Sewanee	2,505
172	Walnut Hill	2,481
173	Carthage	2,466
174	Tazewell	2,451
175	Caryville	2,450
176	Rural Hill	2,441
177	Gruetli-Laager	2,429
178	Hunter	2,390
179	Greenfield	2,336
180	Mascot	2,310
181	Adamsville	2,307
182	South Fulton	2,305
183	Pikeville	2,286
184	Lake City	2,283
185	Mosheim	2,273
186	Parsons	2,267
187	Fairmount	2,245
188	Jacksboro	2,244
189	Ridgetop	2,230
190	Surgoinsville	2,223
191	Central	2,217
192	Spring City	2,199

193	Alamo	2,187
194 TIE	Blaine and Halls	2,182
195	Jellico	2,170
196	Piperton	2,142
197	White Pine	2,139
198	Unionville	2,109
199	Dover	2,071
200	Bluff City	2,062
201	Mountain City	2,058
202	Lakesite	2,028
203	New Johnsonville	2,027
204	East Cleveland	2,019
205	Estill Springs	1,978
206	Lookout Mountain	1,965
207	Mowbray Mountain	1,961
208	Jamestown	1,949
209	Walden	1,948
210	Hopewell	1,900
211	Plainview	1,872
212	Celina	1,848
213	Kimball	1,841
214	Monteagle	1,836
215	Olivet	1,815
216	Cross Plains	1,801
217	Whitwell	1,798
218	Englewood	1,790

219	Ridgely	1,767
220	Burns	1,761
221	Loretto	1,756
222	Charlotte	1,736
223	Graysville	1,722
224	Troy	1,703
225	McEwen	1,687
226	Watertown	1,684
227	Vonore	1,677
228	Three Way	1,676
229	Erin	1,654
230	Rutledge	1,587
231	Gordonsville	1,581
232	Banner Hill	1,576
233	Tracy City	1,561
234	Chapel Hill	1,551
235	Baxter	1,546
236	Red Boiling Springs	1,536
237	Benton	1,526
238	Decatur	1,501
239	Crump	1,500
240	Huntsville	1,494
241	Sneedville	1,486
242	Powells Crossroads	1,483
243	Spencer	1,480
244	Bon Aqua Junction	1,471

245	New Market	1,468
246	Rockvale	1,467
247	Gleason	1,464
248	Fall Branch	1,403
249	Ardmore	1,386
250	Obion	1,339
251	Fincastle	1,333
252	Tennessee Ridge	1,322
253	Cornersville	1,319
254	Cowan	1,313
255	Roan Mountain	1,301
256	New Union	1,283
257	Falling Water	1,280
258	Greenback	1,276
259	Bruceton	1,273
260	Norris	1,272
261	South Carthage	1,270
262	Midtown	1,261
263	Mason	1,242
264	Bradford	1,238
265	Telford	1,227
266	Linden	1,199
267	Kenton	1,188
268	Lobelville	1,182
269	Lyles	1,153
270	Lone Oak	1,126
271	Rutherford	1,116

272	Wildwood	1,110
273	Riceville	1,107
274	Collinwood	1,093
275	Altamont	1,078
276	Sharon	1,067
277	Decaturville	1,053
278	Atwood	1,047
279	Wartburg	1,045
280	Dodson Branch	1,044
281	Winfield	1,035
282	Gray	1,016
283	Grimsley	1,013
284 TIE	Alexandria and Henning	1,002
285	Byrdstown	999
286	Niota	981
287	Orlinda	959
288	Tellico Plains	952
289	Scotts Hill	951
290	St. Joseph	943
291	Coalmont	940
292	Eastview	935
293	Clarkrange	932
294	Gainesboro	926
295	Walnut Grove CDP	925
296	Helenwood	918
297	Michie	916

298	Eagleville	908
299	Rossville	906
300	Middleton	891
301	Philadelphia	882
302	Maury City	861
303	Bulls Gap	856
304	Ethridge	853
305	Friendsville	847
306	New Hope	840
307	Luttrell	830
308	Huntland	818
309	Bethel Springs	806
310	Lakewood Park	795
311	Hollow Rock	779
312	Trezevant	772
313	Rockford	759
314 TIE	Ridgeside and Ooltewah	756
315	Charleston	745
316	Petros	715
317	Gallaway	708
318	Palmer	696
319	Crab Orchard	686
320	Moscow	685
321	Chesterfield	683
322	Petersburg	680
323	Puryear	677

324	Friendship	664
325	Big Sandy	663
326	Wartrace	661
327	Summertown	651
328	Gates	645
329	Flintville	641
330	Doyle	626
331	Allardt	621
332	Mooresburg	611
333	Adams	602
334	Pittman Center	595
335	Calhoun	586
336	Henry	577
337 TIE	Saltillo and Gadsden	574
338	Clarksburg	571
339	Baneberry	568
340	Andersonville	560
341	Morrison	551
342	Bell Buckle	544
343	Beersheba Springs	543
344	Minor Hill	536
345	Trimble	523
346	Wrigley	498
347	Fairgarden	493
348	Ducktown	478
349	Baileyton and Pleasant Hill	462

TIE		
350	Gibson	460
351	Elkton	456
352	Williston	449
353	Elgin	448
354	Bransford	444
355	Stanton	438
356	Gilt Edge	436
357	Finger	430
358	Castalian Springs	428
359 TIE	Hornbeak and Sunbright	426
360	Copperhill	417
361	Toone	413
362	Watauga	411
363	Pelham	408
364	Ramer	396
365	Grand Junction	392
366	McLemoresville	381
367	Hillsboro	380
368	Liberty	374
369	Sardis	366
370	Guys	360
371	Townsend	358
372	Walland	357
373	Rives	356
374	Vanleer and Bethpage	355

TIE		
375	Cedar Hill	353
376	Burlison	348
377	Centertown	341
378	Flat Top Mountain	338
379 TIE	Cumberland City and Cumberland Gap	326
380 TIE	Dowelltown and Woodland Mills	323
381	Cottontown	320
382	Garland	316
383	Stantonville	312
384	Hornsby	311
385	Lynnville	310
386	Milledgeville	297
387	Samburg	296
388	Braden	294
389 TIE	Parrottsville and Medon	279
390	New Deal	273
391	Oakdale	263
392	Walterhill	261
393	Parker's Crossroads	239
394	Darden	226
395	Auburntown	224
396	Graball	217
397	Yorkville	215
398	Oak Grove	201

399	Walnut Grove	176
400	Mitchellville	175
401	Enville	168
402	Iron City	167
403	Bowman	156
404	Slayden	147
405	Normandy	145
406	Fairfield	142
407	Silerton	132
408	Saulsbury	108
409	Viola	105
410	Robbins	100
411	Hickory Valley	90
412	La Grange	81
413	Eva	79
414	Cottage Grove	77
415	Orme	73

The table above displays the most recent population estimates data for all cities where data are available from the following datasets:

- United States Census Bureau. Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2019. U.S. Census Bureau, Population Division. Web. May 2020. http://www.census.gov/.
- United States Census Bureau. B01001 SEX BY AGE, 2019 American Community Survey 5-Year Estimates. U.S. Census Bureau, American Community Survey Office. Web. 10 December 2020. http://www.census.gov/.

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AGENDA ID: VI.d

OAK RIDGE CITY COUNCIL MEMORANDUM

DATE: December 14, 2020

TO: Mark S. Watson, City Manager

FROM: Ken Krushenski , Legal City Attorney

SUBJECT: Amendment to Professional Services Agreement (FY2019-078) with Burr & Forman, LLP-Special Counsel-Tennessee Riverkeeper Inc. v. City of Oak Ridge (U.S. District Court for the Eastern District, Northern Division, Civil Action No. 3:28-CV-00374)

SUPPORTING DEPARTMENT: Public Works

Introduction

An item for the agenda is a resolution to amend the Professional Services Agreement (FY2019-078) with Burr & Forman, LLP, Nashville, Tennessee, to increase the compensation by $50,000.00.

Funding

Funding is available in the Waterworks Fund.

Background

On or about November 6, 2018, the City was served with a copy of the above-captioned lawsuit (Tennessee Riverkeepers, Inc. v. City of Oak Ridge). It was filed as a "citizen" lawsuit under the provisions of the federal Clean Water Act by a non-profit Alabama corporation authorized to operate in the State of Tennessee. The plaintiff alleges the City has violated the provisions of the Clean Water Act by discharging pollutants into the waters of the United States.

Since environmental pollution claims are excluded from the City's liability insurance policy, the City entered into a Professional Services Agreement with Burr & Forman, LLP, to provide consultation and legal representation services in this lawsuit. This law firm has represented other municipalities and private industry in claims made by the same plaintiff.

The agreement was originally entered into under the City Manager's signature authority in an amount not to exceed $25,000.00. Additional compensation was approved by City Council through Resolution 3-20-2019 and Resolution 4-35-2020 for a total not-to-exceed amount of $125,000.00. Settlement negotiations between the plaintiff and the City has not been productive and it will be necessary to continue with pre-trial discovery. As a result of the COVID-19 crisis and the retirement of Judge Mattice, this case has been assigned to Judge Varlan and he has re-set this trial date to February 16, 2021. On November 3, 2020, the City filed a Motion for Summary Judgment. Additional compensation is necessary under this agreement and requires City Council approval. It is recommended that an additional $50,000.00 be added to the compensation for a new not-to-exceed amount of $175,000.00.

Recommendation

Approval of the attached resolution is recommended.

Attachments:

Resolution - Burr & Forman Amendment #3 2020.pdf

RESOLUTION NO. 18-R-5

RESOLUTION TO EMPLOY ADDITIONAL COUNSEL

WHEREAS, the Council for the City of Anniston, Alabama (the "Council") finds that there is an epidemic of opioid additions, overdoses and deaths that presents a hazard to the public health and safety;

WHEREAS, the Council finds that the opioid epidemic has specifically impacted the City of Anniston and its citizens and has caused the City of Anniston to suffer a public nuisance and other injuries and damages;

WHEREAS, the Council is of the opinion that the opioid epidemic is directly related to the increasingly widespread misuse of powerful opioid medications;

WHEREAS, the Council is also of the opinion that the manufacturers and distributors of opioid medications caused the opioid epidemic through their unlawful acts and omissions, including, but not limited to, the false, deceptive and unfair marketing of prescription opioids and/or the illegal diversion and/or distribution of prescription opioids;

WHEREAS, the Council finds that the unlawful acts and omissions of the manufacturers and distributors of opioid medications has injured and damaged the City of Anniston and that the City of Anniston should file suit to abate the resulting public nuisance and to recover its injuries and damages;

WHEREAS, the Council is of the opinion, given the gravity and importance of the court proceedings authorized by this resolution, that special counsel should be employed to aid the City Attorney;

NOW THEREFORE, BE IT RESOLVED by the Council for the City of Anniston, Alabama as follows:

Section 1. Employment of Additional Counsel. The Council hereby engages and employs Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. ("Beasley, Allen") to represent the City of Anniston and aid the City Attorney in the pursuit of claims against the manufacturers and/or distributors of natural, synthetic and semi-synthetic opioid medications for those injuries and damages suffered by the City of Anniston as a result of the opioid epidemic and to abate the resulting public nuisance and hazard to the public health and safety.

Section 2. Terms of Employment. The Council hereby agrees to the terms and conditions set forth in the attached Fee Agreement with Beasley, Allen, including, but not limited to, the payment of a contingency legal fee in the amount of thirty-three percent (33%) of the net recovery, after reimbursement of expenses. The legal fees

of any lawyers or firms representing the City of Anniston in this matter shall be paid from the contingency fee authorized by this resolution. The Council further authorizes the Mayor to execute the attached Fee Agreement with Beasley, Allen on behalf of the City of Anniston.

Section 3. Authorization to File Suit. The Council hereby authorizes Beasley, Allen to file suit in a court with jurisdiction over the matter and to pursue such claims and sources of recovery as Beasley, Allen deems necessary or appropriate. The Council specifically authorizes Beasley, Allen to file on behalf of the City of Anniston those claims that the firm filed on behalf of the City of Greenville, Alabama in the United States District Court for the Middle District of Alabama, Northern Division, Civil Case No. 2:17-cv-00836-WC, and against those parties made a defendant thereto.

PASSED and ADOPTED on this the 6 day of February, 2018.

CITY COUNCIL OF THE CITY OF ANNISTON, ALABAMA

Jack Draper, Mayor

Jay W. Jenkins, Councilmember

David E. Reddick, Councilmember

Benjamin L. Little, Councilmember

Millie Harris, Councilmember

ATTESTED:

Skyler Bass, City Clerk

Examples of Other state and Tenessee Cities legistlation for attorney fees

Merced, Ca

Sec. 603. - City attorney—Powers and duties.

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B. Represent and appear for the City and any City officer or employee, or former City officer or employee, in any or all actions and proceedings in which the City or any such officer or employee, in or by reason of his/her official capacity, is concerned or is a party, but the City Council shall have control of all legal business and proceedings and may employ other attorneys to take charge of any litigation or matter or to assist the City Attorney therein;

Paducah

Sec. 114-245. - Officers and employees.

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(d) The Board may also employ, and remove at pleasure, accountants, engineers, legal counsel, professional and technical advisors or services, experts, and other persons, skilled or unskilled, as it deems requisite for the performance of its duties.

Murfreesboro

Section 67 - Appointment of assistants; employment of special counsel.

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That the city council may also appoint such assistant city attorney or attorneys and employ such special counsel to represent the city or its interests as it may deem necessary, and may fix the salary of, or compensation to be paid to, the same.

Brentwood

Section 67 - Appointment of assistants; employment of special counsel.

SHARE LINK TO SECTIONPRINT SECTIONDOWNLOAD (DOCX) OF SECTIONSEMAIL SECTIONCOMPARE VERSIONS

That the city council may also appoint such assistant city attorney or attorneys and employ such special counsel to represent the city or its interests as it may deem necessary, and may fix the salary of, or compensation to be paid to, the same.

Chattanooga

Sec. 2-48. - Payment for legal services.

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The city attorney is authorized to execute contracts for professional legal services pursuant to sections 2-46 and 2-356, whereby such **attorneys will be paid a maximum retainer**, whether, as periodic fees or as a salary, against which charges for legal services rendered for general corporate legal counseling, advising and drafting, etc., on behalf of the city will be debited and any credit balance shall be applied against additional fees for legal services relating to litigation involving the city, including matters involving administrative tribunals, title search and certifications, and security transactions; and all of such compensation shall not be inconsistent with Rule 8, Canon 2-106(B)1-8, of the Tennessee Supreme Court; and, further, that such arrangement is authorized for all other or subsequent attorneys in the office of the city attorney; provided, however, that any such additional payments as fees for legal services rendered by a special counsel relative to litigation shall be within budgetary limitations, and in order to comply with such budgetary limitations any such professional legal service contracts with special counsel shall provide that all retainer and/or fee determinations shall be made by the city attorney and his judgment on such questions shall be final and conclusive.

Asheville, NC

Sec. 38.1. - [Designation of legal counsel.]

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By a majority vote of those members present and voting at any of its official meetings, the Asheville Civil Service Board may designate independent legal counsel of its choice to advise or represent the board, or both, on such occasions and in such matters as the majority of those board members present and voting deem to be appropriate and necessary. The civil service board shall establish a roster of attorneys from which it may select counsel for the purpose of advising the board during or in connection with grievance hearings held pursuant to section 8. Said list shall be subject to review and approval by the city attorney as to qualifications and fees. The city shall be responsible for the payment of such professional legal services. The use of independent counsel for matters other than grievance hearings held pursuant to section 8 shall be limited to 20 hours per year. In order to avoid the appearance of any possible conflict of interest, the office of the city attorney shall serve as legal advisor to or attorney for the board, or both, only for those matters or proceedings when specifically requested to do so in a writing that has been signed by no fewer than four members of the board.

Franklin, TN

Sec. 1-703. - Duties and responsibilities.

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(9) To recommend and arrange for retention of special counsel in cases involving extensive or specialized litigation;

Section 15. - Authority to Contract.

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No member of the Board of Mayor and Aldermen or any other person, shall have power to make any contract for or create any liability on behalf of the city, except by express authority of the Board.

Metro Government of Nashville

- ### Sec. 8.605. - Assistant metropolitan attorneys.

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There shall be four (4) assistant metropolitan attorneys who shall be appointed by the director of law, subject to the approval of the mayor, and each of whose compensation shall be seventy-five hundred ($7500) dollars per annum, payable semimonthly. The council may by ordinance create additional positions of assistant metropolitan attorney and fix the compensation of such positions, not to be higher than the minimum salary then being paid to an assistant metropolitan attorney. All assistant metropolitan attorneys shall perform such work of the department as may be assigned to them by the director.

Editor's note—See Metropolitan Charter § 18.05 for changes in salary and compensation through the general pay plan.

- ### Sec. 8.606. - Director of law and others not to engage in private practice.

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The metropolitan attorney, the deputy metropolitan attorney and all assistant metropolitan attorneys shall devote their entire time and attention to the business of the department of law, and shall not engage in the private practice of law.

- ### Sec. 8.607. - Employment of special counsel restricted and provided for.

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No department, board, commission or other agency of the metropolitan government may employ special counsel. Whenever the interests of the metropolitan government require special counsel, the council, by resolution, may authorize the mayor to employ such counsel, who shall be paid such compensation for his or her service as the mayor, the director of law and the director of finance shall determine to be reasonable compensation for the services rendered, and as the

council shall by resolution approve. The employment of bond counsel shall not be considered as the employment of special counsel for purposes of this section.

When the interests of the metropolitan council require legal counsel, the council, by resolution, may authorize the vice-mayor to employ such legal counsel, who shall be paid such compensation for his or her services as the council shall determine to be reasonable compensation for the services rendered, and as the council shall by resolution approve. Such resolution shall not require the approval of the mayor, the director of finance or the director of law.

(Res. No. 72-380, § 1, 11-7-72; amended by referendum election of November 6, 2018, Amdt. 6)

Memphis

Sec. 2-8-8. - Extraordinary litigation.

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A. Council approval shall be required before any special attorney is employed by the city to file suit regarding any extraordinary litigation as hereinafter defined.

B. The term "extraordinary litigation" means, for the purposes of this section, any litigation other than litigation pursued by the city in the ordinary course of its usual and customary business affairs and said definition shall exclude any suit filed by the city:

1. To enforce its contractual rights;

2. To enforce any ordinance or resolution of the city;

3. To enforce any state law;

4. To collect any debt or taxes dues and owing to the city or any of its enterprise funds;

5. To appeal any civil service decision;

6. To assert any counter-claim, cross-claim or third party claim permitted by the Tennessee Rules of Civil Procedure;

7. To enforce any franchise agreement or contract to which the city is a party; or

8. Similar to any of the foregoing.

Knoxville

Sec. 2-131. - Organization; duties of city attorney.

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(c)

The council or independent boards may retain legal counsel when deemed appropriate by the council or board.

Brunswick, GA

Section 6.31. - Contracting procedures. This covers attorney also

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No contract with the city shall be binding on the city unless:

(1)

It is in writing;

(2)

Has been reviewed as to form by the city attorney;

(3)

It is made or authorized by the governing body and such approval is entered in the governing body minutes of proceedings pursuant to Section 2.21 of this charter or is authorized as part of the budget process; and

(4)

It is executed by the mayor, mayor pro tempore, or city manager whose signature shall cause the city seal to be affixed.

Number of Attorneys on Staff

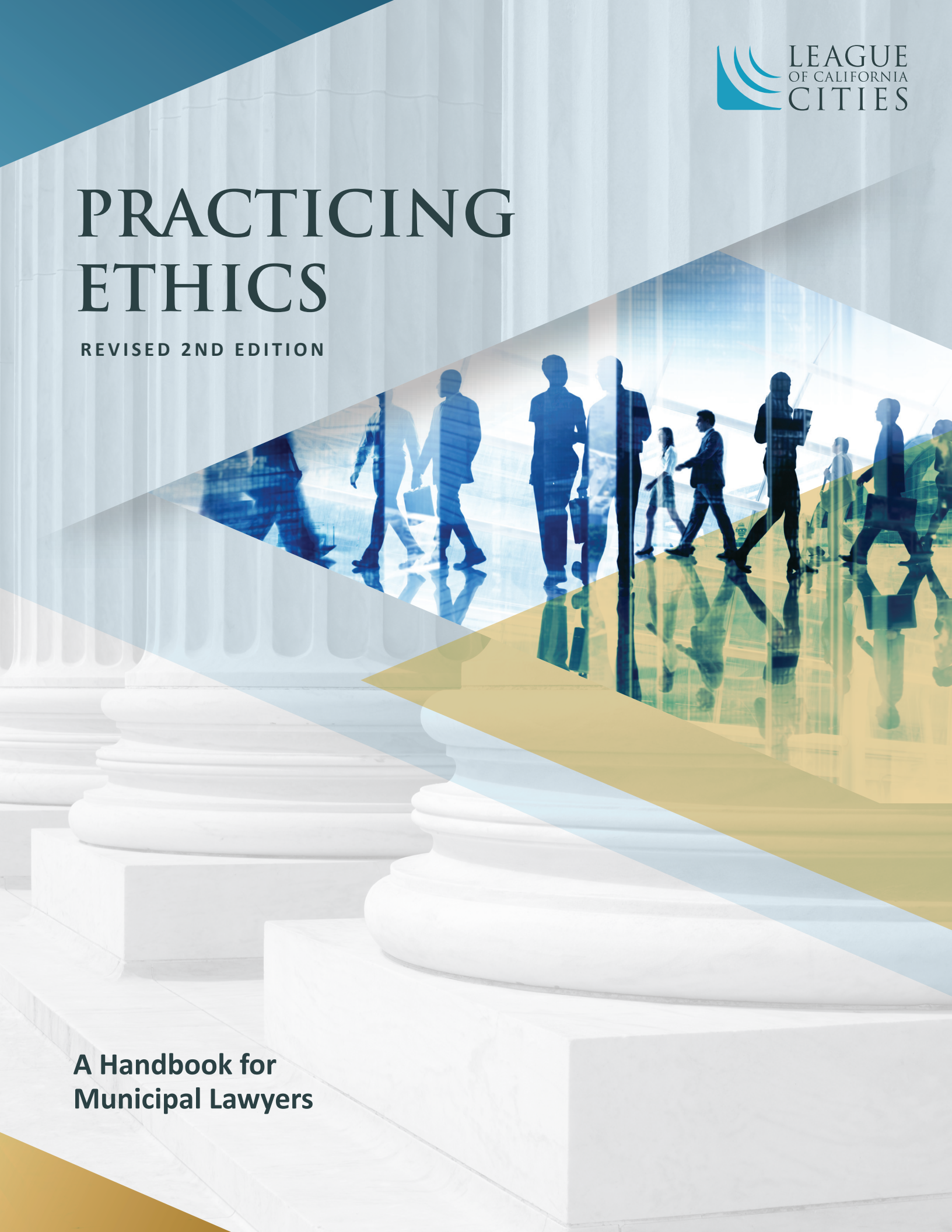
1	Nashville-Davidson--35
2	Memphis—Departments- 6 with 2-3 Attorneys in each,
3	Knoxville—8
4	Chattanooga—6
5	Clarksville--3
6	Murfreesboro--6
7	Franklin--3

8	Jackson--2

LEAGUE OF CALIFORNIA CITIES

PRACTICING ETHICS

REVISED 2ND EDITION



A Handbook for Municipal Lawyers

This publication is provided for general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues and attorneys should perform an independent evaluation of the issues raised in these materials.

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ACKNOWLEDGEMENTS

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Deputy City Attorney, Hayward

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The League of California Cities gratefully acknowledges the contributions of the 2014 Practicing Ethics Drafting Committee for their hard work and dedication in drafting this Handbook:

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FOREWORD

The City Attorneys' Department first published *Practicing Ethics: A Handbook for Municipal Lawyers* in 2004, and then again in 2014. This Revised 2nd Edition (updated in 2020) was undertaken in response to the California State Bar's 2018 comprehensive update of the Rules of Professional Conduct. We are grateful to Joseph Montes, who tackled this update of *Practicing Ethics*, as well as provided presentations to the City Attorneys' Department on the new Rules of Professional Conduct.

The State Bar's 2018 update process for the Rules of Professional Conduct began in 2001 (with the last update in 1992). The 2018 update includes 69 rules, based largely on the ABA Model Rules, but preserving many uniquely "California" aspects of the former rules. The new rules, of course, have been completely renumbered.

In representing governmental entities, there are new rules dealing with "reporting up" issues of malfeasance, contacts between city officials and represented persons, lawyers as witnesses, ethical walls and imputation of conflicts, and responsibilities of city attorneys and supervisory attorneys for the actions of their staff.

Although the impetus to update *Practicing Ethics* was the State Bar's update, the Fair Political Practices Commission (FPPC) has also updated (and renumbered) many of its regulations. The FPPC has now also issued opinions on the application of Government Code §1090. We are grateful to Rebecca Moon and Vadim Sidelnikov of the City Attorneys' Department's FPPC Committee who provided their insights on Chapters 3 and 4.

Ultimately, *Practicing Ethics* is intended to provide a quick reference and starting point for issue spotting, problem solving, and, in some cases, behavior modification. In addition to confirming authorities and any new developments in the law, municipal attorneys should also refer to these other resources from the City Attorneys' Department of the League of California Cities:

The California Municipal Law Handbook (updated annually by the City Attorneys' Department and published by the Continuing Education of the Bar — see especially Chapter 2)

A Guide for Local Agency Counsel: Providing Conflict of Interest Advice (2016) https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Publications/Conflict-of-Interest-Guide-2016.aspx

"Ethical Principles for City Attorneys" https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/City-Attorney-Ethics-Resources/Ethical-Principles-for-City-Attorneys

CONTENTS

CHAPTER 1:

DEFINING THE CLIENT: WHOM DOES THE CITY ATTORNEY REPRESENT?

A. INTRODUCTION

Lawyers owe the duties of both undivided loyalty and confidentiality to their clients.[1] For the city attorney who represents a public entity the question often arises, "Who is the client?" This chapter discusses the nature of the professional relationship between the city attorney and his or her client, as well as the responsibility the city attorney bears for the actions of his or her staff in that regard.

> **"It is the duty of an attorney to… maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."**[2]

B. THE CITY IS THE CLIENT

Case law and the California Rules of Professional Conduct (referred to hereafter collectively as "Rules" and individually as "Rule") establish that the city attorney's client is the city itself, "acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement."[3] Understanding that the city itself is the client is critical, especially when the interests of the city may conflict with those of its officials or employees.

Generally, an attorney's duties of loyalty and confidentiality may be challenged when the interests of two or more clients conflict with one another. If the city attorney's client were defined as each city official or employee who interacts with the city attorney, then a conflict of interest could arise every time two or more of these individuals had opposing interests. As a result, each party would be entitled to his or her own attorney. Fortunately, this is not the case in the vast majority of situations confronting the city attorney.

C. RULE 1.13

Rule 1.13 governs the ethical obligations of the city attorney. Under the Rule, the city attorney owes these obligations to the city itself – as the client – and not to any individual public official or community member. This Rule is also consistent with case law.[4] The Rule obviates disqualification of the city attorney when council members are at odds with one another over an issue, or when the council and city manager have a dispute.

Practice Tip:

Government Code Section 41801 and some City charters contain language requiring the city attorney to advise specified officials. These provisions have no effect on the underlying principle that the city itself is the client. City officials are merely embodiments of the city, and the city attorney does not have a conflict of interest simply because the officials may have opposing agendas or positions.

That the city itself, and not any particular official or subordinate board, is the city attorney's client is important because the city attorney typically advises individuals along the entire chain in the city's hierarchy. Since these individuals are the embodiments of the city – and not separate and independent clients – the city attorney has no obligation to keep information obtained from one individual confidential from others in the hierarchy. This is significant because a city attorney typically has to gather information from a number of officials in order to provide legal advice and representation to the city.

However, because of due process requirements, the same attorney from the city attorney's office may not be able to prosecute an administrative action or assist staff with the prosecution of an administrative action and also serve as the advisor to that administrative tribunal.[5] A due process wall may allow different attorneys in an in-house city attorney's office to both advocate and advise as long as proper screening functionally separates attorneys performing the two functions.[6] But the same will most likely not hold true for contract city attorneys and special counsel attorneys from the same outside law firm serving in those dual roles.[7] Because the rules in this area of the law are changing rapidly,[8] you should carefully review the relevant case law. (For more on this topic, see Section G of Chapter 2 and Chapter 5.)

D. THE "DULY AUTHORIZED DIRECTORS, OFFICERS, EMPLOYEES, MEMBERS, SHAREHOLDERS, OR OTHER CONSTITUENTS"

While the city attorney has but one client – the city itself – he or she may take directions from a number of different individuals. Determining who speaks for the city as the "duly authorized directors, officers, employees, members, shareholders, or other constituents"[9] at any given time requires a review of the organic law of the city.

For example, under the council-manager form of government,[10] the city manager is the "duly authorized officer" when it comes to terminating or disciplining a city employee.[11] As a result, most city attorneys conclude that there is no legal basis to allow council members to view personnel records of all city employees. Unlike the city manager, council members play no role in the day-to-day hiring, discipline, and firing of these employees.

However, the city council does hire, evaluate, and fire the city manager. As a result, the council may review employee files if it can make a particularized showing that city employee personnel files are necessary for a performance evaluation of the city manager. In that event, the "duly authorized directors" would be the city council acting through formal actions taken by a majority of its members. As a result, the city attorney may take his or her direction from the council in providing access to the files solely for the purpose of facilitating the evaluation of the city manager.

Furthermore, if the city manager's management practices become the subject of a lawsuit – or the threat of a lawsuit – the city council would have the authority to direct the resolution of the matter. The council could act by stipulating to reinstatement and payment of back pay to the affected city employee. This is true even though the city manager would normally be the "duly authorized officer" in charge of city personnel issues.

E. CITY ATTORNEY'S DUTY TO REPORT MATTERS UP THE HIERARCHY

When a city attorney learns 1) that the conduct of a city official or employee is or may be a violation of law that may be "reasonably imputable to the organization" and 2) is "likely to result in substantial injury to the organization," State Bar Rules expressly require the city attorney to take the matter to the "highest internal authority within the organization."[12] If only one factor is present, the city attorney is not required, but may "report up" the issue. While reporting such activity up the city's hierarchy, the city attorney must not disclose any confidential information beyond the organization itself. Whistleblower statutory protections applicable to employees of state and local public entities[13] do not supersede the statutes and rules governing the attorney-client privilege.[14]

Finally, in the event the "highest internal authority" fails to heed the city attorney's advice and that failure is likely to result in substantial injury to the client, the city attorney retains the right or, where appropriate, the obligation to resign employment pursuant to Rules 1.13(d) and 1.16.

F. CITY ATTORNEY'S DUTY NOT TO TREAT CITY OFFICIAL AS CLIENT OR TO PROMISE CONFIDENTIALITY

Whenever the city attorney becomes aware that the interests of a city official or employee may be adverse to those of the city, Rule 1.13(f) requires the city attorney to make clear that he or she represents the city and not the individual official or employee. The city attorney should advise the individual that the city attorney cannot withhold any information the individual shares from others in the city with authority over the matter.[15] A clear admonition may help prevent the official from misperceiving the nature of a communication with the city attorney.

Walking this line can be difficult. A city attorney who commences every meeting with city officials with a warning that they are not his clients is not likely to have a productive relationship with the officials. However this issue is handled, do not promise confidentiality to individual council members or other city officials or lead them to believe they have a confidential relationship. Further, the city attorney must let the officials know he or she will share information the official provides to any official or agency in the city with a business need to know.

For example, a council member's conflict of interest may be of critical importance to the entire council if the council member does not disqualify himself or herself and that failure to do so could invalidate the council's action. The city attorney should make clear that conflict of interest advice is provided to a council member in his or her official capacity and such advice is subject to disclosure to the entire council. This may be true of other types of advice to council members and to other city officials, such as an opinion on whether legislation proposed by a council member is preempted or unconstitutional.

It is advisable to make it clear from the outset that the city attorney owes the duty of loyalty and confidentiality to the city itself – and the council as a whole – rather than to an individual. Some city attorneys make it a practice to provide standing memoranda to elected officials and staff explaining this principle.

Practice Tip:

The California Attorney General has opined that when a city attorney obtains information in confidence from a council member under circumstances leading the council member to believe that a confidential relationship exists between the city attorney and the council member, the city attorney is precluded from prosecuting the council member under the Political Reform Act.[16]

G. JOINT REPRESENTATION OF THE CITY AND ITS EMPLOYEES

Rule 1.13(g) provides that the consent of the city may be required before the city attorney may undertake the representation of an individual official or employee. However, the Government Tort Claims Act imposes a mandatory duty on the city to defend and indemnify public officials and employees.[17] While this statutory obligation, in effect, constitutes the city's consent to employee representation by operation of law (though not necessarily by the city attorney), these areas of joint representation can create conflicts of interest (see chapter 2).

H. REPRESENTING MORE THAN ONE CLIENT

There are times when the city attorney has more than one client. The most common example of this is where the city attorney is representing an employee who is being sued – along with the city – in a lawsuit. Also, a quasi-independent city board, official or agency (collectively "agency") could become a separate client under exceptional circumstances where the city and the agency become adverse to one another in litigation. The city attorney may provide advice to both the city and the agency in a particular matter. Nevertheless, in the event of litigation over the matter where the agency and the city are adverse, the city attorney who chose to advise both may not represent either in the litigation. In the alternative, the city attorney foreseeing potential adversity between the city and the agency may elect at the outset of the matter to advise the city and inform the agency that it will need outside counsel.[18] (see Chapter 2)

I. THE PUBLIC AND "YOUR" CLIENT

Rule 4.2 prohibits communication with a represented person about the subject of the representation without the consent of that person's lawyer. In the context of a city client, this communication can become problematic, in both directions. First, members of the public may wish to speak with the city attorney or someone in the city attorney's office. If that person is represented in a matter, the city attorney (and everyone on his or her staff—see paragraph J below) must be careful to ensure that any communication is either limited to matters outside of the representation (Rule 4.2, Comment 4), or has been authorized by the represented person's attorney.

In the other direction, a lawyer representing a member of the public can communicate with a "public official, board, committee or body" (Rule 4.2(c)(1) where "public official" is defined as a public officer of a city with comparable decision-making authority and responsibilities as an officer, director, partner or managing agent of an organization (Rule 4.2(d)). Although Rule 4.2 applies to governmental organizations:

> [S]pecial considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and article 1, section 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (d)(2) of this rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this rule when the lawyer knows the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).(Comment 7)

Paragraph (b)(2) of the rule prohibits communication with a constituent of the city if the subject of the communication is any act or omission of the constituent in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.

Practice Tip:

Keeping officials in your organization (and especially those in your office if you are the city attorney) apprised of pending matters can help those officials be alert to situations where communication with members of the public can create or exacerbate liability for the City. Note that Rule 4.2 does allow a lawyer to advise a client not to speak with a represented party (Comment 3). Finally, advising city officials that "listening" is always preferable to "speaking" may reduce exposure arising out of inadvertent statements or disclosures.

J. THE CITY ATTORNEY'S RESPONSIBILITY FOR THE ACTIONS OF OTHERS

In representing the city as a client, it is important to remember that the most recent update to the Rules of Professional Conduct make the city attorney (and other supervising attorneys) responsible for the actions of their staff—including the actions of non-lawyers. Rule 5.1 indicates that a lawyer who possesses managerial authority over the firm (for contract city attorneys) or the office (for in-house attorneys) shall make reasonable efforts to ensure that measures are in place to give reasonable assurance that all lawyers in the firm/office comply with the Rules of Professional Conduct and the State Bar Act.[19] This generally includes having policies and procedures in place to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised (Comment 1).

A lawyer that has supervisory authority over another lawyer is charged with making reasonable efforts to ensure that those supervised comply with the Rules of Professional Conduct and the State Bar Act.[20] The supervisor is responsible for another lawyer's violation when the supervisor directs the conduct involved, or knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action.[21]

Rule 5.2 provides an "out" for a supervised attorney who acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3(a) requires that the manager in an office (the city attorney) train and supervise non-lawyer staff appropriately to reasonably ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer. Further, Rule 5.3(b) makes a supervisory lawyer responsible for the actions of non-lawyers in the office if the lawyer is aware of conduct that would violate a rule, and fails to timely act to avoid or mitigate the consequences.

CHAPTER 1 ENDNOTES

1 *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal.4th 839, 846 (2006); *Havasu Lakeshore Investments, LLC v. Fleming*, 217 Cal.App.4th 770 (2013); California Rules of Professional Conduct, Rules 1.7 and 1.9.

2 California Business and Professions Code section 6068(e)(1).

3 California Rules of Professional Conduct, Rule 1.13(A); *La Jolla Cove Motel & Hotel Apartments, Inc. v. Superior Court*, 121 Cal.App.4th 773, 784-785 (2004); *Brooklyn Navy Yard Cogeneration Partners v. Superior Court,* 60 Cal.App.4th 248, 254-255 (1997); *Skarbrevik v. Cohen*, 231 Cal.App.3d 692, 703-704 (1991). But note, comment 6 to Rule 1.13 states: "It is beyond the scope of this rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency."

4 *Ward v. Superior Court*, 70 Cal.App.3d 23, 32 (1977) [county counsel's only client is County of Los Angeles and had no separate attorney-client relationship with the county assessor and other county officials that he represented as part of his duties as county counsel; thus county counsel was not disqualified from representing the county assessor in his individual capacity and subsequently representing the county in a suit brought against it by the county tax assessor, who was himself suing as an individual and taxpayer]. But see *People ex rel. Deukmejian v. Brown*, 29 Cal.3d 150 (1981) [where Attorney General had given confidential advice to client board, he is subsequently precluded from suing the board on the very same matter]. California Rules of Professional Conduct, Rule 1.13(b). [See also cases cited in Endnote 3.]

5 *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal.App.4th 81 (2003); *Quintero v. City of Santa Ana*, 114 Cal.App.4th 810 (2003). See also *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 40 Cal.4th 1, 10 (2006) ["Procedural fairness does not mandate the dissolution of unitary agencies, but it does require some internal separation between advocates and decision makers to preserve neutrality"]; see also chapter 2.

6 *Howitt v. Superior Court*, 3 Cal.App.4th 1575, 1586-1587 (1992). See also *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 40 Cal.4th 1, 10-11 (2006); *Richardson v. City and County of San Francisco Police Com.*, 214 Cal.App.4th 671, 705 (2013); see also discussion concerning ethical screens, chapter 2.G.

7 *Sabey v. City of Pomona*, 215 Cal.App.4th 489 (2013).

8 *Today's Fresh Start, Inc. v. Los Angeles County Office of Education*, 57 Cal.4th 197 (2013); see also chapter 2.

9 California Rules of Professional Conduct, Rule 1.13(a); *Brooklyn Navy Yard Cogeneration Partners v. Superior Court*, 60 Cal.App.4th 248, 254 (1997).

10 Government Code Section 34851 to 34859; *Stahm v. Klein*, 179 Cal.App.2d 512, 514 (1960); 81 Ops.Cal.Atty.Gen. 304, 307-308 (1998).

11 In some charter cities, multiple city officials are directly appointed by the city council and can be removed only by the city council. In those situations, the city manager would not be the "duly authorized officer" when it comes to terminating or disciplining those city officials.

12 California Rules of Professional Conduct, Rule 1.13(b). See also *Responsible Citizens v. Superior Court*, 16 Cal.App.4th 1717, 1730, fn. 5 (1993) and Labor Code Section 1102.5, subd. (g).

13 These whistleblower protections include Labor Code Section 1102.5, which prohibits employers from retaliating against employees for reporting an alleged violation of a state or federal statute, rule, or regulation. Protected activity under this statute does not cover reporting violations of local law. *Edgerly v. City of Oakland*, 211 Cal.App.4th 1191, 1199 (2012).

14 84 Ops.Cal.Atty.Gen. 71, 78 (2001). See also *Cordero-Sacks v. Housing Authority of City of Los Angeles*, 200 Cal.App.4th 1267, 1278 (2011) [citing holding of Attorney General's opinion]; see also chapter 7.

15 State Bar of Cal. Standing Comm. on Prof'l .Responsibility and Conduct, CA Eth.Op. 2001-156, WL 34029610.

16 71 Ops.Cal.Atty.Gen. 255 (1988).

17 California Government Code section 995 provides, in part: "[U]pon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official capacity or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity."

18 *People ex. rel. Deukmejian v. Brown*, *supra*, 29 Cal.3d 150. (Rule 3-310 (now Rule 1.9) prohibits Attorney General from suing client department on a matter on which he advised that department); accord, *Santa Clara County Counsels Assn. v. Woodside*, 7 Cal.4th 525, 548 (1994) ["duty of loyalty for an attorney in the public sector does not differ appreciably from that of the attorney's counterpart in private practice"]; *Civil Service Comm. v. Superior Court*, 163 Cal.App.3d 70, 75-78 (1984) [under Rule 3-310 (now Rule 1.9), county counsel may not represent county board of supervisors in suit against county's civil service commission, where county counsel's office advised commission on same matter and county failed to obtain the commission's informed written consent to subsequent adverse representation of the board of supervisors in its suit to invalidate the commission's decision]; State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2001-156, WL 34029610; see also chapter 2.

19 Business and Professions Code sections 6000-6243.

20 Rule 5.1(b).

21 Rule 5.1(c).

CHAPTER 2:

CONFLICTS OF INTERESTS ARISING FROM THE CITY ATTORNEY'S SIMULTANEOUS OR SUCCESSIVE REPRESENTATIONS

A. INTRODUCTION

Rules 1.7 through 1.9 broadly prohibit a range of possibly conflicting interests, including personal business or other interests of the lawyer that are adverse to those of the client. This chapter examines conflicts of interests arising from the simultaneous or successive representation of clients that are particular to city attorneys. These conflicts arise when the city attorney represents more than one public client whose interests conflict with one another.

City attorneys also need to be aware of conflicts between the interests of their public and current or former private clients. These conflicts are the same as conflicts between the interests of private clients and are discussed only briefly in this chapter.

B. RULES 1.7 AND 1.9 AND CLIENT REPRESENTATION

Rules 1.7 and 1.9 govern conflicts of interest arising from the representation of two clients who may be adverse to one another. Rule 1.7 requires informed written consent in the following circumstances:

(a) A lawyer shall not, without informed written consent from each client…represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent from each affected client…represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests.

Rule 1.7(c) requires a written disclosure to a client where:

(1) the lawyer has, or knows that another lawyer in the lawyer's firm has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows or reasonably should know that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer.[1]

Representation of clients under Rule 1.7 (a)-(c) is further qualified by limitations in 1.7(d).

Rule 1.9 governs representation of a client whose interests may be adverse to those of a former client.

Rule 1.11 addresses special conflicts of interest for former and current government officials and employees who transition from public service to private and vice versa (see discussion in section G).

C. SIMULTANEOUS AND SUCCESSIVE REPRESENTATION OF CLIENTS WITH ADVERSE INTERESTS

Conflicts of interest can arise when a city attorney's current or former clients have interests that are adverse to those of the city. Such conflicts of interest generally fall into two categories: (1) simultaneous representation of clients with adverse interests; and (2) successive representation of clients with adverse interests.

1. Simultaneous Representation

The simultaneous representation of clients with adverse interests arises when the same lawyer, firm, or office concurrently represents those clients in either the same or a different matter. Simultaneous representation as to the very same matter is prohibited *per se* because it violates the attorney's duty of loyalty and confidentiality.[2]

2. Successive Representation

The successive representation of clients with adverse interests arises when the representation of a current client is adverse to the interests of a former client. Successive representation is prohibited if there is a substantial relationship between the current matter and the prior representation. If there is, it is presumed that the lawyer acquired confidential information from prior representation. Accordingly, Rule 1.9 bars the subsequent adverse representation without the prior client's informed written consent to the later representation.

Practice Tip:

Under the rule of vicarious disqualification, not only is the lawyer who represented the former client disqualified; his or her entire firm or office may also be disqualified. The major ethical concern in cases of successive representation is the violation of the duty of confidentiality.[3]

D. SPECIAL CONSIDERATIONS FOR ATTORNEYS IN THE PUBLIC SECTOR

The courts weigh special considerations before finding that a public law office must be disqualified because an attorney's prior representation of a party is adverse to the public entity for which the lawyer now works. The general rule is that "a public attorney, acting solely and conscientiously in a public capacity, is not disqualified to act in one area of his or her public duty solely because of similar activity in another such area."[4] "The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement ought to be forbidden categorically."[5]

Conflict of interest rules were drafted with private attorneys primarily in mind. In the public sector, the financial incentive to favor particular clients over others or to ignore conflicts is reduced if not eliminated. Courts have recognized in this context that disqualification of a public attorney can result in minimal benefits while causing dislocation and public expense. For these reasons courts have not assumed that the existence of a conflict of interest for one member of a public entity's legal office warrants disqualification of the entire office.[6]

Practice Tip:

In the public sector, because of the somewhat lessened potential for conflicts of interest and the cost to the public for disqualifying whole offices of government funded attorneys, the use of internal screening procedures or "ethical walls" to avoid conflicts have been allowed unless the disqualified attorney is the head of the office. However, this general rule does not equally apply to city attorneys who are members of law firms and also does not apply equally to due process walls.[7]

E. TWO OR MORE SEPARATE "CLIENTS" WITH ADVERSE INTERESTS

The city attorney's client is the city itself, as embodied in the city council or other highest official or agency over the engagement.

> ***Government Code section 41801 provides that "[t]he city attorney shall advise the city officials in all legal matters pertaining to city business."***

The city attorney always advises city officials in their official capacity not as individuals with interests separate and distinct from the city. Because the city attorney represents the city as a single client entity, the adverse interests of two or more city officials generally does not give rise to a conflict under Rules 1.7 and 1.9.

For example, county counsel is not disqualified from representing the county in a lawsuit filed by the county assessor merely because the assessor and county counsel exchanged confidential information concerning the operation of the assessor's office. Assessors are not independent, but are under the supervision of the county board of supervisors. The information exchanged between the assessor and county counsel is therefore not confidential as to the county and accordingly not grounds for disqualification.[8]

Similarly, a city attorney may advise both the mayor and city council as to the legality of an ordinance where the council has the power to adopt the ordinance under the city charter and the mayor has the power to veto it. The mayor and council may have antagonistic positions, but the city attorney's client is the city.[9]

There are, however, circumstances where individual officials or agencies of a public entity can acquire separate client status even though they are not necessarily separate legal entities. The most common of these circumstances are: (1) disputes between the city and its quasi-independent boards or commissions or joint powers authorities of which the city is a member; and (2) the defense of city employees pursuant to the Government Claims Act.

1. Representing Quasi-Independent Bodies and Officials and Joint Power Authorities

A conflict can arise when the city council and a subordinate quasi-independent body or official are involved in litigation against one another. This situation is most likely to arise in charter cities if the charter creates a quasi-independent official or body with the ability to make a binding decision and the city council seeks to overturn that decision by filing suit against the subordinate body.[10] By contrast, general law cities are generally more hierarchical in structure, with the council clearly established as the final decision maker with respect to most subordinate bodies.

Civil service commissions and rent control boards are examples of bodies that can acquire quasi-independent status under the Rules.

Representing a joint powers authority ("JPA") can give rise to conflicts in a manner similar to quasi-independent bodies where an attorney who represents one of the participating public agencies is selected to act as an attorney for the JPA.

Agreeing ahead of time as to how to resolve conflicts between the JPA and its participating agencies can avoid problems when the conflicts arise. In *Elliott v. McFarland Unified School District*,[11] for example, two school districts entered into a joint powers agreement and the agency created was represented by counsel for one of the districts. The parties agreed that if a conflict of interest arose between the members of the JPA, the counsel representing the JPA could continue to represent his own district. The other district with a conflicting interest would obtain its own counsel since it had granted informed written consent to the successive adverse representation by the JPA counsel of his own district.

A city attorney who represents a JPA should also be aware of Political Reform Act (*see chapter 3*) and Government Code section 1090 (*see chapter 4*) issues that can arise in the course of representing a JPA.

2. Defending City Employees Pursuant to the Government Claims Act

a. The City's Duty to Defend City Officials and Employees

The Government Code sets out a comprehensive statutory scheme for determining the rights of public employees to a defense and indemnification from their employing entities with respect to suits filed against them arising out of the course and scope of their employment.[12] The duty to provide a defense is imposed by Government Code section 995, which provides in pertinent part as follows:

> Except as otherwise provided in sections 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity. For the purposes of this part, a cross-action, counterclaim or cross-complaint against an employee or former employee shall be deemed to be a civil action or proceeding brought against him.[13]

The duty to defend under Government Code section 995.2 is subject to three limitations:

- The act or omission giving rise to the action must have been within the employee's scope of employment;
- The employee cannot have acted or failed to act because of actual fraud, corruption, or actual malice; and
- Defense of the action or proceeding by the public entity cannot create a specific conflict of interest between the public entity and the employee or former employee.

For purposes of the third limitation a "specific conflict of interest" is a conflict of interest or an adverse or pecuniary interest, as specified by statute or by a rule or regulation of the public entity. Thus, the statute contemplates that a "specific conflict of interest" could result in the separate representation of the entity and the employee.

In the context of the Government Claims Act defenses, conflicts of interests requiring careful analysis of Rules 1.7 and 1.9 typically arise when:

- The city attorney undertakes the defense of an employee in tort litigation, and the city is contemplating adverse personnel action against that employee; or
- The city defends an employee under a reservation of rights because the act or omission may not have arisen in the course and scope of employment.

The Government Code allows the public entity to provide for the employee's defense by "its own attorney or by employing other counsel for this purpose or by purchasing insurance which requires that the insurer provide the defense."[14] Furthermore, the Code provides that (1) where the employee has timely requested the defense, (2) the act or omission arose out of the course and scope of the public employment, and (3) the employee has cooperated in good faith in the defense, the entity must pay any judgment arising from the suit or any settlement or compromise "*to which the entity has agreed*."[15] These sections have been interpreted to give the public entity – not the employee – the right to control the employee's defense[16] and to decide whether a conflict of interest exists.[17]

The statutory scheme also permits the public entity to assume the defense of the employee under a reservation of rights as to whether the act or omission arose out of the course and scope of employment. In addition, it permits the public entity to pay the judgment or settlement "only if it is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the public entity."[18] If the governing body makes certain findings, the public entity may indemnify the employee against an award of punitive damages as well.[19]

b. Joint Representation of a City and its Employees in Litigation

Whenever an employee is potentially subject to discipline for the same acts as those at issue in the suit, there will always be a conflict of interest under Rule 1.7 because the interests of the entity as the employer and the individual are adverse to one another. Under those circumstances the same lawyer simply may not represent both the employee and the employer. Since under Rule 1.13 the entity itself is the city attorney's primary client, it is the employee's or official's representation that should be contracted out while the city attorney continues to represent the entity. Occasionally this is not feasible. For example, where the subordinate official was advised by the city attorney's office before informing the official that the city could have an adverse position, the city attorney will have to withdraw from representing both sides of the dispute.

Law firms and large city attorney law offices employ ethical screening devices to wall off the lawyers prosecuting a disciplinary matter from the lawyers handling a tort suit.[20] If a sufficient ethical wall cannot be created and maintained, outside counsel should be retained to represent the employee.

The way to avoid hiring duplicative counsel is to try to resolve any disciplinary issues at the claims stage, when there is only a single client, the city. If possible, an ethical wall should be erected before the duty to defend arises. It is only when a suit is filed that the city's duty to defend the employee under the Government Claims Act is triggered. Up to that point, the claim is simply filed with the city to evaluate and the city attorney represents a single client, the city.

If the disciplinary issue is resolved by the time suit is filed, the city and the employee will no longer have adverse interests and the city attorney will be able to represent both the city and the employee without violating Rule 1.7 (although the circumstances should still be evaluated under Rule 1.9). Although the Government Claims Act imposes time limits to respond to claims and gives the claimant the right to sue when the entity fails to act on the claim within statutory deadlines, the city can agree to toll time limits and take more time at the claims stage to either resolve the case or to ensure that a suit is not filed until after any possible adversity is eliminated.

That punitive damages are sought is not sufficient to trigger a conflict of interest between the entity and the employee and require separate representation.[21] Further, in *DeGrassi v. Glendora*, the court held that a city had no duty to reimburse a city council member for retaining a private lawyer to defend her in a suit brought against her in her official capacity, where the council member refused to agree to the city's condition that cooperate in her defense and allow the city to control the defense.[22]

Where a potential issue in litigation against a public agency and its employee is whether the employee was acting within the course and scope of employment, the public agency may undertake the defense with a reservation of rights as to that issue. Nevertheless, such a reservation may place in question the ability of the city attorney to defend both the city and the employee. For this reason a better practice may be to decide the course and scope of employment issue before undertaking representation of the employee. Either decide to provide the defense without a reservation of rights or, in the rare situation where there is a significant course and scope issue, inform the employee that the city will not undertake his or her defense thereby assuming the risk that a court will find the employee was in the course and scope requiring the city to pay for the defense.[23]

For More Information: For a more detailed discussion of the issues presented by the joint defense of the entity and its employees and officials, see Manuela Albuquerque, *Joint Defense of Suits Brought Against Public Entities and Their Employees: Are Conflicts of Interest Manufactured or Real?*, 24 Pub. L.J. 1 (2000), available at www.cacities.org/attorneys.

F. OBTAINING INFORMED WRITTEN CONSENT

Rules 1.7 and 1.9 allow representation of clients with actually or potentially conflicting interests if the attorney first obtains each client's informed written consent, as defined in Rule 1.0.1. This requires each client's written agreement to the representation following written disclosure of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client.

The particular problem for city attorneys in obtaining consent is determining who can provide it on the city's behalf. As discussed in Chapter 1, determining who speaks for the city in a given matter depends on who is the duly authorized director, officer, employee, member, shareholder, or constituent of the city. In many cases, this will mean obtaining the informed written consent of the city council or city manager. The particular facts of each case must be carefully evaluated to ensure that the person or body authorized to speak on the city's behalf gives the consent. In some cases, that person may be the city attorney.

Practice Tip:

Remember that informed written consent must be based upon the circumstances actually contemplated by the consent granted. If the consent is not informed or circumstances change such that consent is vitiated, the waiver is not effective.[24]

G. ETHICAL WALLS TO AVOID CONFLICTS OF INTEREST

Devices employed to screen lawyers in separate branches of publicly-funded law offices from one another have been allowed for the representation of clients with adverse interests.[25] For example, a county counsel office may represent both the public guardian in the conservatorship proceeding and the county in a petition to declare the conservatee's child a ward of the court.[26]

However, while such walls may be accepted in cases of successive representation or in very large offices, they are fraught with danger in cases of simultaneous adverse representation as to the same matter and could be deemed a violation of Rules 1.7 and 1.9, especially where the conflict arises from the prior private clients of the city attorney.[27]

Prior to 2018, the California State Bar did not have an express rule on the use of ethical screens. With the latest update to the Rules of Professional Conduct, the State Bar has adopted a "limited" rule.

Rule 1.0.1 defines "Screened" as follows:

> "the isolation of a lawyer from any participation in a matter including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these rules or other law; and (ii) to protect against other law firm28 lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter."

Rule 1.10 describes the proper use of ethical screens, and may only be used to avoid a prohibited conflict under Rule 1.7 or 1.9 when the conflict arises out of a lawyer's association with a prior firm. The Rules Commission that drafted the 2018 rules specifically rejected the broad use of ethical screens afforded under the Model Rules of professional conduct, limiting the use as follows:

> "[T]he phrase "arises out of the personally prohibited lawyer's association with a prior firm" further limits the availability of screening to situations where a prohibited lawyer has moved laterally from another firm. Put another way, a law firm could not erect a screen around those firm lawyers who had represented a former client when the lawyers were associated in the same firm in order to represent a new client against the former client."[29]

Rule 1.10 also limits the use of screens to circumstances where the lawyer being screened did not have substantial involvement in the matter creating the conflict.

Rule 1.11 creates a special rule for lawyers moving between government and private practice, private practice and government, and governmental employment to governmental employment with another agency. The Rule allows the use of screens without the limitation on the extent of involvement by the government lawyer when that lawyer is moving into private practice or into another governmental office. For lawyers moving from private practice to government, comment 10 to the Rule states that the extent to which any conflicts may be imputed to other lawyers in that governmental agency is governed by caselaw, rather than Rule 1.11.

Because the new Rules limit the use of ethical screens, the viability of prior caselaw or opinions authorizing such use beyond the limited scope described by the Rules is questionable.

CHAPTER 2 ENDNOTES

1 Note that Rule 1.8.10 expressly prohibits sexual relations with clients. In the context of an organization, this prohibition extends to sex with a constituent of the organization who supervises, directs or regularly consults with the lawyer concerning the organization's legal matters.

2 Rule 1.7(d)(3).

3 *Flatt v. Superior Court (Daniel),* 9 Cal.4th 275, 283-284 (1994). But see also *Kirk v. First American Title Insurance Company*, 183 Cal.App.4th 776 (2010) [rejecting blanket rule of vicarious disqualification in the private context]. See also Rule 1.10 Imputation of Conflicts of Interest: General Rule.

4 *In re Lee G.*, 1 Cal.App.4th 17, 29 (1991).

5 *Id*. at 28, *quoting Castro v. Los Angeles County Bd. of Supervisors*, 232 Cal. App.3d 1432, 1444 (1991).

6 *People v. Christian*, 41 Cal.App.4th 986, 997-98 (1996) [permitting lawyers from two separate branch offices of the public defender, screened off from one another, to represent criminal co-defendants with adverse interests]. "Thus, in the public sector, in light of the somewhat lessened potential for conflicts of interest and the public price paid for disqualifying whole offices of government funded attorneys, use of internal screening procedures or "ethical walls" to avoid conflicts within government offices…have been permitted." *Id.* at 998. Also *see City and County of San Francisco v. Cobra Solutions* 38 Cal.4th 839 (2006) and *City of Santa Barbara v. Superior Court*, 122 Cal.App.4th 17 (2004). See also discussion in section G and Rule 1.11.

7 *Sabey v. City of Pomona*, 215 Cal.App.4th 489 (2013).

8 *Ward v. Superior Court*, 70 Cal.App.3d 23, 35 (1977).

9 State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2001-156, WL 34029610; see also chapter 1.

10 *Civil Service Commission v. Superior Court*, 163 Cal.App.3d 70 (1984), in which the county counsel was disqualified under Rule 3-310 (now Rule 1.9) from representing a board of supervisors in a suit against a county civil service commission. The suit challenged the commission's action in reversing a discharge and county counsel had advised the commission about the same matter. The major rationale for the court in concluding that there was more than one client represented by the county counsel was the fact that the quasi-independent board's decision was binding and could not be overruled by the board of supervisors. Since the county counsel had already advised the commission, he had to withdraw from representing the board of supervisors against the commission that he had advised as to the same matter. The court relied on *People ex. rel Deukmejian v. Brown*, 29 Cal.3d 150 (1981). There, Rule 3-310 (now Rule 1.7) prohibited the attorney general from suing a client department in a matter on which he advised that department. 80 Ops. Cal. Atty. Gen. 127 (1997) (Opinion No. 96-901) [when a county counsel takes a position in favor of the interests of the county board of supervisors and adverse to the interests of an independently elected sheriff, a conflict of interest may, depending upon the individual circumstances, thereafter exist so as to entitle the sheriff to legal representation in that matter by independent counsel].

11 *Elliott v. McFarland Unified School District*, 165 Cal.App.3d 562, 571 (1985).

12 California Government Code section 825 *et seq.*

13 This provision has been held to apply to actions under 42 U.S.C. § 1983 (*Williams v. Horvath*, 16 Cal.3d 834, 843 (1976)).

14 California Government Code section 996.

15 California Government Code section 825 (emphasis added). *Stuart v. City of Pismo Beach*, 35 Cal.App.4th 1600, 1607 (1995) [city could refuse to continue providing a defense to a police officer who was cooperating with the opposing party because such cooperation created a conflict of interest between the city and the officer].

16 *DeGrassi v. City of Glendora*, 207 F.3d, 636, 642 (9th Cir. 2000).

17 *City of Huntington Beach v. The Petersen Law Firm*, 95 Cal.App.4th 562, 566-567 (2002).

18 California Government Code section 825.2(a).

19 California Government Code section 825.2(b). *Stuart v. City of Pismo Beach*, 35 Cal.App.4th 1600, 1607 (1995) [city could refuse to continue providing a defense to a police officer who was cooperating with the opposing party because such cooperation created a conflict of interest between the city and the officer].

20 But see discussion at section G concerning limitations on the use of screens.

21 *Laws v. County of San Diego*, 219 Cal.App.3d 189, 198-200 (1990). There is no conflict because city councils cannot agree in advance to indemnify officials and employees for punitive damages. *See id*. at 198 [contrasting the authority of public entities to make discretionary decisions after judgment is rendered to pay punitive damages awards with the public policy against the issuance of liability insurance against punitive damages].

22 *DeGrassi v. Glendora*, 207 F.3d 636, 642-643 (9th Cir. 1999).

23 *San Diego Navy Federal Credit Union v. Cumis Ins. Society*, 162 Cal.App.3d 358, 375 (1984); See also *Laws v. County of San Diego*, (1990) 219 Cal. App.3d 189 (1990); California Government Code section 825.

24 See definition of "Informed consent" in Rule 1.0.1.

25 *See* cases discussed in *People v. Christian*, 41 Cal.App.4th 986, 993-995 (1996). Screening devices used to avoid conflicts of interest should be distinguished from similar arrangements used to avoid due process violations that would otherwise arise from the same attorney or attorneys simultaneously performing advocacy and advisory functions in administrative proceedings. *Howitt v. Superior Court* (County of Imperial), 3 Cal.App.4th, 1575, 1586-1587 (1992) (screening measures within county office avoided due process violation); but see also *Sabey v. City of Pomona*, 215 Cal.App.4th 489, 497-498 (2013) [screening measures did not avoid due process violation where attorneys representing city in advocacy and advisory functions were partners from the same private law firm].

26 *In re Lee G.*, 1 Cal.App.4th 17 (1991).

27 *City and County of San Francisco v. Cobra Solutions, Inc.*, 8 Cal.4th 839, 853-854 (2006) [city attorney's prior representation of corporation later sued by the city for fraud required vicarious disqualification of the entire city attorney office because as a head of a government law office, the city attorney was the position of both making policy decisions and overseeing the attorneys who served under him such that both the city and the corporation could question the city attorney's confidentiality and loyalty].

28 Note "law firm" is defined to include the legal department of a government organization.

29 California State Bar Rules Revision Commission Report on Proposed Rule 1.10, Executive Summary, p. 3. http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.10-Exec_Summary-Redline.pdf

CHAPTER 3:

THE POLITICAL REFORM ACT: ETHICAL CONSIDERATIONS FOR THE CITY ATTORNEY

A. INTRODUCTION

The Political Reform Act (PRA), adopted by the voters in 1974, governs disclosure of political campaign contributions and spending by candidates and ballot measure committees; it also creates ethical rules for state and local government officials that impose limits on certain actions they may take that affect the official's financial interests. The Fair Political Practices Commission (FPPC) was created by the PRA to oversee and implement its provisions. The PRA is set forth in Government Code sections 81000 *et seq*., and the FPPC's implementing regulations are located in the California Code of Regulations (CCR), at Title 2, Division 6, sections 18110-18997.[1]

City attorneys are public officials subject to the PRA. However, there are some aspects of the PRA that apply differently to city attorneys than to other public officials. Also, some aspects of the PRA apply differently to contract city attorneys than to in-house city attorneys. These differences are the focus of this chapter. Because city attorneys routinely need to apply and interpret the PRA for their clients, they should already have a basic knowledge of the PRA and the Regulations. As a result, this chapter will presume a general understanding of the PRA and the guidance set forth in Regulation 18700 used to analyze potential financial conflicts.[2]

Distinct from the PRA, Government Code Section 1090 prohibits public officials from making or participating in the making of contracts in which they have a financial interest; it also must be considered when analyzing possible financial conflicts of interest. See chapter 4 for a full discussion of Government Code Section 1090 issues.

B. THE POLITICAL REFORM ACT APPLIES TO BOTH IN-HOUSE AND CONTRACT CITY ATTORNEYS

The PRA defines "public officials" as every member, officer, employee, or consultant of a state or local government agency.[3] Therefore, an individual serving as city attorney (or assistant or deputy city attorney) in an in-house capacity is a public official. Similarly, an individual serving a city by contract with the power to make governmental decisions or providing services normally provided by a city staff member is a "consultant" and, thus, also a public official.[4] As a result, city attorneys are public officials covered by the PRA whether they work for the city in-house or pursuant to a contract.

Practice Tip:

Both in-house and contract city attorneys are required to file an annual California Form 700 Statement of Economic Interests pursuant to Government Code section 87200. In addition, assistant and deputy city attorneys will typically be designated filiers under the city's local conflict of interest code because their duties involve them in the making of governmental decisions.

C. DECISIONS AFFECTING THE CITY ATTORNEY'S COMPENSATION OR PAYMENTS TO THE CITY ATTORNEY'S LAW FIRM

The basic rule regarding conflict of interests under the PRA is that a public official may not make, participate in making, or in any way use or attempt to use his or her official position to influence a governmental decision when he or she knows (or has reason to know) that he or she has a disqualifying financial interest. A public official has a disqualifying financial interest if the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, directly on the official, or his or her immediate family, or on any financial interest described in the regulations.[5]

Although "financial interest" generally includes any source of income to the official within twelve months before the decision is made, the PRA specifically provides that salary received from a local government agency is not considered income for purposes of the PRA.[6] Regulation 18232 defines salary from a government agency as follows:

> "'Salary' from a state, local, or federal government agency means any and all payments made by a government agency to a public official, or accrued to the benefit of a public official, as consideration for the public official's services to the government agency. Such payments include wages, fees paid to public officials as "consultants" as defined in California Code of Regulations, Title 2, section 18700.3, pension benefits, health and other insurance coverage, rights to compensated vacation and leave time, free or discounted transportation, payment or indemnification of legal defense costs, and similar benefits."[7]

Therefore, a salary from the city, paid directly to either in-house or contract city attorneys, is not defined as income under the PRA, and does not constitute a disqualifying financial interest.

Contract city attorneys typically do not receive compensation directly from the city. Rather, they receive compensation from and/or have an ownership interest in the law firm that is paid by the city for their services. Thus, contract city attorneys will likely have a financial interest in decisions affecting their compensation because the city will generally compensate their firm – and not the individual contract city attorney – for these services.

Regulation 18704 defines "Making, Participating in Making and Using or Attempting to Use Official Position to Influence a Government Decision." Regulation 18704(d)(3) specifically provides that "Making or participating in making a governmental decision shall not include…Actions by a public official relating to his or her compensation or the terms or conditions of his or her employment or consulting contract."

The FPPC's Leidigh Advice Letter applied the predecessor to these Regulations to city attorney contracts.[8] The advice letter indicates that an attorney employed by a law firm where the firm has a contract with a government agency to provide services may negotiate changes in, a renewal of, or extension of, his or her firm's contract with that agency, or negotiate a separate contract for his or her law firm, provided that the attorney does so while acting in the attorney's private capacity.[9] The FPPC concluded that such actions were within the scope of both of the consultant contract exceptions (the "participation" exception to then Regulation section 18702.4(a)(3) and the "using his or her official position to influence" exception to then Regulation section 18702.4(b)(3)).

Contract city attorneys are frequently requested to render advice to their clients on matters that could result in generating additional work for the city attorney or other members of his or her office. Rendering such advice does not usually implicate the PRA for in-house city attorneys because their compensation will generally not be affected by the amount of work they or their offices perform.

However, the compensation of contract city attorneys and their law firms frequently depends on the amount of work attorneys in the firm perform for the city. For example, the city attorney's firm might receive additional compensation depending on whether the city attorney's office files or defends a lawsuit on behalf of the city. It would be untenable if the PRA prevented a contract city attorney from participating in such decisions in his or her official capacity. The FPPC avoided this result by providing that contract city attorneys and other consultants can participate in and use their official position to influence decisions that could result in additional compensation to them or their firm so long as the contract with the city already specifically includes such services.[10] The FPPC reasoned that the governmental decision to pay the law firm for the legal services enumerated in the contract had already been made by disinterested agency officials at the time the contract was approved. The city attorney's participation in a decision that could trigger these services merely involved implementation of that preexisting decision.

Practice Tip:

Contract city attorneys should make certain that their contracts contain provisions to provide specialized services prior to providing advice that might lead to a need for such services. Otherwise, the attorney's performance of those services after having participated in the underlying decision necessitating the services could result in a violation of the PRA. This area can become tricky if the decision on amending the city attorney's contract and the underlying decision become intertwined.

City attorneys frequently are requested to participate in decisions involving general benefits or compensation that could indirectly affect their own compensation. For example, a city attorney might be requested to advise the city on an issue relating to the CalPERS retirement benefit formula, which would affect his or her retirement benefits. Government Code section 82030(b)(2) and Regulations 18232 and 18704, discussed above, may apply to these decisions for in-house city attorneys, allowing them to provide advice, even though it could indirectly affect their compensation. This result is not certain; there is no guidance on the issue.

In the case of contract city attorneys, if the firm's compensation is not linked in any way to the benefits being discussed, he or she could advise the city because the decision would not impact the firm's compensation. If it were linked, Regulation 18704 may still permit the city attorney to provide advice to the extent that the action related to the terms or conditions of his or her consulting contract. But see Chapter 4 for a discussion of the application of Government Code Section 1090 to this issue.

Practice Tip:

Independent from PRA considerations, neither contract nor in-house city attorneys should attend a closed session at which their compensation is discussed. Government Code section 54957.6 (the meet and confer Brown Act closed session provision) provides the only authority to discuss the city attorney's salary in closed session. That section, however, does not authorize the affected employee to attend the closed session. Both contract and in-house city attorneys would violate these Brown Act provisions by attending a closed session during which their (or their firm's) compensation is discussed.

D. DECISIONS AFFECTING OTHER CLIENTS OF THE CITY ATTORNEY

City attorneys will sometimes be requested to participate in decisions affecting another client of the city attorney. This situation arises more commonly for contract city attorneys, who often represent clients in addition to the city. Under the PRA, there may be a disqualifying economic interest depending on whether the other client is a source of income to the city attorney.[11] In addition, the Attorney General has opined that for purposes of Government Code section 1090, public officials who are attorneys for private clients have a financial interest in their clients' contracts.[12]

In-house city attorneys can also sometimes face such an issue. For example, in-house city attorneys might be called on to represent another entity, such as a joint powers authority, to which the city belongs.

The PRA would not be implicated for in-house city attorneys so long as the other client is a public entity because the salary the city attorney receives from that entity is not income under the PRA. Additionally, the PRA would not apply to this situation for either in-house or contract city attorneys if the individual is not compensated by the joint powers authority for providing services to the authority. Keep in mind that the Rules of Professional Conduct apply, and client waivers may be needed. (See chapter 2.)

The situation is a little more complicated for contract city attorneys who work for firms if the other entity compensates the attorney or the firm. Government Code Section 82030 provides that sources of income to a public official owning 10% or more of a business entity include sources of income to the business entity if the public official's pro-rata share of income from that source exceeds $500. As a result, city attorneys owning more than 10% of a law firm will not be able to participate under the PRA in decisions affecting other clients of the firm, if the city attorney's pro-rata share of the income from that other client exceeds $500.[13]

However, sources of income to the firm will not be sources of income to city attorneys owning less than 10% of the law firm. In such cases, the PRA would require the city attorney to abstain from participating in decisions affecting the other client only if it is reasonably foreseeable the decision would have a material financial effect on the law firm. So long as the firm will not perform work for the client that would flow from the decision, it is unlikely that the PRA would be implicated.

E. OTHER RESOURCES

1. City Attorneys' Dep't, League of Cal. Cities, The California Municipal Law Handbook (Cont.Ed.Bar 2017 ed.) §§2.114 - 2.202.
2. Providing Conflict of Interest Advice (2016), available at: http://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Publications.aspx

CHAPTER 3 ENDNOTES

1 All further references in this chapter to "Regulations" refer to the California Code of Regulations, Title 2, Division 6, sections 18110-18997.

2 Regulation 18700 sets forth a four step analysis to determine the existence of a conflict of interest.

3 California Government Code section 82048.

4 California Code of Regulations section 18700.3.

5 California Code of Regulations section 18700(a).

6 Government Code section 82030(b)(2).

7 California Code of Regulations section 18232.

8 *Leidigh Advice Letter*, A-94-127 (1994).

9 The *Eckis Advice Letter*, A-93-270 (1993), which determined that contract city attorneys could not negotiate or renegotiate their contracts, was decided under different regulations and is no longer valid.

10 *Ritchie Advice Letter*, A-79-045 (March 19, 1979). This advice letter addresses the issue whether a contract city attorney can participate in a rezoning decision that would likely lead to a redevelopment agency bond sale from which the city attorney would receive a percentage commission as bond counsel. Although the advice letter did not reach the ultimate issue, it does indicate that the bond counsel payments, even if paid as a percentage of the bond proceeds, are considered salary from a government agency and, thus, are excluded from income under the PRA. The implication of the advice letter is that the city attorney could participate in the rezoning decision. In this case, the attorney was a sole practitioner.

McEwen Informal Assistance Letter, I-92-481, I-92-523 and I-92-G14. This informal advice letter contains a comprehensive analysis of the PRA as applied to city attorneys. For purposes of this chapter, the relevant determination is that a city attorney can participate in decisions that could result in additional compensation from the city to the firm if the services for which the extra compensation will be earned are included in the contract. Some of the Regulations discussed in this informal advice letter have changed. For example, the portion of the letter prohibiting a contract city attorney from renegotiating the contract between the city and the city attorney's firm, even in his or her private capacity, is no longer valid. Thus, the analysis in this letter should be reviewed carefully.

11 *Mosely Advice Letter,* A-01-161 (2001). This advice letter analyzes whether a contract city attorney may represent a city in a contract dispute with the retired police chief even though the attorney's law firm had also provided legal services to the police chief in past years. In this particular case, no conflict was found since the firm had not provided any legal services to the police chief in the 12 months prior to the dispute. Therefore, since the firm did not have a disqualifying economic interest, the attorney could represent the city in the matter.

12 101 Ops Cal Atty Gen 1 (2018). This opinion concludes that a city council member who is also an attorney may not advocate on behalf of the client, or participate in a governmental decision concerning a client's interests when the client's interests are adverse to the city.

13 *McEwen Advice Letter*, A-89-454.

CHAPTER 4:

CITY ATTORNEYS' FINANCIAL INTERESTS IN CONTRACTS: CONFLICTS OF INTEREST UNDER GOVERNMENT CODE SECTION 1090

A. INTRODUCTION

Government Code section 1090 generally prohibits public officials from making or participating in the making of contracts in which they have a financial interest.[1] This statute codifies the common law prohibition against self-dealing with respect to contracts entered into by government agencies. Public officials must comply with the requirements of both section 1090 and the Political Reform Act (see Chapter 3).

In contrast to the Political Reform Act, which has been interpreted in comprehensive administrative regulations and both formal and informal advice letters promulgated by the Fair Political Practices Commission, Section 1090 has in the past been interpreted and applied only through appellate court decisions and Attorney General opinions. Effective January 1, 2014, however, the Fair Political Practices Commission was given authority to issue opinions and advice regarding prospective compliance with Section 1090.[2]

In light of the general and sometimes ambiguous statutory language, the task of analyzing Section 1090 issues and reaching definitive conclusions can be particularly challenging. This difficulty, combined with the especially severe penalties for violations, militates in favor of interpreting Section 1090 very conservatively. This chapter focuses on potential conflicts of interest under Section 1090 that are of particular concern to all city attorneys and some special counsel.

B. GOVERNMENT CODE SECTION 1090 AND CITY ATTORNEYS GENERALLY

1. Elements of a Section 1090 Violation.

Section 1090 prohibits "city officers or employees" from being "financially interested in any contract made by them in their official capacity." The essential elements of a Section 1090 violation are:

- a city officer or employee
- acting in an official, rather than private, capacity
- who participates in the making
- of a contract entered into by the city
- in which the official has a direct or indirect financial interest

a. City Officer or Employee.

A city attorney holds a public office, and therefore is a "city officer" within the meaning of section 1090, regardless of the individual's status as an employee or independent contractor.[3] That much is clear. It is less clear whether Section 1090 also applies to lawyers serving as special counsel to a city if they are in a position to influence the decision to enter into a contract in which they have a direct or indirect financial interest.

In the early case of *Shaefer v. Berinstein,* the court held that an attorney retained as special counsel to handle certain real property matters was a city officer subject to section 1090.[4] The attorney was hired to rehabilitate properties burdened by tax deeds and special assessments. The court held that he was acting as an officer of the city within the meaning of section 1090 when he advised the city council to sell certain properties, which he then fraudulently purchased through dummy entities. Similarly, in *California Housing Finance Agency v. Hanover,* the court held that an outside attorney who was in a position of influence over a public agency's contracting decisions was an "employee" within the meaning of Section 1090, even if he would be classified as an independent contractor under common law principles.5 In *People v. Superior Court (Sahlolbei),* the Supreme Court affirmed that section 1090's reference to "officers" applies to an outside advisor or independent contractor "with responsibilities for public contracting similar to those belonging to formal officers…."[6] The FPPC has also issued a few 1090 opinions on this topic.[7]

Given the uncertainty in this evolving area, special counsel should carefully consider the risks under Section 1090 when advising client agencies on contracts in which counsel may have a direct or indirect financial interest.

b. Acting in an Official Capacity.

Section 1090 prohibits city officials from having a financial interest in contracts made by them "in their official capacity." It does not prevent them from entering into contracts made in their private capacity. This distinction is fact-dependent, and there is no bright line test for determining whether an official is acting in a private capacity.

In *Campagna v. Sanger,* a law firm provided contract city attorney services under an agreement providing a monthly retainer. The retainer excluded litigation, but the agreement provided that the firm would be paid reasonable fees for litigation, depending upon the type of services provided.[8] An attorney with the firm negotiated a legal services contract with the City providing that his firm and another law firm would represent the city in prosecuting a toxic contamination lawsuit against chemical companies. The contingency fee agreement approved by the city council set forth how the total fee would be calculated, but did not explain how the two firms would split the fee. Under a separate oral agreement with the second law firm, the city attorney's firm was to receive a certain percentage of the total contingency fee.

The court held that the city attorney did not violate Section 1090 when he negotiated with the city on his firm's behalf in his private capacity to provide additional legal services beyond the basic retainer agreement. However, the contingency fee agreement did not establish how the firm would be paid for this additional work; that was determined in the separate referral fee agreement between the city attorney's firm and the second firm. The attorney admitted and the court found that when negotiating this second agreement, he was acting within the course and scope of his official duties as the city attorney. Because he was financially interested in a contract made in his official capacity, a violation of Section 1090 had occurred; and the referral fee agreement was unenforceable. The court's discussion of the contingency fee agreement is confusing due to the unique facts presented in this case; however, the court did clearly hold that a city attorney can negotiate his or her contract with the city when acting in a private capacity.

In *People v. Gnass,*[9] a city attorney was a partner in a private law firm hired to provide part-time, contract city attorney services to the City of Waterford. Waterford formed a Public Financing Authority through a joint powers agreement with its redevelopment agency. The city attorney was criminally prosecuted for representing the Waterford PFA in connection with the formation of several other PFA's under the Marks-Roos Local Bond Pooling Act, then receiving compensation for serving as disclosure counsel for revenue bond issuances of the other PFA's. The court held that the city attorney was acting in his official capacity when he advised the Waterford PFA with regard to formation of the other PFA's, in which he had a prohibited financial interest.

c. Making a Contract.

The courts, the Attorney General, and the FPPC have read section 1090 broadly so that the "making of a contract" includes actions preliminary to approval and execution. This includes involvement in early discussions about the need for the contract, as well as negotiations of contract terms. The prohibition of section 1090 applies when a public official has the opportunity to exert influence over decisions leading to a contract, even if the official does not personally participate in the actual approval or execution of the contract.[10]

Practice Tip:

Try to identify potential Section 1090 conflicts as early as possible and refrain from any involvement in discussions that may lead to a prohibited contract. It will usually be impossible to "unring the bell" after you have participated in preliminary decision-making, with the possible result that the contract cannot be entered into at all.

d. Financial Interest.

The courts and the Attorney General have broadly interpreted the term "financial interest" to include both direct and indirect financial interests in a contract.[11] In the *Gnass* case, discussed above, the court found an indirect financial interest when a city attorney, acting in his official capacity, provided advice to a financing JPA regarding the formation of several other JPAs, then reaped a financial reward by serving as disclosure counsel for bonds issued by the other JPAs. This case is troubling because it suggests that a contract which creates a mere possibility of future paid legal work can constitute an indirect financial interest.

The Attorney General has opined that a city council cannot enter into a contract with a law firm, of which a city council member is a partner, to represent the city in a lawsuit, even if the law firm would receive no fees for its services and would agree to turn over to the city any attorney fees that might be awarded in the litigation. The Attorney General pointed to the potential divergence of interests between the law firm and the city because the costs incurred by the firm in pursuing the litigation might give it an incentive to settle, as well as the potential for indirect economic gain to the firm through the marketing value of a successful outcome.[12]

Furthermore, the Attorney General has concluded that a member of a city council, who is also an attorney, may not advocate on behalf of a client's interest when those interests are adverse to the city.[13] The council member, in his private capacity, represented a client in a dispute with the city over a ban of newspaper racks on city property; however, the council member ceased representation prior to the client filing suit against the city. In analyzing the council member's financial interest in the representation of his client, the Attorney General determined neither the remote interests nor the non-interests exceptions applied, resulting in a violation of section 1090. However, the Attorney General also noted that section 1090 would not be implicated based solely on litigation between the city and the council member's client, since a contract with a client for attorney representation is not a contract made in the council member's official capacity.

In *Frasor-Yamor Agency, Inc. v. County of Del Norte,* the court found a financial interest arising out of a county supervisor's status as an employee and part owner of an insurance brokerage which placed insurance policies in its capacity as an agent for the county, even though the supervisor had agreed with his firm to share in none of the commission income attributable to the insurance policies. In reaching this conclusion, the court relied on the potential impact of the overall financial success of the company on the value of the supervisor's ownership interest. Additionally, the company could potentially receive additional remuneration in the form of profit-sharing, over and above ordinary commissions, based on the overall volume of business it produced.[14]

In 2016, the Attorney General issued an opinion on the question of whether a private attorney acting as a contract city attorney may also act as bond counsel for the same city and be paid based on a percentage of the bond issues.[15] In this type of arrangement, the bond counsel receives no fee unless the bonds are issued. The Attorney General opined that such an arrangement was prohibited by section 1090.

City attorneys should also be aware that financial interests may arise from the employment or business activities of their spouse. Both the financial interests and exceptions applicable to the spouse will be imputed to the city attorney.[16]

2. Exceptions: Non-Interests and Remote Interests.

a. Non-interests.

Section 1091.5 provides that a public official is deemed not to have a financial interest in a contract and may fully participate in its formation if his or her interest falls within certain listed categories. Of particular interest to city attorneys are Subdivisions (a)(9) and (a)(10) of Section 1091.5. Subdivision (a)(9) is commonly referred to as the "governmental salary exception". Under this provision, a public official is deemed to have a non-interest in a contract when the official's interest is "that of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record." Subdivision (a)(10) provides that a public official who also serves as an attorney for a party contracting with the public agency has a non-interest in a contract if the attorney has not received and will not receive any remuneration as a result of the contract and has an ownership interest of less than 10% in the law practice or firm.

The exception contained in Subdivision (a)(9) was interpreted in *Lexin v. Superior Court.*[17] *Lexin* involved a felony prosecution of several city employees who also served on the board of the city's municipal retirement system. The board of the retirement system, a separate legal entity from the city, voted to authorize an agreement which allowed the city to defer payments into the retirement fund in exchange for the city's agreement to provide increased pension benefits for city employees, including the defendants. For most employees, the increased benefit consisted of an enhanced multiplier for calculating retirement benefits. The contract also created a special benefit for one board member who served as a union president, allowing him to use a higher salary for his retirement calculations.

The *Lexin* court had no difficulty concluding that the board members had participated in the making of a contract in which they had a financial interest. After an exhaustive analysis, the court concluded that Section 1091.5(a)(9) provides an exception to the prohibition of Section 1090 for an individual whose financial interest in a proposed contract is only the present interest in an existing employment relationship with a public agency which is a party to the contract, provided that the contract does not directly affect the individual's own department. However, this exception does not apply when the contract effects prospective changes in the pension benefits or other elements of government compensation provided to the interested officials.

The court ultimately concluded that the board members did qualify for the "public services" exception under Section 1091.5(a)(3), which states that a non-interest exists when a member of a public body or board is a recipient of public services on the same conditions as if he or she were not a board member. In *Lexin*, board members' financial interest arose because of their role as constituents of the retirement board and recipients of the public services it provided. There was no conflict, the court reasoned, because the pension benefits were broadly available to all others similarly situated, rather than narrowly tailored to favor a particular employee or group of employees. It is noteworthy that in reaching this interpretation, the court relied on legal authorities interpreting the "public generally" exception in the Political Reform Act. However, this defense was not available to the board member who received a special benefit.

Similarly, in *People v. Rizzo,* the governmental salary exception was held inapplicable to a city manager and assistant city manager who participated in modifying the city's supplemental retirement plan to provide themselves with unique benefits not made available to other plan members.[18]

b. Remote Interests.

Government Code section 1091 provides that a public board may approve a contract in which one of its members has only a "remote interest," provided that the interested official discloses his or her financial interest, has it noted in the board's official records, and refrains from participating in the decision-making process leading to contract formation.

Section 1091(b)(13) applies to the interest "of a person receiving salary, per diem, or reimbursement for expenses from a government entity." The Attorney General has interpreted the term "salary" as including other elements of compensation such as retiree health benefits. But the Attorney General also concluded that this provision encompasses only a public official's employment with another government agency seeking to contract with the agency the interested official serves. Hence it does not apply when a community college district board member receives retirement health benefits directly from the district as a former faculty member under a collective bargaining agreement and the district is renegotiating the amount of health benefits with employee representatives.[19] In contrast, it does permit a city council to contract with a sheriff's office for law enforcement services, as long as a council member who was also a deputy sheriff refrains from participation in the making of the contract.[20] When Section 1091(b)(13) is read in conjunction with the non-interest provision contained in Section 1091.5(a)(9), it appears that a member of a public agency board has a non-interest in salary and benefits received from employment with a different public agency, as long as the contract in question does not directly involve the department of the agency that employs the official. In this situation, the public official may participate in contract approval. Even if the contract affects the department employing the official, it may be approved without the official's participation under the remote interest exception contained in Section 1091(b)(13).[21]

Section 1091 makes one remote interest specifically applicable to attorneys and certain other occupations; this remote interest dovetails with the non-interest set forth in Section 1091.5(a)(10). Section 1091(b)(6) encompasses the interest of an attorney of a contracting party, if the attorney has not received and will not receive remuneration as a result of the contract and has an ownership interest of 10 percent or more in the law practice or firm. Prior to the addition of the 10% ownership provision, the Attorney General found that a city council member had only a remote interest in the client of a law firm in which his spouse was a partner because the law firm would receive no remuneration from the contract since the firm's representation of the client concerned matters unrelated to the contract with the city.[22] Although this issue has not yet been addressed by the courts or the Attorney General, it seems reasonable to conclude that the references to receipt of remuneration under a contract found in Section 1091(b)(6) and Section 1091.5(a)(10) do not prevent a city attorney from being paid by the city for drafting the contract itself, as long as the city attorney is not going to receive remuneration from the other party to the contract in the future as a result of the contract.

3. Rule of Necessity.

In limited circumstances, a public official or board may be permitted to carry out essential duties despite a conflict of interest when the official or board is the only one who may legally act. For example, a school superintendent may enter into a memorandum of understanding with school employees, even though he was married to a school employee, because he was the only official authorized to approve the MOU.[23] Similarly, a community college board was allowed to negotiate health benefits with its faculty, even when a board member was a retired faculty member whose retirement health benefits would be affected because only the board is legally authorized to act on this decision.[24] It is unlikely that there will be many situations where the rule of necessity might apply to a city attorney. One possible scenario might be where a city charter provision expressly requires approval of a particular contract by the city attorney.

4. Penalties for Violations.

Any contract made in violation of Section 1090 is void and unenforceable even if the city official acted pursuant to legal advice from the city attorney, the violation was unintentional, and the contract was not unfair or fraudulent.[25] The city, or any other party except the financially interested official, may seek nullification of a contract made in violation of section 1090, as well as the interested city official's disgorgement of profits and payment of restitution.[26] Actions to void contracts under Section 1090 must be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, the violation.[27] A public official who knowingly and willfully makes a contract in which he has a financial interest can be punished by fines, imprisonment, and disqualification from holding any public office.[28] Effective January 1, 2014, the Fair Political Practices Commission was given authority to bring administrative or civil actions to enforce Section 1090 after obtaining authorization from the District Attorney, resulting in possible fines of up to $10,000 or three times the financial benefit received by a defendant for each violation.[29]

Practice Tip:

If it is not clear whether a particular contract will give rise to a section 1090 violation affecting the city attorney, it is advisable for the city attorney to abstain from any participation. This approach will minimize the risk of a successful criminal prosecution because the element of "making" a contract would be absent.

C. IDENTIFYING AND ANALYZING POTENTIAL CONFLICTS OF INTEREST UNDER SECTION 1090

Several common circumstances in which city attorneys may encounter potential Section 1090 conflicts are:

- Negotiating new or amended employment contracts with the city
- Representing the city in negotiations with employee groups for salary or benefit changes that may also apply to the in-house city attorney.
- Negotiating for the performance of additional services outside the scope of an existing legal services agreement with the city attorney's law firm
- Contracts with other clients of the city attorney's law firm

» Serving as legal counsel to a joint powers agency of which the city is a member

1. Negotiating City Attorney Employment Contracts

Section 1090 does not prohibit contract city attorneys from negotiating the terms of their employment contracts directly with the city so long as they are acting solely in their private capacity.[30] The Attorney General has acknowledged that a public employee's contract may be renegotiated, "so long as the employee totally disqualifies himself or herself from any participation, in his or her public capacity, in the making of the contract."7 Nevertheless, the Attorney General also stated that "when a contractor serves as a public official (e.g., a city attorney) and renegotiates a contract, this office recommends that such contractors retain another individual to conduct all negotiations. In so doing, the official would minimize the possibility of a misunderstanding about whether the contractor's statements were made in the performance of the contractor's public duties or in the course of the contractual negotiations."[32] Although this passage is not supported by references to legal authority, the Attorney General's recommendation merits consideration because the retention of legal counsel to conduct contract negotiations could provide additional factual support for the conclusion that the city attorney is truly acting in his or her private capacity.

Practice Tips:

When negotiating your employment contract or amendments thereto, notify the city council in writing that you are representing yourself in your personal capacity and not advising them in your official capacity as the city attorney. Any letter or memorandum providing this notification should be on personal or law firm letterhead.

Consider establishing further separation between your official service as the city attorney and representation of your personal financial interests in the contract negotiations. Options include presenting your proposal to the city manager or human resources director and allowing that individual to present it to the city council, or even retaining personal legal counsel as suggested by the Attorney General.

Refrain from providing legal advice on the city's negotiating strategy or how contract provisions should be interpreted. If asked to provide such advice, remind the city that you are acting in your private capacity and recommend that the city consult with independent counsel. If you are an in-house city attorney, consider recommending that your city obtain legal advice on your contract from outside counsel, rather than from one of your subordinates.

2. Representing the City in Negotiating Employee Benefit Changes that May Also Affect an In-house City Attorney

An in-house city attorney may be called upon to provide advice and representation for negotiations with employee groups through the collective bargaining process. These negotiations sometimes cover compensation and benefit changes which can reasonably be expected to apply to the city attorney, either through a "me too" clause in the attorney's employment agreement, through local custom and practice, or otherwise. The *Lexin* and *Rizzo* cases hold that although the government salary exception applies to an interest in government compensation under an existing employment relationship, contracts that may result in future changes to that compensation do not qualify as non-interests under Section 1091.5. Moreover, even though the remote interest exception under Section 1091(b)(13) states that it applies to an interest "of a person receiving salary, per diem, or reimbursement of expenses from a government entity," Lexin reasoned on the basis of legislative history that it is inapplicable when the contract involves a direct financial impact on the official.

This case presents a dilemma for a city attorney who is expected to advise the city in the collective bargaining process. The Section 1090 issue could be avoided if the city attorney abstains from participation in the making of a collective bargaining agreement when it is reasonably foreseeable that the compensation changes reflected in the agreement will be applied to the city attorney. Another possible way to mitigate legal risk would be to avoid including a "me too" clause in the city attorney's employment agreement.

The *Lexin* case provides little useful guidance on these important practical questions. Because of the lack of clarity in this area of the law, city attorneys may wish to consider seeking an opinion or advice from the Fair Political Practices Commission before proceeding.

There may be factual situations where it is appropriate to rely on the "rule of necessity" to allow participation in the formation of contracts with employee groups, even though the elements of a Section 1090 violation are present and no exceptions apply. As discussed above, this rule authorizes formation of a contract despite a conflict of interest when necessary to ensure that essential governmental functions are performed. The *Lexin* case suggested that the rule of necessity could apply in appropriate circumstances to permit city officials to negotiate contracts affecting their personal salaries, but did not reach that issue.[33]

3. Negotiating to Provide Additional Legal Services

a. In-house City Attorneys

City attorneys are often asked to perform litigation, bond counsel and other specialized services. Such requests normally do not present any questions under Section 1090 for in-house city attorneys because they usually will not receive any additional compensation for performing such services.

b. Contract City Attorneys

Whether a request for specialized legal services would raise Section 1090 questions for contract city attorneys depends on two factors: (1) will the city attorney's contract with the city require modification in order for the attorney to be paid for these services; and (2) will the city attorney's involvement in the making of a contract between the city and a third party generate additional income or otherwise have a financial effect on the city attorney? The last question is particularly important if there would be additional income coming to the city attorney from an entity other than the city.

A contract city attorney who is advising the city on the likelihood of success in litigation or on other matters that could affect the city attorney's income or that of his or her law firm will not have a Section 1090 issue arising from the additional income that could result from these services if the retainer agreement already provides for such services. This is because the provision of those services will not require a new contract or an amendment to the existing contract. Since no contract is involved, Section 1090 is not implicated.

However, if the contract does not include those services, the city attorney will likely need to amend the contract. Although city attorneys can represent themselves in such negotiations, they may not recommend the need for such services in their capacity as city attorney or advise the city as a client with respect to the contract amendment.

There is no consensus legal opinion or direction on whether a Section 1090 violation when providing advice on decisions that might require additional services not already included in the contract for which the city attorney could be selected by the city. Such situations should be carefully evaluated on a case-by-case basis. If the firm's existing representation of the city is on a limited basis as special counsel and the city relies on its city attorney to advise it as to the wisdom of participating in litigation, then a Section 1090 violation would likely not occur.

Practice Tip:

Contract city attorneys should include in their retention agreements all services they anticipate providing for the city and specify the basis for determining the compensation for those services.

4. Contracts Between the City and Another Client of City Attorney's Law Firm

Cities sometimes wish to contract with other clients of the city attorney. This situation is more common for contract city attorneys, who may be members of firms with many public and private clients. It can also arise for in-house city attorneys who represent other government entities, such as joint powers authorities, affiliated with the city. As long as the city attorney avoids involvement in the "making" of a particular contract, the city and the other client can contract without violating Section 1090. There may be situations in which the city attorney may lawfully work on the contract, perhaps more in theory than practice. The city attorney can participate in the making of the contract if the elements of the Section 1091.5(a)(10) non-interest exemption are met (city attorney will not receive remuneration as a result of the contract and has an ownership interest of less than 10% in the law practice or firm). The city attorney may, however, have an indirect financial interest if his or her compensation could increase as a result of the income the firm would receive for representing the other client, or through enhancement in the value of the partnership interest.[34]

If the city attorney's other client is a public entity, then potential Section 1090 issues must be addressed for that entity as well if the attorney advising that client qualifies as an "officer or employee" of that entity within the meaning of Section 1090.

Practice Tip:

Even if you determine that you have no Section 1090 conflict, you still need to check the Rules and the Political Reform Act for possible ethical or financial conflicts.

5. Serving as Legal Counsel to a Joint Powers Authority

City attorneys are frequently asked to advise agencies closely affiliated with the city itself, or to work on the contract that will form a joint powers agency which includes the city as a member. Section 1090 issues can arise when the city attorney advises two legally distinct, but related entities and receives compensation separate from the compensation provided for services as city attorney/general counsel. If faced with this situation, take a close look at the *Gnass case and make an assessment whether you are facing an analogous fact pattern.*

Practice Tip:

Be particularly wary of any situation in which you or your firm will be paid by an entity that, directly or indirectly, is "across the table" from the city in a contract negotiation, even if the contract constitutes only one aspect of a more complex transaction.

A more typical joint powers agreement advances policy objectives shared by a number of public agencies. Often, the "lead" city hosts the new agency by providing staffing and facilities and is reimbursed by the authority for doing so. If the city attorney is a public employee, the contract forming the JPA usually does not present Section 1090 issues because the city attorney will not receive additional compensation.

In the case of a contract city attorney, however, the issue is more complex. A joint powers authority is created by contract, and an attorney who expects to be considered as general counsel for the new agency may be deemed to be financially interested in that contract under the reasoning of *Gnass. Therefore, it may be prudent for the city attorney to advise the city that he or she will either (1) not represent the city in the formation of the authority or (2) not provide legal services to the new authority after it is formed.*

D. OTHER RESOURCES

1. An Overview of Section 1090 and FPPC Advice (2020). Available from the FPPC website at http://fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/section-1090/Section%201090%20-%20Overview%20-%20Oct%202020.pdf
2. City Attorneys' Dep't, League of Cal. Cities, The California Municipal Law Handbook (Cont.Ed.Bar 2017 ed.) §2.149, p. 182.

3. Counsel and Council: A Guide for Building a Productive Employment Relationship. This handbook contains basic information about structuring the employment relationship between the city attorney and the city council. It also contains suggested employment agreement provisions, including "scope of services" for both contract and in-house city attorneys. It can be downloaded from the League of California Cities website: http://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys/Publications.aspx
4. Providing Conflict of Interest Advice (2016). Also available from the League of California Cities website.
5. Conflicts of Interest (2010). Available from the website of the Office of the California Attorney General: www.oag.ca.gov
6. *"When In Doubt, Sit It Out – Gov. Code Section 1090 Update," presented by Steven Dorsey at the May 2011 City Attorneys Conference. Available from the League of California Cities website.*
7. *"Section 1090 Overview and Recent Developments," presented by Jack C. Woodside and Sukhi K. Brar at the May 2017 City Attorneys Conference. Available from the League of California Cities website.*

CHAPTER 4 ENDNOTES:

1 Section 1090 states:

> "(a) Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.
>
> (b) An individual shall not aid or abet a Member of the Legislature or a state, county district, judicial district, or city officer or employee in violating subdivision (a).
>
> (c) As used in this article, "district" means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries."

2 Government Code section 1097.1(c)(2).

3 *People ex rel. Clancy v. Superior Court*, 39 Cal.3d 740, 747 (1985) [main holding of case is that city cannot retain special counsel to prosecute civil nuisance abatement cases via a contingency fee agreement]; 70 Ops.Cal. Atty.Gen. 271, 273-274 (1987) (Opinion No. 87-905).

4 *Shaefer v. Berinstein*, 140 Cal.App.2d 278, 291 (1956); see also companion case of *Terry v. Bender*, 143 Cal.App.2d 198, 206-207 (1956) [involving same nefarious scheme].

5 *California Housing Finance Agency v. Hanover*, 148 Cal.App.4th 682, 690-694 (2007); see also *HUB City Solid Waste Services, Inc. v. City of Compton*, 186 Cal.App.4th 1114, 1125 (2010) [independent contractor who managed the city's in-house waste division was acting as a public official within the meaning of Section 1090 when he advised the city to enter into a franchise agreement with a waste management company he created]; cf. *Handler v. Board of Supervisors*, 39 Cal.2d 282, 286 (1952) [county charter provision requiring appointment of officers or employees by ordinance held inapplicable to attorney retained by contract to perform specialized legal services on a temporary basis].

6 *People v. Superior Court (Sahlolbei)*, 3 Cal. 5th 230, 237–38 (2017) (specifically disapproving the holding in *People v. Christiansen, 216 Cal. App.4th 1181 (2013))*.

7 FPPC Advice letters on Section 1090: Burns Advice Letter, A-14-060; Ennis Advice Letter, A-15-006; Webber Advice Letter, A-15-127; Chadwick Advice Letter, A-15-147; Green Advice Letter, No. A-16-084; Ancel Advice Letter, A-16-173.

8 *Campagna v. City of Sanger*, 42 Cal.App.4th 533 (1996).

9 *People v. Gnass* , 101 Cal.App.4th 1271, 1289-1292 (2002) [note that the indictment in *Gnass* was set aside because of defective instructions to the grand jury on the question whether the Section 1090 violation was knowing and willful].

10 *Stigall v. City of Taft*, 58 Cal.2d 565, 571 (1962); *Millbrae Assn. for Residential Survival v. City of Millbrae*, 262 Cal.App.2d 222, 237 (1968); 81 Ops.Cal.Atty. Gen. 169 (1998) [participation in the planning and approval of a revolving loan program precludes subsequent borrowing from the fund]; *People v. Gnass*, *supra*, 101 Cal.App.4th 1271, 1292-1298; Chadwick Advice Letter, No. A-16-090; Webber Advice Letter, No. A-15-127; but see Asuncion Advice Letter, No. A-14-062; Williams Advice Letter, No. A-15-029; Walter Advice Letter, No. A-15-050.

11 *Thomson v. Call*, 38 Cal.3d 633 (1985); see also *Torres v. City of Montebello,* 234 Cal.App.4th 382, 402 (2015); *People v. Honig*, 48 Cal.App.4th 289, 314-315 (1996); 92 Ops.Cal.Atty.Gen. 67, 69 (2009).

12 86 Ops.Cal.Atty.Gen. 138 (2003).

13 101 Cal. Op. Att'y Gen. 1 (2018).

14 *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal.App.3d 201 (1977).

15 99 Ops.Cal.Atty.Gen. 25 (2016).

16 e.g., *Thorpe v. Long Beach Community College Dist.*, 83 Cal.App.4th 655 (2000) [community college district properly denied promotion to employee whose spouse sat on the district board that had to approve the appointment; non-interest exception provided in Government Code section 1091.5(a)(6) for pre-existing employment held inapplicable when an employee is appointed to a new position]; 85 Ops.Cal.Atty.Gen. 34 (2002) [city employee may not participate in negotiation of or drafting a development agreement when her spouse is an employee of a firm that provides services to the developer, even though he has no interest in the firm, he will not work on this project, and his income will not be affected by the negotiations or its outcome]; 81 Ops.Cal.Atty.Gen. 169 (1998) [city council could not execute a contract for purchase of equipment with a corporation because city council member and her spouse owned stock in corporation and the spouse was employed by corporation; non-interest and remote interest exceptions held to be inapplicable]; see also Kellner Advice Letter, No. A-15-021.

17 *Lexin v. Superior Court*, 47 Cal.4th 1050, 1079-1085 (2010).

18 *People v. Rizzo*, 214 Cal.App.4th 921 (2013).

19 89 Ops.Cal.Atty.Gen. 217, 221 (2006) [but note that the contract in question was allowed to be approved under the rule of necessity].

20 83 Ops.Cal.Atty.Gen. 246 (2000).

21 *Lexin v. Superior Court*, *supra*, 47 Cal.4th 1050, 1081 (2010).

22 78 Ops.Cal.Atty.Gen. 230 (1995).

23 65 Ops.Cal.Atty.Gen. 305 (1982); see also 69 Ops.Cal.Atty.Gen. 102 (1986).

24 89 Ops.Cal.Atty.Gen. 217 (2006).

25 *Thomson v. Call*, *supra,* 38 Cal.3d 633; *People v. Chacon*, 40 Cal.4th 558 (2007).

26 Government Code section 1092(a); *County of San Bernardino v. Walsh*, 158 Cal.App.4th 533 (2007).

27 Government Code section 1092(b).

28 Government Code section 1097; *People v. Gnass*, *supra*, 101 Cal.App.4th 1271, 1305; *People v. Honig*, 48 Cal.App.4th 289 (1996).

29 Government Code sections 1097.1 to 1097.5, added by AB 1090, 2013 California Statutes, Chapter 650.

30 *Campagna v. City of Sanger*, *supra*, 42 Cal.App.4th 533, 539-540.

31 Conflicts of Interest, California Attorney General, 2010, at p. 66.

32 *Id. at pp. 66-67.*

33 *Lexin v. Superior Court*, *supra*, 47 Cal.4th 1050, 1085.

34 *See* 86 Ops.Cal.Atty.Gen 138 (2003).

CHAPTER 5:

THE CITY ATTORNEY'S ROLE AS PROSECUTOR

A. INTRODUCTION

City attorneys occasionally perform dual functions, handling both civil and criminal matters. Generally, the performance of these dual functions will not result in the disqualification of the city attorney's office.[1] But the intrusion of improper influences upon the city attorney's exercise of prosecutorial discretion can result in disqualification in criminal and code enforcement matters and possibly other proceedings where a city attorney is representing the City as a sovereign.[2]

> "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 [Meritorious Claims and Contentions] and 3.4 [Fairness to Opposing Party and Counsel]."[3]

This chapter examines those circumstances where a city attorney's other duties and responsibilities and improper influences may conflict with his or her role as a prosecutor.

B. FACTORS TO CONSIDER WHEN FILING CRIMINAL CASES

1. Impartiality and Objectivity

Prosecuting criminal and quasi-criminal proceedings presents special ethical issues. For instance, it may be alleged that the city attorney filed a criminal complaint or a code enforcement action as a result of pressure from the city manager, chief of police, city council or an individual council member. There may also be allegations that the city attorney filed the action in an effort to protect the city from civil liability; for example, filing a criminal complaint for battery on a peace officer to counteract or deter a potential civil action against the city for use of excessive force.

City attorneys serving as prosecutors on behalf of the people in civil nuisance abatement and criminal proceedings are subject to heightened standards of impartiality and objectivity. City attorney decisions in these proceedings must not be influenced by factors other than probable cause and the interests of justice. As the California Supreme Court observed in *People ex rel. J. Clancy v. Superior Court*:

> "[A] prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly."[4]

Indeed, courts are likely to apply these standards in any case where the government is exercising powers unique to a sovereign as in civil nuisance abatement and condemnation actions.[5]

Penal Code section 1424 authorizes disqualification of a criminal prosecutor where: (1) there is a reasonable possibility that the prosecutor may not exercise his or her discretionary function in an evenhanded manner; and (2) the conflict is so grave that it is unlikely that a criminal defendant will receive fair treatment.[6] The conflict must be more than apparent. "The statute does not allow disqualification because participation of the prosecutor would be unseemly, appear improper, or even reduce public confidence in the criminal justice system. An actual likelihood of prejudice must be shown."[7] Note that public agency attorneys operating under contingency fee agreements also face the potential for disqualification under Penal Code section 1424.

2. Probable Cause

Violations of municipal codes can be enforced criminally as misdemeanors[8] or infractions[9] or enforced administratively.[10] City attorneys prosecuting criminal violations of their city's municipal codes are subject to Rule 3.8, which prohibits the filing of criminal charges where the prosecuting attorney knows or should know that the charges are not supported by probable cause. Likewise, if after filing the charges the prosecuting attorney discovers the lack of probable cause, or after conviction determines based upon new evidence that the defendant did not commit the crime, he or she must notify the court in which the charges are pending and seek dismissal of the action or take other action to remedy the conviction.[11]

Practice Tip:

The city council has budgetary authority over the resources that the city attorney may devote to criminal prosecutions. But the city attorney who also acts as a prosecutor needs to clearly warn the council, city manager, chief of police and other interested officials early in his or her tenure that they must not try to influence city attorney's exercise of prosecutorial powers including whether to file criminal complaints in specific cases. Attempts to influence these decisions expose the city to a defense claim that probable cause does not support the decision to prosecute or that the city attorney is not independently exercising prosecutorial powers. The city attorney who has already given this warning can more easily remind officials when a highly visible or political case arises that may invite interference.

Practice Tip:

Situations giving rise to administrative penalties can trigger a criminal prosecution of the owner of the property or business. This connection between the civil and criminal aspects of the enforcement supports the need for the city attorney's neutrality and objectivity.[12] Therefore, city attorneys should apply the same standards of review when deciding whether to institute actions to abate nuisances and to enforce administrative citations for municipal code violations.

3. Prosecutorial Immunity

Federal law provides city attorney prosecutors with absolute immunity from liability for their acts in initiating or pursuing criminal charges.[13] Likewise, under state law, city attorneys are immune from any actions for malicious prosecution.[14] However, immunity is qualified, not absolute, regarding statements a prosecutor makes to the media regarding a criminal case.[15]

Practice Tip:

Under Rule 3.6, city attorneys should exercise restraint in making statements to the media when exercising the sovereign or unique governmental powers to file or prosecute civil or criminal proceedings to avoid materially prejudicing a pending case. The prosecutor can, however, respond to recent publicity not initiated by the prosecutor or the client to the extent reasonably necessary to protect the city or one of its officers or employees from the substantial undue prejudicial effect of that publicity. The city attorney should limit the response to providing the information necessary to mitigate the recent adverse publicity. Note also under Rule 3.8(e), the city attorney as prosecutor is also charged with exercising reasonable care to prevent persons under his or her supervision (including investigators, law enforcement personnel, employees or other persons) from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6. Where media interest is likely, the city attorney should consider advising the "team" to limit media responses to the city attorney or a specific identified person who can be trained on the limitations of Rule 3.6.

4 Conflicts of Interest of the City Attorney

Conflicts of interest requiring recusal of the city attorney in a criminal or quasi-criminal proceeding may arise when he or she acquires a conflicting personal or emotional – rather than professional – interest in the case or where the city attorney seeks to use the criminal proceedings as a means to advance "personal or fiduciary interests."[16] In the event of a conflict of interest in proceeding to be brought in the name of the people, the city attorney should refer the matter to the local District Attorney's Office. Examples of conflicts of interest and appearance of conflicts that would likely require recusal include:

- Prosecution of officers, employees or agents of the city for an act committed in the course and scope of their official duties;
- Prosecution of a city council member or personnel of the city attorney's office, or continued prosecution of a matter against an individual who becomes a council member or department staff member after the criminal action is filed;
- Prosecution of an officer, employee or agent of the city who has previously provided confidential information relating to the criminal prosecution to members of the city attorney's office for use in a civil matter; and
- Cases in which an employee of the city attorney's office, or member of an employee's family, is the victim of the alleged crime.

Proper management and oversight should be provided to avoid such conflicts of interest and ensure recusal at the earliest opportunity.

Practice Tip:

A city attorney who serves as a prosecutor cannot seek direction from the city council when filing a criminal case. However, a city attorney filing a civil action can, and in many cases must, receive direction from the city council before filing the lawsuit. In the case of a nuisance abatement action, the city attorney may bring either a criminal action in the name of the "People" or a civil action in the name of the city.[17] In the former case, no council direction is required or permitted, and the case cannot be discussed in closed session because the People, not the city, are the client.

One consequence of proceeding with a criminal action is that there is no attorney-client privilege with respect to the city because the city is not the client in that instance; however, the attorney work-product and other privileges that are held by prosecutors would still apply.[18] When seeking direction from the city council regarding institution of a potential civil nuisance abatement action, the city attorney should focus the council's deliberations on factors that will enable the city attorney to comply with his or her obligation to file such actions with impartiality and neutrality and to pursue fairness and the interests of justice.

C. CRIMINAL ACTIONS CANNOT BE USED TO GAIN AN ADVANTAGE IN CIVIL CASES

A common potential pitfall involves a city attorney prosecutor's use of his or her position to gain an advantage in a civil action. Rule 3.10 expressly prohibits the threat of criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. However, the comments to the Rule make clear that a statement that the lawyer will present criminal, administrative, or disciplinary charges is not prohibited *unless* it is made to obtain an advantage in a civil dispute. Further, the Rule does not prohibit actually presenting criminal, administrative, or disciplinary charges, even if doing so creates an advantage in a civil dispute. Finally, the Rule does not apply to a threat to bring a civil action.

A court may apply the same ethical principles to a city attorney's use of administrative or civil enforcement proceedings to exert leverage in existing or potential civil disputes. The key distinction in these matters is the extent to which public criminal, administrative, or disciplinary charges are used to leverage concessions in a related civil matter.[19]

Prior state bar opinions and prior rules stated that a prosecutor's "offer to dismiss a criminal prosecution may not be conditioned on a release from civil liability because that practice constitutes a threat to obtain an advantage in a civil dispute in violation of the Rules of Professional Conduct."[20] But Rule 3.10 now expressly allows a government lawyer to offer a global settlement or release/dismissal agreement in connection with related criminal, civil, or administrative matters, provided that the lawyer has probable cause for initiating or continuing criminal charges.[21]

Additionally, in response to an offer from defense counsel, the prosecutor and defendant may stipulate to the existence of probable cause as part of the dismissal of the criminal case where there is no basis for a finding that the prosecutor sought the stipulation to gain any civil advantage. Ultimately, the question will be whether the prosecutor acted in the interest of justice or sought to coerce the defendant into agreeing to the stipulation. In this inquiry the defendant's access to and receipt of advice from counsel on the stipulation will also blunt a claim of coercion.[22]

A city attorney is not disqualified from prosecuting defendants merely because the city attorney would also defend any civil action the defendants may file against the city and arresting officers alleging, for example, excessive force in the arrest leading to the prosecution.[23] There is a long history of government law offices both prosecuting crimes and defending civil actions that the criminal defendants file against the government, and courts have held that the a city attorney's dual service as a city's criminal prosecutor and civil defender does not *per se* warrant recusal of the city attorney from the criminal proceeding.[24]

Practice Tip:

City attorney offices performing civil and criminal (including code enforcement) functions should establish internal policies and procedures that avoid the intrusion or appearance of intrusion of improper influences in the criminal proceeding.[25] For example, guidelines that separate civil and prosecutorial functions and prohibit communications between civil lawyers and criminal prosecutors could forestall claims that the office is using the criminal process to deter the filing of civil actions against the city and its officials. To that end the city attorney should consider assigning to a chief assistant or chief deputy final authority over prosecutorial decisions on individual cases while the city attorney retains authority over general administrative and policy matters related to the criminal functions of the office.

D. CONTRACT CITY ATTORNEYS AND THE ABILITY TO PROVIDE CRIMINAL DEFENSE SERVICES

In *People v. Rhodes*, the California Supreme Court held that a city attorney with prosecutorial responsibilities may not defend persons accused of crimes.[26] The court observed that even in the absence of a direct conflict of interest with the city attorney's official duties, "there inevitably will arise a struggle between, on the one hand, counsel's obligation to represent his client to the best of his ability and, on the other hand, a public prosecutor's natural inclination not to anger the very individuals whose assistance he relies upon in carrying out his prosecutorial responsibilities."[27]

However, following the *Rhodes* decision, Government Code section 41805 was amended to allow a city attorney and his or her firm to represent criminal defendants in cases other than violations of city laws, as long as:

- The firm has been expressly relieved of all prosecutorial responsibilities on the city's behalf; and
- The accused had been expressly informed of the defense counsel's role as city attorney and had waived any conflict created by it.

Notwithstanding Section 41805, the court in *People v. Pendleton* found that since a city attorney did not prosecute city crimes (although his firm did handle prosecutions for another city) and had aggressively represented the criminal defendant, there was no prejudice to the criminal defendant as a result of the city attorney's failure to comply with Section 41805 and did not reverse the criminal conviction.[28]

The Los Angeles County Bar Association issued an ethics opinion reiterating that firms that engage in prosecutorial work in enforcing violations of the city's municipal code may not, represent criminal defendants. Even though such representation may not result in *per se* reversals of criminal convictions, the Association concluded such representation violates Section 41805 and prior Supreme Court decisions.[29]

CHAPTER 5 ENDNOTES

1 "[A] public attorney, acting solely and conscientiously in a public capacity, is not disqualified to act in one area of his or her public duty solely because of similar activity in another such area." *In re Lee G.*, 1 Cal.App.4th 17, 29 (1991). See also *People v. Superior Court (Hollenbeck)*, 84 Cal.App.3d 491, 504 (1978).

2 *People v. Municipal Court (Byars)*, 77 Cal.App.3d 294, 296 (1977) [Court found that there was no conflict or appearance of impropriety that prevented city attorney from handling a prosecution. "Here we must determine whether the circumstances are appropriate to justify trial court action barring participation by a prosecuting attorney where: (1) a city attorney is charged by law with the obligation both of prosecuting misdemeanors within the city and of defending civil actions against the city and its agents; (2) a claim is pending against the city and its agents asserting liability to the defendants in the criminal prosecution arising out of the same incident which is the basis of the prosecution; (3) there is no evidence of personal, as opposed to purely professional and official, involvement of anyone in the prosecutor's office in the civil litigation; and (4) there is no evidence supporting an inference that the prosecutor is improperly utilizing the criminal proceeding as a vehicle to aid his function of defending claims against his employer."]

3 Rule 3.8 Special Responsibilities of a Prosecutor, Comment 1.

4 *People ex rel. J. Clancy v. Superior Court*, 39 Cal.3d 740, 746 (1985) [citing ABA Code of Prof. Responsibility, EC 7-14]. *Clancy* involved a nuisance abatement action against an adult bookstore where the prosecuting attorney was being paid a contingency fee. The Court concluded that certain nuisance abatement actions share the public interest aspect of criminal cases and often coincide with criminal prosecutions and found that the lawyer's contingent fee arrangement was improper, just as it would be in a criminal prosecution. The Court analyzed the case under principles of neutrality and applied conflict of interest rules substantially similar to the conflict of interest rule applicable to criminal prosecutors. Later, in *County of Santa Clara v. Superior Court* , 50 Cal. 4th 35, 54 (2010), the California Supreme Court clarified that the rules applicable to criminal prosecutors do not always apply in nuisance abatement actions, but principles of heightened neutrality are valid and necessary in such actions. Unlike *Clancy*, in *Santa Clara*, the Court upheld the public agency's engagement of contingent-fee counsel where the public entity's in house lawyers retained and exercised exclusive approval authority over all critical prosecutorial decisions in the case including the unfettered authority to dismiss the case. In that case the court also noted that the action did not seek to put the defendant out of business and that the defendant had the resources to mount a full defense.

5 *City of Los Angeles v. Decker*, 18 Cal.3d 860 (1977); *Clancy*, *supra*, 39 Cal.3d at 748-749.

6 *People v. Choi*, 80 Cal.App.4th 476, 483 (2000). When a close personal friend of the district attorney was murdered close in time and location to the murder that occurred in the case being prosecuted, the court found that there was a reasonable possibility that the district attorney's office might not exercise its discretionary function in an evenhanded manner and held recusal of the entire district attorney's office was appropriate.

7 *Millsap v. Superior Court*, 70 Cal.App.4th 196, 197 (1999).

8 California Government Code section 36900.

9 *Ibid.*

10 California Government Code section 53069.4.

11 Rule 3.8, Special Responsibilities of a Prosecutor.

12 *Clancy*, *supra*, 39 Cal.3d at 749, and *County of Santa Clara*, *supra*, 50 Cal.4th at 53, fn 10.

13 *Imbler v. Pachtman*, 424 U.S. 409, 432 (1976) [lead conc. opn. of White, J.] [prosecutor immune in section 1983 action]; but see *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) [attorney who participated in a pre-arrest investigation functioned as a detective searching for clues, not a prosecutor, and therefore, qualified, not absolute, immunity applied] and *Burns v. Reed*, 500 U.S. 478 (1991) [no absolute immunity for prosecutor's legal advice to police officers].

14 California Government Code section 821.6 provides: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

15 *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993) ["Statements to the press may be an integral part of a prosecutor's job…and they may serve a vital public function. But in these respects a prosecutor is in no different position than other executive officials who deal with the press, and…qualified immunity is the norm for them."]

16 *People v. Superior Court (Martin),* 98 Cal.App.3d 515, 521 (1979) [citations omitted].

17 California Code of Civil Procedure section 731.

18 California Penal Code section 1054.6.

19 *Cohen v. Brown*, 173 Cal.App.4th 302, 317-318 (2009).

20 State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1989-106 and 1991-124. State Bar Rules of Professional Conduct, Rules 5-100 and 5-110; see also *MacDonald v. Musick* (9th Cir. 1970) 425 F.2d 373, 375.

21 Rule 3.10, Comment 4.

22 *Salazar v. Upland Police Department*, 116 Cal.App.4th 934, 944 (2004).

23 *People v. Municipal Court (Byars),* 77 Cal.App.3d 294, 298 (1978).

24 *Id.* at 300.

25 "Ethics and Responsibility for the California Prosecutor," California District Attorneys Association, 3rd Edition (1992), Section 2.9 "Dual Function Offices," pages 55-58.

26 *People v. Rhodes*, 12 Cal.3d 180, 186-187 (1974).

27 *Id.* at 184.

28 *People v. Pendleton*, 25 Cal.3d 371, 379 (1979).

29 L.A.Co. Bar Assn. Form. Op. 453 (1991).

CHAPTER 6:

THE CITY ATTORNEY AND OUTSIDE COUNSEL

A. INTRODUCTION

A variety of important considerations should guide the retention of outside counsel by city attorneys. This chapter discusses several factors that may come into play when selecting and working with outside counsel, such as:

- Avoiding improper grounds for hiring or terminating outside lawyers;
- Developing and using standard contracting procedures;
- Conflicts of interest;
- Billing and other practices of the outside firm;
- Special rules for outside counsel in civil public nuisance contingency fee arrangements; and
- Confidentiality of billing records.

B. AVOID IMPROPER GROUNDS FOR HIRING OR FIRING OUTSIDE LAWYERS

City attorneys must select and manage outside counsel in a manner that does not result in discrimination, or create the perception of an improper basis for selecting or terminating outside counsel. It can be a challenging situation for city attorneys when, for instance, council members have expressed concern based on either fact or perception, that their race, national origin, sex, sexual orientation, religion, age, or disability is not represented among the outside lawyers selected by the city attorney. It is also challenging if the city has not had lawyers of particular under-represented groups in the past and the city manager feels that it is time for the city to hire someone from those unrepresented groups.

Another difficult situation may occur when the city is contemplating a jury trial involving allegations of discrimination based on race or sex. Does the city attorney select someone because of the pressure from a council member or the city manager? Does the city attorney hire someone because they are the same race or sex as the plaintiff assuming that those characteristics will influence the jury?

In making decisions regarding selection of outside counsel, city attorneys must be guided by principles and laws set forth in the State Bar Rules of Professional Conduct; United States and California Constitutions; and in state statutes that prohibit discrimination in the hiring of outside counsel on the basis of race, national origin, sex, sexual orientation, religion, age, or disability. Neither a perceived view of the jury regarding the race, national origin, sex, sexual orientation, religion, age, or disability of the lawyer, nor the feeling that the city should have more legal representation by members of a specific race, national origin, sex, sexual orientation, religion, age, or disability should control the selection of outside counsel.

1. Rule 8.4.1

Rule 8.4.1 prohibits discriminatory conduct in a law practice, which includes governmental legal departments, on the basis of race, national origin, sex, sexual orientation, religion, age, or disability in the hiring, discharge or other determination regarding the conditions of employment of any person. Accordingly, to avoid the risk of violating Rule 8.4.1, city attorneys should select outside lawyers based on the lawyer's or law firm's ability to provide quality legal representation in a cost effective manner rather than on race, national origin, sex, sexual orientation, religion, age, or disability.

2. State and Federal Laws

The California Constitution prohibits public entities from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.[1]

Further, public programs or benefits that are provided based on race or sex have generally been presumed invalid as suspect classifications that violate the equal protection clause, absent some showing that such discrimination was necessary to remedy prior discrimination.[2] Therefore, to support a determination of the necessity to hire a law firm or lawyer based on race, ethnicity, or gender, there must be a showing of past discrimination that supports the need to create specific racial, ethnic or gender hiring requirements.

Practice Tip:

It is important for a city attorney to consider periodically how outside counsel is obtained and if there should be a broader approach such as an RFP for a particular project or on-call for certain categories of services. There is no guiding authority on the nature of a preferential program that would pass constitutional muster. Therefore, when selecting outside counsel, city attorneys should regularly call on lawyers without regard to race, national origin, sex, sexual orientation, religion, age, or disability. This is an excellent way to maintain a broad base of qualified lawyers from whom to choose. If council members exert pressure to hire a lawyer or firm of a particular ethnicity, the city attorney may be able to deflect such pressure by telling them that they utilize lawyers from a diverse pool. The city attorney should also remind them that selecting or not selecting someone because of their race, national origin, sex, sexual orientation, religion, age, or disability violates the rules of professional conduct for lawyers in California.

Practice Tip:

If pressure is being exerted by a council member or city manager to fire or stop using a lawyer or law firm that is performing in a satisfactory manner and the city attorney senses that it is because they are not viewed as a member of the "right" group, the city attorney should indicate that the matter is being handled appropriately. Further, the city attorney should advise them that, consistent with city policy and rules of professional conduct, they can fire or stop using a lawyer or firm for any lawful reason or no reason, but they cannot make those types of decisions based on illicit reasons, such as those related to race, national origin, sex, sexual orientation, religion, age, or disability.

3. Decisions to Terminate Outside Counsel Based on the Lawyer's Public Criticism

While the First Amendment's guarantee of free speech may protect some independent city contractors from termination because of their speech on matters of public concern,[3] the Ninth Circuit Court of Appeals has held that lawyers who hold policymaking positions do not have such protection.[4] Nevertheless, city attorneys should exercise care in decisions regarding termination of outside lawyers because they are outspoken critics of the city. Depending on the nature of comments made, the role played by the outside attorney, and issues related to a lawyer's duty of loyalty to his or her client, it can be difficult to know if termination on such grounds will or will not be protected by the First Amendment.

C. DEVELOP AND USE STANDARD CONTRACTING PROCEDURES

In addition to complying with the rules prohibiting discrimination, it is advisable to have systems in place to avoid allegations of "cronyism" in the selection of outside counsel. One such form of "cronyism" may occur when friends or colleagues of council members are chosen as outside counsel. This can become problematic if the attorneys are selected frequently, and even more so if the city attorney does not agree with their approach to a matter or if they do not effectively represent the city. To avoid this situation, it is advisable to refrain from selecting lawyers who are politically involved at the city level, unless they are clearly the best (or only) lawyer qualified to handle the matter.

Methods for selection can vary, based on such factors as timing, cost, required technical/specialized expertise, prior experience with a firm or lawyer, and the type of legal matter involved. For example, if timing is a factor and selection must be done immediately, the city attorney may want to use legal counsel with whom he or she has worked successfully on prior matters.

D. CONFLICTS OF INTEREST

An agency's contract with outside counsel can provide that the attorney must not acquire a conflict of interest during the term of engagement. Some cities have policies precluding the hiring of lawyers who also represent clients adverse to the city.

Practice Tip:

It may become embarrassing if it is discovered that an outside firm represents another client that is adverse to the city. Even if such representation may not be "adverse" for purposes of Rules 1.7 and 1.9; the situation will likely still be problematic.

One way to avoid perceived conflict problems is to include a clause in the engagement agreement that prohibits the lawyer from representing clients who are adverse to the city. In considering issues related to waiver and consent, the city attorney should keep in mind who has authority to grant a waiver and give informed consent to the representation. Depending on the city's practice or the language in the engagement agreement, the city attorney, the city manager or the city council may give such consent.

A conflict may arise when a contract city attorney participates in a decision to "assign" new work to his or her law firm. Government Code section 1090 may apply to outside counsel once they are hired by the city (see chapter 4).

The Political Reform Act and Fair Political Practices Commission (FPPC) regulations (see chapter 3), along with local ordinances or rules set forth guidelines regarding gifts to public officials and employees. City attorneys, like many other public officials, must be sure to report the value of gifts received from lawyers. City attorneys should keep track of meals paid for by outside counsel, tickets to various events, gifts of spa treatments, and so on that are provided by law firms doing business with the city. While lawyers who deal regularly with municipalities are probably aware of the gift restrictions, those who are newer to city representation may be unaware of the requirements and may need to be educated regarding the FPPC rules regarding gifts.

E. BILLING AND OTHER PRACTICES OF THE OUTSIDE FIRM

The city attorney or his or her staff should review the bills and monitor the billing and other practices of outside counsel in order to avoid questionable ethical practices by outside counsel. The city attorney, or another lawyer or person familiar with the matter being handled, should review the bills submitted by the outside lawyer. The billing statement should provide the city attorney's office with a quick summary of case activity and tell how much time is spent on various aspects of a matter.

Practice Tip:

The same person should review the bill on a particular matter each month and should look for content, time spent, and consistency with the agreed upon terms of representation. Block billing (where several items are grouped together within one large block of time) should be discouraged in most, though not necessarily all, situations. Review of bills also helps to ensure that major activities were first cleared with the city attorney's office. Periodic questioning of items on the bill informs the firm that the city attorney is reviewing the bills. The city should not be charged for responding to questions about the bills.

It is important that the city attorney be aware of the status of matters handled by outside counsel. Frequently, the city attorney is charged with responsibility for all legal matters in which the city is involved. Reviewing the bills, pleadings and correspondence, and regular updates from outside counsel are important to the city attorney's ability to manage that responsibility; as well as for his or her ability to answer questions from staff or council members about a particular matter. Accordingly, any agreement with the outside law firm should designate that the city attorney is in charge of all legal services and tactical decision-making. The city council and city manager should also understand that the city attorney must have the discretion to control the manner in which litigation or other legal matters are handled, and that appropriate oversight is being exercised regarding the firm.

Practice Tip:

Supervising outside counsel includes doing such things as watching them in court or at a hearing, reviewing their work product, serving as a conduit with staff regarding discovery, and periodically commenting on documents they prepare. Also, the city attorney should be in regular contact and communicate with the outside lawyer regarding the matter, including prospects for settlement and alternate means of dispute resolution. The city attorney should ensure that outside counsel does not delegate any aspect of the case without prior consultation with and approval by the city attorney. That being said, the city attorney and the outside lawyer should view the relationship as a partnership to provide the client with the best possible representation.

F. SPECIAL RULES FOR OUTSIDE COUNSEL IN CIVIL PUBLIC NUISANCE CONTINGENCY FEE ARRANGEMENTS

At times, cities may find it advantageous to employ outside counsel on a contingency fee basis. Special rules apply when outside counsel are retained on a contingency fee basis to handle civil nuisance actions.

A public lawyer or outside counsel acting as a public lawyer must observe the rules of prosecutorial neutrality even in *civil* nuisance actions by avoiding a pecuniary interest in the outcome of the matter.[5] California courts have general authority to disqualify counsel when necessary in the furtherance of justice.[6] The courts will exercise their authority to disqualify outside counsel hired on a contingency fee basis by a city to prosecute a civil public nuisance action when important constitutional concerns (such as the First Amendment) are implicated, ongoing business activity is threatened, and there is a threat of criminal liability.[7]

In *County of Santa Clara v. Superior Court*, the California Supreme Court has upheld the use of contingency fee arrangements with outside counsel in civil public nuisance actions, while pointing out that "a heightened standard of neutrality is required for attorneys prosecuting public-nuisance actions on behalf of the government."[8] This heightened standard is generally met, and the retention of private counsel on a contingent-fee basis is permissible, if neutral, conflict-free government attorneys retain the power to control and supervise the litigation and the government's action poses no threat to fundamental constitutional interests and does not threaten the continued operation of an ongoing business.[9]

The power to "control and supervise" public nuisance actions must be reflected in a contingency fee agreement, which must include several specific criteria indicating control of "critical discretionary decisions" by the supervising in-house public agency attorney, including at a minimum:

- The authority to settle the case
- The ability for any defendant to contact the lead government attorneys directly
- The retention by the government attorneys of complete control over the course and conduct of the case
- The retention by the government attorneys of veto power over any decisions made by outside counsel
- The government attorney with supervisory authority must be personally involved in overseeing the case.[10]

G. CONFIDENTIALITY OF OUTSIDE COUNSEL BILLING RECORDS

The League of California Cities publication, *The People's Business: A Guide to the California Public Records Act* (2017) contains an excellent discussion of the disclosability of outside counsel billing records. In general, billing records are exempt from disclosure under the attorney-client privilege or attorney work-product doctrine to the extent they describe an attorney's impressions, conclusions, opinions, legal research or strategy.[11] Recent court decisions have also drawn a distinction as to whether a matter is pending, or has concluded, although even some fee totals for concluded matters may not be subject to disclosure.[12]

PRACTICE TIP

City attorneys may wish to direct outside counsel to provide a cover sheet with a billing summary showing disclosable information such as who did the work, the number of hours expended and the amount of the bill.

CHAPTER 6 ENDNOTES

1 California Constitution, art. 1, section 31 [Proposition 209].

2 *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *Richmond v. Croson Co.*, 488 U.S. 469 (1989). As the California Supreme Court observed, "the United States Supreme Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classification in order to remedy such discrimination." *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4th 537, 568 (2000).

3 *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996). In *Umbehr*, the United States Supreme Court found that independent contractors are protected from termination of their at-will government contracts in retaliation for their exercise of free speech rights. The contractor must show initially that the termination was motivated by his or her speech on a matter of public concern. The government "will have a valid defense if it can show, by a preponderance of the evidence, that, in light of their knowledge, perceptions, and policies at the time of the termination, the Board members would have terminated the contract regardless of his speech." *Id.* at p. 685.

4 *Biggs v. Best, Best & Krieger*, 189 F. 3d 989 (9th Cir. 1999) [an associate attorney at a contract city attorney firm could be terminated because of political activity related to the city since she acted as a policymaker]; see also, *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811.

5 *County of Santa Clara v. Superior Court*, 50 Cal.4th 35, 50 (2010).

6 *Id.*, at p. 48.

7 *Id.*, at p. 54.

8 *Id.,* at p. 57.

9 *Id.,* at 58.

10 *Id.,* at pp. 63-64.

11 *U.S. v. Amlani* (9th Cir. 1999) 169 F.3d 1189 (9th Cir. 1999); *Clarke v. American Commerce Nat. Bank* (9th Cir. 1992) 974 F.2d 127; *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639 (2000).

12 California Government Code section 6254(k); The Ninth Circuit Court of Appeals has stated that "[o]ur decisions have recognized that the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege." *Clarke v. American Commerce Nat'l Bank,* 974 F.2d 127, 129 (9th Cir.1992). *United States v. Amlani*, 169 F.3d 1189, 1194 (9th Cir. 1999); see also *County of Los Angeles v. Superior Court* 211 Cal.App.4th 57 (2012) approving redaction of law firm billing records, "to show [only] the information that is not work product – the hours worked, the identity of the person performing the work, and the amount charged." But see *Los Angeles County Board of Supervisors v. Superior Court* 2 Cal.5th 282, 297-298 (2016) ["When a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees….The same may not be true for fee totals in legal matters that concluded long ago."]

CHAPTER 7:
THE DUTY OF CONFIDENTIALITY

A. INTRODUCTION

This chapter examines the ethical duty of city attorneys to maintain the confidentiality of matters involving their clients. It also discusses the impact of whistleblower laws on city attorneys' ethical responsibilities of confidentiality.

B. CONFIDENTIALITY

Among the most important duties an attorney owes to the client is the duty of confidentiality (see chapter 1). Given that confidentiality is the cornerstone of trust between the client and the attorney, California public policy has long held this duty is paramount, and may not be breached except in very limited circumstances. Business and Professions Code subsection 6068(e) requires an attorney to:

> "[M]aintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client… [A]n attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."

The California Supreme Court put it this way:

> "Protecting the confidentiality of communications between attorney and client is *fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring 'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense'.*"[1]

Additionally, Evidence Code section 954 allows a client to refuse to disclose, and to prevent others from disclosing, confidential communications between the client and the client's attorney. The attorney-client relationship has been characterized by at least one court as "sacred,"[2] while another court has admonished that the relationship "must be of the highest character."[3] The duty of confidentiality survives the termination of the attorney-client relationship, apparently indefinitely.[4]

If a city attorney finds himself or herself in federal court on behalf of a client, the Federal Rules of Evidence include specific provisions related to the attorney-client privilege, and circumstances under which it may be waived in the context of the federal matter. The Rules generally provide that the federal common law on privileges controls, unless otherwise provided for in the U.S. Constitution, federal legislation or a rule of the Supreme Court,[5] but they also contain specific provisions related to waivers of the attorney-client privilege in federal litigation.[6] There is an ongoing debate as to the scope of the privilege in the federal context and it is likely that the scope of the privilege is narrower in federal proceedings.[7]

1. Confidentiality in the Public Sector

The duty of confidentiality takes on a special meaning in the public sector where the client is a public entity and not an individual.[8] In the governmental setting, the client cannot speak for itself, but rather, must rely on its elected and other authorized officials to act in its interest. Thus, the issues of who possesses and who may exercise the attorney-client privilege, and to whom the public entity attorney owes the duty of confidentiality, become particularly relevant when the city attorney faces or suspects official malfeasance.

2. Government Malfeasance

In the Spring of 2000, Cindy Ossias, a government attorney for the California Department of Insurance, disclosed confidential information that allegedly evidenced governmental abuse of authority in her department. The State Bar's Office of Trial Counsel (OTC) investigated her actions for potential violations of the duty of confidentiality. While the OTC ultimately declined to prosecute Ossias, her story reflects the difficulty attorneys face in government representation.

The Rules reinforce the standard of confidentiality set in Business & Professions Code section 6068(e), even in the context of an attorney "know[ing] that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is (i) a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization …"[9] The Rules provide that the attorney "shall not reveal information protected by Business and Professions Code section 6068, subdivision (e)" and if the client "insists upon action or fails to act in a manner that is a violation of a legal obligation to the organization or a violation of law and is reasonably imputable to the organization, and is likely to result in substantial injury to the organization," the attorney's response may include "the lawyer's right, and, where appropriate, duty to resign or withdraw in accordance with rule 1.16."[10]

The Rules require attorneys to protect the confidences of the client, at all costs, while state whistleblower statutes (discussed below) encourage all government employees to report government malfeasance. California law has given more importance to maintaining the duty of confidentiality than to the public attorney's status as a government employee and would-be whistleblower**.**

Courts have expressed the principle that city attorneys are subject to special ethical obligations in the "furtherance of justice."[11] In the context of whistleblowing on suspected malfeasance, that special obligation appears in conflict with the duty of confidentiality. For example, if city officials empowered to protect the city are themselves guilty of violating the law or committing waste that harms the city, then how can the city attorney protect his or her client? While the client is not the individual official who committed the malfeasance, that official may be the highest officer over the engagement. If so, then to whom may the city attorney disclose the malfeasance?

Even when an attorney representing an organization becomes aware that an agent of the organization intends to commit a crime that may result in substantial injury to the organization, the attorney "shall not reveal information protected by Business and Professions Code section 6068, subdivision (e)."[12] The attorney has limited options, including: (1) urging the agent to reconsider his or her actions, or (2) going up the chain of command to the highest level of the organization authorized to act. If the highest level of the organization refuses to act and no other legally permissible options can be discerned, then the attorney's only remaining option may be to resign.[13] Rule 1.16 delineates the circumstances under which withdrawal from representation of a client is mandatory and when it is permissive.[14]

While Rule 1.13 makes the duty of confidentiality paramount, it does not directly address the unique nature of government representation as it relates to either the duty of confidentiality or whistleblowing. A 2001 Attorney General opinion did, however address this issue.[15] The opinion noted that, in some respects, "[R]ule [1.13] appears designed to meet the concerns of the private sector better than the concerns of public practice" and recognized there are real differences between city attorneys and private practitioners representing corporate entities.[16] The opinion ultimately concluded, however, that the Legislature did not intend to "supersede or impair the attorney-client privilege" when it enacted several laws (discussed below) to protect government employee whistleblowers.17 Accordingly, the city attorney's duty is to maintain client confidentiality.

If the highest city officer refuses to act, or is also guilty of malfeasance, then should the city attorney keep quiet and knowingly allow his client, the city, to suffer due to the putative illegal actions of its individual representatives? While Rule 1.13 requires the city attorney to go up the chain of command, it prohibits the city attorney from disclosing any confidential information beyond the organization. If the highest authority is the city council, and not a particular individual within city government, then the city attorney may address his or her concerns to the council itself. Since California cities function under various forms of city government (council-manager, strong-mayor, etc.), the general rule should be considered in light of the particular governing structure of the city in question. For example, in a strong-mayor form of government, the mayor may be the highest level of authority empowered to speak or act on behalf of the city, though even that broad authority may be limited or applied based on particular charter or municipal code provisions.

Practice Tip:

City attorneys facing the difficult question of whether they should or must withdraw from representing a client that may be violating the law may wish to seek the advice and assistance of special ethics counsel.

3. Grand Jury Proceedings

For a discussion of the privilege in grand jury proceedings, please see chapter 8.

C. WHISTLEBLOWING STATUTES AND THE DUTY OF CONFIDENTIALITY

To protect government employees who report criminal action by government officials, the California Legislature enacted four "whistleblower" statutes: the California Whistleblower Protection Act,[18] the Whistleblower Protection Act,[19] the Local Government Disclosure of Information Act[20] and the Whistleblower Protection Statute[21] (jointly the "Whistleblower Laws"). The Legislation sought to prevent abuses within the government by protecting employees who might otherwise not report wrong-doing for fear of losing their jobs. The Whistleblower Laws built upon the history of earlier statutes related to reporting government malfeasance by expanding whistleblower protections.[22] The Whistleblower Laws protect from retaliation those public employees who disclose nonpublic information regarding malfeasance in their respective agencies that harms the public interest.

1. California Whistleblower Protection Act (CWPA)

The CWPA protects employees of state agencies who disclose activities that (1) violate state or federal laws or regulations, (2) constitute economic waste or (3) involve gross misconduct, incompetence or inefficiency.[23] The Office of the State Auditor administers the law and investigates and reports on improper governmental activities.

2. Whistleblower Protection Act (WPA)

The WPA expands the protections found in the CWPA and gives state employees the right to disclose government malfeasance to the Legislature.[24] However, the WPA includes language that a court would likely interpret as excluding government attorneys' disclosure of confidential client information from the protections of the WPA. Specifically, the WPA states "[n]othing in [the operative] section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law."[25]

3. Local Government Disclosure of Information Act (LGDIA)

The LGDIA extends whistleblower protections to the municipal level by encouraging local government employees to disclose information regarding gross mismanagement, a significant waste of public funds, abuse of authority, or dangers to public health and safety.[26]

4. Whistleblower Protection Statute (WPS)

California Labor Code section 1102.5 prohibits employers from retaliating against an employee for disclosing a violation of state or federal law.[27]

D. THE WHISTLEBLOWER LAWS VS. THE DUTY OF CONFIDENTIALITY

When updating the Rules of Professional Conduct in 2018, the California State Bar declined to modify Rule 1.13 to protect public agency attorneys from professional discipline in the event they choose to disclose confidential information relating to official malfeasance noting that such a modification would conflict with the fundamental duty of confidentiality state law imposes on attorneys.[28] Also, two attempts by the Legislature to provide that protection were vetoed.[29]

The Attorney General has also addressed whether the Whistleblower Laws supersede existing statutes and rules governing the attorney-client privilege.[30] In determining that Whistleblower Laws do not supersede those statutes and rules, the Attorney General relied on the separation of powers doctrine, the rule of statutory reconciliation and the failure of the Legislature to express its intent to supersede the "strong and long established public policy" of client confidentiality.[31]

1. Statutory Reconciliation

The Attorney General stated that "statutes must be harmonized to the extent possible…and construed in the context of the entire system of which they are a part."[32] Some of the Whistleblower Laws included language permitting disclosure "to the extent not expressly prohibited by law." The Attorney General interpreted the express enumeration of statutory bans that would not apply to whistleblowers to manifest legislative intent to not alter the obligation of attorneys under Business and Professions Code subsection 6068(e), a current and well-established law that is not enumerated in the Whistleblower Laws.[33]

2. Lack of Express Provisions Overturning Well-Established Law

The Attorney General noted that in *General Dynamics Corp. v. Superior Court*, the court made clear that "[e]xcept in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client."[34] Since State law does not make clear an intent to either change the client confidentiality laws, or modify the existing ethical code provisions, the Attorney General declined to conclude the Whistleblower Laws supersedes the duty of confidentiality.[35]

3. Separation of Powers

The Attorney General also made a brief separation of powers argument noting the regulation of the practice of law has been "recognized to be among the inherent powers of the courts; the courts are vested with the exclusive power to control the admission, discipline, and disbarment of persons entitled to practice before them."[36] The opinion recognized the tension between the Legislature and the courts in this area, stating the Legislature may regulate and control the practice of law to a "reasonable degree," but may not restrict the court's authority to discipline persons entitled to practice before it.[37] Any attempt to do so would "overstep constitutional bounds."[38]

No law requires a city attorney to become a whistleblower and, as stated previously, no law protects city attorneys who choose to do so. Nevertheless, a city attorney representing a client who is committing malfeasance in office is confronted with the personal ethical choice of whether to terminate that representation knowing he/she cannot make a public disclosure about the reasons underlying that potential departure.[39] As a public official and officer of the court, a city attorney may feel a personal obligation to make the public aware of wrongdoing where communicating with the highest level of authority in the city has not succeeded in bringing about a termination of the wrongdoing. The consequences of a disclosure will be vulnerability to charges of violating Rule 1.13 and Business and Professions Code section 6068.

CHAPTER 7 ENDNOTES

1 *People, ex rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1146 [Emphasis added, internal citations omitted.]

2 *Solin v. O'Melveny & Myers, LLP, 89 Cal.App.4th 451, 457 (2001),* quoting *Mitchell v. Superior Court*, 37 Cal.3d 591,600 (1984).

3 *Styles v. Mumbert*, 164 Cal.App.4th 1163, 1167 (2008) [citations omitted]

4 *Ibid.* ["So fundamental is this precept that an attorney continues to owe a former client a fiduciary duty even after the termination of the relationship."]

5 Federal Rules of Evidence, Rule 501.

6 Federal Rules of Evidence, Rule 502.

7 Please see a report on this issue at: http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/federal_agency_privilege_waiver_politics.html

8 *Ward v. Superior Court*, 70 Cal.App.3d 23, 35 (1977) [holding that the client of the county counsel was the county, acting through its board of supervisors].

9 California Rules of Professional Conduct, Rule 1.13(b).

10 *Id.* at subsections (c) and (d).

11 In *People ex rel. Clancy v. Superior Court*, 39 Cal.3d 740, 745 (1985), a private attorney retained by a city under a contingent fee arrangement to prosecute civil nuisance abatement actions was ordered disqualified, in the interests of justice, because his personal stake in the actions was inconsistent with the neutrality required of a government lawyer when prosecuting a nuisance abatement action.

12 California Rules of Professional Conduct, Rule 1.13(c).

13 *Id.* at subsection (d).

14 California Rules of Professional Conduct, Rule 1.163-700(a) and (b).

15 84 Ops. Cal. Atty. Gen. 71 (2001); 2001 Cal. AG LEXIS 21.

16 84 Ops. Cal. Atty. Gen at 74; 2001 Cal. AG LEXIS 21 at 9.

17 84 Ops. Cal. Atty Gen at 76; 2001 Cal. AG LEXIS 21 at 14.

18 California Government Code sections 8547-8547.12.

19 California Government Code sections 9149.20-9149.22.

20 California Government Code sections 53296-53297.

21 California Labor Code section 1102.5.

22 Former Government Code sections 10540, 10541, 10542, 10543, 10544, 10545, 10546, 10547 (Stats.1981, ch. 1168, § 7, pp. 4694-4696); former Government Code section 10549 (Stats.1984, ch. 1212, § 6, p. 4160); former Government Code section 10548 (Stats.1986, ch. 353, § 4, pp. 1511-1512); former Government Code sections 10550 and 10551 (Stats.1988, ch. 1385, § 3, pp. 4668-4669).

23 Charles S. Doskow, The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (A Two-Year Journey to Nowhere), 25 Whittier L. Rev. 21 (2003), at 30 [citing California Government Code section 8547.2].

24 Doskow, *supra* note 1, at 31 [citing California Government Code section 9149.21].

25 *Id.* (citing California Government Code section 9149.23(c)).

26 Doskow, *supra* note 1, at 31, [citing California Government Code section 53296(c)].

27 California Labor Code section 1106 and *Hansen v. Department of Corrections & Rehabilitation*, 171 Cal. App.4th 1537 (2008) apply that section to public employees. However, *Edgerly v. City of Oakland*, 211 Cal. App.4th 1191 (2012) determined that section only applies to disclosure of state or federal laws, not enactments of a charter city.

28 Report of the Commission for the Revision of the Rules of Professional Conduct, Rule 1.6 p. 49, referencing a prior failed attempt to revise Rule 3-600, http://www.calbar.ca.gov/portals/0/documents/rules/rrc2014/final_rules/rrc2-1.6_[3-100]-all.pdf

29 AB 363 (2002) would have protected city attorneys from professional discipline for referring a matter regarding malfeasance in office (1) to a higher authority in the organization, and (2) to law enforcement in specified circumstances. However, that bill was vetoed by Governor Gray Davis.

AB 2713 (2004) would have expanded the exception to the duty of confidentiality by authorizing an attorney "who, in the course of representing a governmental organization, learns of improper governmental activity…to refer the matter to law enforcement or to another governmental agency and would exempt the attorney from disciplinary action for making a referral of the matter." AB 2713 was vetoed by Governor Arnold Schwarzenegger.

30 84 Ops. Cal. Atty. Gen. 71 (2001); 2001 Cal. AG LEXIS 21.

31 84 Ops. Cal. Atty. Gen. at 77; 2001 Cal. AG LEXIS 21 at 17.

32 84 Ops. Cal. Atty. Gen. at 76; 2001 Cal. AG LEXIS 21 at 14.

33 84 Ops. Cal. Atty. Gen. at 77; 2001 Cal. AG LEXIS 21 at 15.

34 *General Dynamics Corp. v. Superior Court*, 7 Cal.4th 1164, 1190 (1994).

35 84 Ops. Cal. Atty. Gen. at 76-78; 2001 Cal. AG LEXIS 21 at 13-18.

36 84 Ops. Cal. Atty. Gen. at 78; 2001 Cal. AG LEXIS 21 at 18 [citing *Santa Clara County Counsel Attys. Assn. v. Woodside*, 7 Cal.4th 525, 543 (1994)].

37 *Id.* (citing *Hustedt v. Workers' Comp. App. Bd.*, 30 Cal. 3d 329, 337 (1981)).

38 84 Ops. Cal. Atty. Gen. at 78; 2001 Cal. AG LEXIS 21 at 19.

39 California Rules of Professional Conduct, Rules 1.13(d) and 1.16.

CHAPTER 8:

THE CITY ATTORNEY AND GRAND JURIES

A. INTRODUCTION

City attorneys are often called upon to help their clients respond to grand jury investigations, subpoenas, reports, and, in rare cases, state and federal indictments. The vast majority of grand jury issues that city attorneys face arise out of grand juries acting in their civil capacity. This chapter addresses the ethical issues that may arise in each of these contexts and the roles and duties of the city attorney.

B. CALIFORNIA LAW

California requires the summoning of a grand jury each year in every county.[1] California's statutory provisions concerning the formation, composition and functioning of grand juries are found in Penal Code sections 888 through 939.91.[2] A grand jury has 11 to 23 persons (depending on the size of the county) "returned from the citizens of the county before a court of competent jurisdiction, and sworn to inquire of public offenses committed or triable within the county."[3]

Most grand juries have jurisdiction over both criminal and civil matters and serve three essential functions:

- Act as the public's "watchdog" by investigating and reporting on local government operations, accounts, and records.[4]
- Examine criminal charges and determine whether criminal indictments should be returned.[5]
- Hear allegations regarding willful or corrupt misconduct by a public official and determine whether to present formal accusations requesting the official's removal from office.[6]

Grand juries have only those powers expressly granted by statute.[7] Accordingly, the authority of grand juries to investigate cities and issue reports is only as extensive as expressly authorized by statute.[8] The authority of grand juries to investigate cities, counties and special districts is set forth in Penal Code sections 925 through 933.6.

Initially, the investigatory power of grand juries was limited to cities' finances; however, in 1983, the grand juries' authority to investigate cities was greatly expanded and grand juries are now authorized to "examine the books and records of any incorporated city" as well as "investigate and report upon the operations, accounts, and records of the officers, departments, functions, and the method or system of performing the duties of any such city . . ."[9] The grand jury's authority, however, may be limited to procedural matters and not substantive policy concerns.[10]

In conducting investigations, grand juries may employ experts and assistants to supplement their investigations.[11] Grand juries also may request issuance of subpoenas to compel witnesses to attend grand jury proceedings.[12]

When a grand jury is questioning witnesses at a grand jury session, the presence of non-witnesses (including counsel for witnesses in civil proceedings) is prohibited.[13] Also, a grand jury may admonish a witness not to disclose what the witness learns in the grand jury room, but cannot require the witness to execute an admonishment form.[14]

While grand juries have much latitude in conducting investigations, the California Attorney General has opined that grand juries may not compel the disclosure of information protected by attorney-client or attorney work-product privileges.[15] In fact, based on the broad interpretation of the Attorney General regarding the applicability of the attorney-client and attorney work-product privileges in the non-criminal setting it is arguable that grand juries are not entitled to other materials or information protected by constitutional, statutory or common law privileges.[16] It is possible, however, that this standard could be relaxed when grand juries are investigating misconduct of public officials.

After a civil investigation is concluded, the grand jury issues a final report that contains its findings and recommendations.[17] No later than 90 days after the grand jury has submitted its report, Penal Code section 933(c) requires "agencies" (including cities, housing authorities, and districts) to submit a written response to the grand jury report to the Presiding Judge of the Superior Court.[18] The respondent must respond in writing to each finding indicating whether it agrees disagrees, in whole or in part, with the finding.[19] In addition, the written response must indicate whether the recommendation has been implemented, will be implemented, requires further analysis, or will not be implemented.[20]

Practice Tip:

Prior to conducting a formal investigation, grand juries will sometimes issue requests for information and documents to determine whether the grand jury should initiate a formal investigation. These requests for information are often directed to staff, and the city attorney should ensure that a process is in place so that the city attorney is notified of these requests and has an opportunity to assert appropriate objections.

Civil grand juries gather most of their information in committees of three that interview city officials and take the information back to the full grand jury. Most information is confidential, but a grand jury may obtain judicial approval to release non-privileged information to the public.[21]

City staff members may ask the city attorney to accompany them to these interviews to explain the laws that underlie the staff action on a specific matter. The city attorney should advise the official that the city attorney may not attend the interview without the consent of the members of the committee. The officials who will be meeting with the grand jurors should ask in advance of the meeting whether the city attorney may accompany the officials.

Also, grand juries may issue a final report that is not directed to the City Council or City Manager.[22] For instance, a grand jury may send the final report to the Chief of Police for response. In these situations, it is important to ensure that a process is in place to insure that the City Council and City Manager are made aware of the final report so the City Council can approve a response to the findings and recommendations as required by law.

C. FEDERAL LAW

Grand juries are recognized in the Fifth Amendment to the United States Constitution which provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."[23] This protects against unwarranted prosecution by requiring charges to be brought by presentment or indictment.[24]

The formation, composition and function of federal grand juries can be found in Rule 6 of the Federal Rules of Criminal Procedure.[25] Federal grand juries are formed by the court's order when "the public interest so requires" and are composed of between 16 to 23 persons.[26] However, no matter how many grand jurors are on the grand jury, it takes a vote of 12 grand jurors to issue an indictment.[27]

Currently, there are two different types of grand juries in the federal system: "regular" grand juries and "special" grand juries.[28] A regular grand jury primarily considers whether, based on the evidence presented, there is probable cause to believe a crime has been committed and that they should "return" an indictment (i.e., charge a person with those crimes).[29] In addition to regular grand juries, in 1970, to combat organized crime, Congress created special grand juries that may issue not only an indictment but also a report on its investigation. Generally, special grand juries are created for specific investigative purposes.[30]

A federal grand jury is highly dependent upon the prosecutor for many of its functions. This is because, while the grand jury can also investigate matters and subpoena evidence, it is usually the prosecutor who proposes the charges and gathers the required evidence for consideration.[31]

Like California grand juries, the power of the federal grand jury to investigate and subpoena documents is limited. Under Rule 501 of the Federal Rules of Evidence, privileges are "governed by the principles of common law."[32] Rule 1101(d)(2) of the Federal Rules of Evidence states that the privileges are applicable to grand jury proceedings.[33] Thus, the attorney-client privilege and work-product doctrine recognized by Rules 501 and 502 of the Federal Rules of Evidence apply to grand jury proceedings. However, because federal grand juries are criminal in nature, the privileges applicable to federal cases are more limited. In fact, the Supreme Court has warned against expansive construction of privileges for criminal cases since the proceedings of a criminal trial are a "search for the truth" and civil cases do "not share the urgency or significance of the criminal subpoena request."[34]

D. ETHICAL ISSUES RAISED BY WORK INVOLVING GRAND JURIES

Three common ethical questions arise in responding to grand jury investigations, subpoenas and reports:

- Who is the client?
- What materials are not protected by the attorney-client, attorney work-product and other privileges?
- When are city attorneys required to recuse or disqualify themselves?

1. Who is the Client?

The city attorney represents the city as a legal entity and not individual elected officials or staff who may be the subjects of a grand jury investigation. (See chapter 1.) While the city is the client, in certain circumstances, it may be in the city's interest to disclose information that would be subject to the attorney-client privilege so that the grand jury is fully informed of all relevant facts. In this instance, the city attorney should seek a waiver of the attorney-client privilege from the city council or other authorized official or agency.

Practice Tip:

City attorneys cannot and should not promise individual public officials that they will keep confidences from the city council and other city officials. City attorneys should remind staff or officials who approach them for advice regarding grand jury investigations or subpoenas that the city attorney's client is the city, not the individual staff member or official.

2. The Attorney-Client Privilege and Attorney Work-Product Privilege

As referenced above, grand juries may not compel the disclosure of information protected by attorney-client or work-product privilege.[35] In California, despite the absence of an express statutory exemption from the privilege for grand jury proceedings, the Attorney General has issued an opinion that the protections for attorney-client communications afforded by Evidence Code section 910 apply to grand jury proceedings.[36]

The California Attorney General has also opined that the attorney work-product privilege applies in county grand jury proceedings because of the common law's recognition of the broad applicability of the privilege, the similarities between grand jury proceedings and pretrial discovery, and because "the various privileges found in the Constitution, statutes and common law historically have been applied in grand jury proceedings."[37] It is this last rationale that allows cities to put up a broad resistance to grand jury inquiries of privileged communications in grand jury proceedings. But as noted above in discussing the attorney-client privilege in the context of a federal grand jury's investigation of a federal official, courts could conclude that in the context of public agencies the need for the grand jury to conduct thorough investigations outweighs the protections of attorney-client privilege.

Public entities have a right to assert the attorney-client privilege with respect to communications made in the course of the attorney-client relationship.[38] With regard to city business, the city itself is the client; however, the city is not a natural person and it communicates – like other corporations – through people.[39] City officers and employees may claim the attorney-client privilege derivatively. At times, the attorney-client privilege may attach to communications between the city attorney and other city officials.[40]

Communications between the city attorney and the mayor, council members, city manager, city clerk, city treasurer, and department heads, while acting in their official capacity, are protected by the attorney-client privilege. While the applicability of the attorney-client and/or work-product privileges to public officials may be more limited in criminal matters, it appears reasonably settled that where city staff or officials are acting in their official capacities and do not have interests adverse to the city, and there is no alleged wrongdoing, the advice they have sought from, the information they have provided to and advice they have received from, the city attorney are protected by attorney-client privilege and a grand jury may not obtain such information by subpoena.

That said, the attorney-client privilege does not protect, and a grand jury can obtain, information disclosed to a city attorney by a staff member or official who was not acting in his or her official capacity. Similarly, the attorney-client privilege does not apply to communications to the city attorney from staff members or officials whose interests are adverse to the city's interest.[41] For example, the attorney-client privilege will not shield communications or requests for advice regarding crime or fraud.[42]

As discussed in chapter 7, federal courts have limited the applicability of the attorney-client privilege when a federal grand jury is investigating a federal official for commission of a crime in office, and the federal official asserts the attorney-client privilege to prevent the grand jury from questioning the government attorneys who advised the official. The core rationale for the decision is that the attorney-client privilege belongs to the government and should not prevent the grand jury, another governmental agency, from attaining information regarding official misconduct in office. A federal grand jury might take the same approach when investigating local and other non-federal officials.

Practice Tip:

City attorneys should remind any staff member or official who starts to provide information about possible criminal wrongdoing that the attorney-client privilege does not protect this information and that the city attorney may be compelled to disclose it to the grand jury and is obligated to disclose it to the city council.

In circumstances where a staff member is being asked to disclose information to a grand jury that may be subject to the attorney-client privilege, the city attorney must keep in mind who holds the privilege for the city, which usually will be the city council. In most cases, as holder of the privilege, only the city council or other highest agency or officer with jurisdiction over the subject matter – not individual council members, or the staff member or attorney being contacted by the grand jury – can waive the privilege and disclose the information. In the event the city council or other Brown Act body holds the privilege, it must therefore deliberate in open session when considering waiver of the privilege, absent an applicable Brown Act closed session justification.

Where the grand jury is requesting information that is protected by the attorney-client privilege, the city council or other authorized agency or officer - acting through the city attorney – has the authority to demand that the employee refuse to provide the requested information to the grand jury. However, four whistleblower statutes place an important limitation on this authority.[43] These statutes are designed to protect government employees who report criminal activity by government officials. Whistleblower statutes may protect from retaliation public employees who disclose confidential information to a grand jury regarding criminal actions of the city if they follow the procedural requirements of the whistleblower statutes. These statutes, however, do not protect city attorneys. (See chapter 7.)

When responding to or providing advice relating to a grand jury subpoena or report, it may be necessary under certain circumstances for the city attorney to recuse himself or herself and hire outside counsel to handle the matter. For example, the city attorney should recuse himself or herself in the event a grand jury is investigating an issue on which the city attorney made errors, that, if revealed to the public in a grand jury report, might result in legal action, malpractice, negative performance review, or significant embarrassment for the city attorney. Because the city attorney may be more concerned with his or her personal interest in withholding particular information from the grand jury rather than with the best interests of the city, the city attorney should recuse himself and recommend that the city hire outside counsel under Rule 1.7. (See chapter 2.)

Practice Tip:

City attorneys can assist grand juries in working more effectively with cities. Broad, unfocused or misdirected grand jury investigations and subpoenas can consume significant amounts of city attorney and city staff time. Grand juries generally receive formal training on numerous subjects when they are impaneled. Based on a series of interviews of grand jurors, grand jury experts, and a supervising judge, it appears that, at least in some counties, the curriculum includes very little, if anything, about how cities operate. City attorneys should consider contacting the presiding judge of their superior court and offering to supplement the current grand jury training program by meeting with the grand jury when it is impaneled to explain the structure of city departments, the city's major reports, and contact people at the city for various types of information. City attorneys should also encourage the city's officers and employees to fully cooperate with the grand jury.

CHAPTER 8 ENDNOTES

1 California Constitution article I, section 23.

2 California Penal Code section 888 *et seq*.

3 California Penal Code sections 888 and 888.2.

4 California Penal Code sections 925 *et seq*.

5 California Penal Code section 917.

6 California Penal Code section 922; and Government Code section 3060 et seq.

7 *McClatchy Newspapers v. Superior Court,* 44 Cal.3d 1162, 1172 (1988).

8 Thomas B. Brown, The Investigatory and Reporting Authority of Civil Grand Juries Acting in Their "Watch Dog" Capacity, League of California Cities Annual Conference 1, i, ii (1995) [footnote omitted]. The grand juries' authority may or may not apply in a charter city. *See, e.g., People v. Hulburt,* 75 Cal.App.3d 404 (1977); *Curphey v. Superior Court In and For Los Angeles County,* 169 Cal.App.2d 261 (1959).

9 California Penal Code section 925a.

10 78 Ops.Cal.Atty.Gen 290 (1995).

11 California Penal Code section 926(a).

12 California Penal Code section 939.2.

13 California Penal Code section 939; *Farnow v. Superior Court*, 226 Cal.App.3d 481, 489 (1990). Minors are entitled to be accompanied under limited circumstances per Penal Code section 939.21;

14 70 Ops.Cal.Atty.Gen. 28 (1987).

15 86 Ops.Cal.Atty.Gen. 101 (2003).

16 70 Ops.Cal.Atty.Gen. 28 (1987).

17 California Penal Code section 933.

18 California Penal Code section 933(c).

19 California Penal Code section 933.05(a).

20 California Penal Code section 933.05(b).

21 California Penal Code sections 924, 924.1-924.6, 939.1; *City of Woodlake v. Tulare Cnty*. Grand Jury, 197 Cal.App.4th 1293 (2011).

22 California Penal Code section 933(c).

23 U.S. Constitution amendment V.

24 *Wood v. Georgia, 370 U.S. 375, 390 (1962)*.

25 Fed. R. Crim. P. 6.

26 Fed. R. Crim. P. 6(a)(1).

27 Fed. R. Crim. P. 6(f).

28 Fed. R. Crim. P. 6; 18 U.S.C.A. § 3331-3334.

29 Fed. R. Crim. P. 6.

30 *United States v. Handley,* 407 F.Supp. 911, 914 (N.D.Ind. 1976); 18 U.S.C.A. § 3333(a).

31 *United States v. Sells Eng'g, Inc.,* 463 U.S. 418, 430 (1983).

32 Fed. R. Evid. 501.

33 Fed. R. Evid. 1101(d)(2).

34 *In re: Bruce R. Lindsay, 148 F.3d 1100 (D.C. Cir. 1998)*; *Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 384 (2004).*

35 70 Ops.Cal.Atty.Gen. 28 (1987).

36 70 Ops.Cal.Atty.Gen. 28 (1987); California Evidence Code sections 901, 910, 950.

37 70 Ops.Cal.Atty.Gen. 28 (1987).

38 *Roberts v. City of Palmdale,* 5 Cal.4th 363, 370-72 (1993).

39 *D.I. Chadbourne, Inc. v. Superior Court,* 60 Cal.2d 723, 736-38, (1964); *Hamilton v. Town of Los Gatos*, 213 Cal.App.3d 1050, 1059 n.7 (1989).

40 70 Ops.Cal.Atty.Gen. 28 (1987).

41 California Evidence Code section 950 et seq.

42 California Evidence Code section 956.

43 California Government Code sections 8547-8547.13, 9149.20-9149.23, 53296-53299; California Labor Code section 1102.5.

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Why the Government lawyer may not be the lawyer of the Council or Commission

March 1, 2012 by P. Stephen DiJulio
Category: Council-Commission Advisor

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Introduction

"The Care and Feeding of the City or Town Attorney" was published in the Fall 2006 issue of *Municipal Research News*. That article provided some basic information and emphasized the need for communication among government clients and their lawyers; it only briefly addressed the question of who is the attorney's client. This column focuses more directly on that issue and summarizes the foundations for what is generally understood as the "entity" approach to legal representation of municipal corporations.

From local political struggles over access to legal counsel ("Gold Bar Mayor Vetoes Resolutions of Tyranny," *Monroe Monitor*, May 15, 2006) to litigation determining who is city attorney ("Legal Drama Unfolding in Benton City," *TriCity Herald*, August 14, 2006), the management of legal services is regularly a source of dispute. Struggles between various elected officials even create tensions for an elected prosecuting attorney. ("Auditor's Case Ruling Backs County's Position," *White Salmon Enterprise*, October 5, 2005). State law mandates that a prosecuting attorney "be legal advisor to all" county officers in all matters relating to their official business. RCW 36.27.020. But, when one county officer disagrees with another officer, who is the prosecutor's client? Similarly, when a mayor and council are at odds over an issue involving legal issues, who is the city attorney's client? These issues are not unique to municipal corporations. They have long been a source of debate among corporate lawyers as well as lawyers for other governmental entities. (See, e.g., Rob Roy Smith, *The Council's Counsel: The Ethics of Representing Tribal Councils*, Idaho State Bar Association Annual Meeting, July, 2006.)

Who is the Attorney's Client?

The answer to the above question is easily stated but difficult to apply: In Washington State, **the municipality as an entity** is the lawyer's client.

The **entity model** is one of a number of theories of legal representation that have been considered by legal professionals. Others include the **group model** and the **public interest model**. See, Ivan Legler, *Once Again: Choosing the Model that Determines Who Are the Municipal Attorney's Clients*, NIMLO [IMLA] October, 1994 ("*Legler*"). See also, W. Witkowski, *Who is The Client of The Municipal Government Lawyer*, PLI No. 10925 (2007). As discussed in the Legler article, under the **group model**, an organization "shares" attorneys with some or all of the individuals that make up the organization. For example, the city attorney would represent the mayor, council, board of adjustment, civil service commission, municipal court judge and any other city department. The **group model**

assumes all of the individual clients within the organization consent to the lawyer's representation of each, even in the face of conflict. The model breaks down when an individual (*e.g.*, board of adjustment) disagrees with another (*e.g.*, mayor's planning director), and refuses to waive the conflict between the two.

Under the **entity model**, the lawyer has only the organization as a client, and not its individual elected officials, department heads, agents or other "constituents." *Legler*, citing G. Hazard & W. Hodees, *The Law of Lawyering*, 387 (2nd ed. 1993) ("*The Law of Lawyering*"). As will be discussed, the **entity model** has now been formally adopted as the standard in the State of Washington.

A third model, often advocated, is the **public interest model**. This model is based on the belief that government lawyers should act "in furtherance of the governmental and public interest." *Legler* cites the argument of the University of New Mexico Law School's Professor Maureen Sanders, *Government Attorneys and the Ethical Rules: Good Souls in Limbo*, 7 BYU J. Pub. L. 39, 77 (1993). In the **public interest model**, according to Professor Sanders, either the government's or public's interests are the municipal lawyer's "client." The obvious concern with this model is that the attorney must decide who the client is and what position to take. This model may find application in some states for an elected prosecutor, or a state's attorney general, but it is impractical for most lawyers serving as retained (in house or outside) legal counsel for a municipality.

Washington courts have addressed from time to time the argument that government lawyers are held to a higher standard than lawyers representing the private sector (there are particular standards that apply to criminal prosecution that are not addressed in this column). When acting as regulator, the Washington Supreme Court has stated that government is to act "scrupulously just" when dealing with its citizens. *State ex.rel. Shannon v. Sponburgh*, 66 Wn.2d 135, 143, 401 P.2d 635 (1965). But that standard does not apply in the normal course of a lawyer's representation of a government client.

> While we agree with the basic proposition that the government should be just when dealing with its citizens, we do not believe that an attorney representing the government has a duty to maintain a standard of conduct that is higher than that expected of an attorney for a private party. If we were to impose such a heightened duty on an attorney for the government we would be creating a two-tiered system of advocacy, one for legal representatives of the government and the other for counsel of private parties.

Lybbert v. Grant County, 141 Wn.2d 29, 37-38, 1 P.3d 1124 (2000). While the **entity model** was not formally adopted until 2006 by the Supreme Court, the Court's 2000 decision in *Lybbert* signaled that municipal lawyers in their civil representation would not be subject to a "public interest" model.

The Entity Model of Representation

The **entity model** or theory of representation is now "almost universally" accepted. *The Law of Lawyering*, 17 11 (2004-2 Supplement). More importantly, it has been embodied in the state's Rules of Professional Conduct (RPC) that became effective September 1, 2006. RPC 1.13 states simply in its initial sentence that **"a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."** The duty defined in RPC 1.13 applies to governmental organizations, as well. RPC 1.13, Comment 9. But the comment to the RPC candidly recognizes the dilemma for government lawyers:

> Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the governmental context and is a matter beyond the scope of these Rules.

The comments to these ethics rules give an example: if an action requiring legal counsel involves a particular employee or "bureau" of a department, that department may be the client for purposes of the Rule. But the example does not solve this riddle: in the event of a lawsuit involving claims of deputy sheriff misconduct, does the prosecutor represent the deputy sheriff; the office of county sheriff; the county; all of the above; some of the above; or none?

Attorney Serves at Direction of Officer who has Power to Decide

The standard set forth in Rule 1.13 is also recognized in another respected treatise, *The Restatement of the Law Governing Lawyers*, §§ 96 and 97 (2000) ("*Restatement*"). Under the *Restatement*, when a lawyer is employed or retained to represent a governmental organization, the interests of the organization (and the attorney's role) are defined by the organization's "responsible agents acting pursuant to the organization's decision-making procedures." Correspondingly, the lawyer must follow the instructions as given by persons authorized to act on behalf of the organization. *See* Comment A to *Restatement* § 97. But, "those who speak for the governmental client may differ from one representation to another." *Restatement* § 97 at Comment C. The *Restatement* notes one succinct statement of the chain of authority: "[t]he responsibility of an agency attorney is to represent the interests of **the officer who has the legitimate power to decide upon the course of action**"). 2 *Restatement* 52, citing Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. Chi. L. Rev. 1293, 1296 n. 7 (1987).

Under the council-manager form of government, there should be little doubt that in most cases the manager will be the officer who has the power to decide upon a course of action. RCW 35A.13.120. A city council does have the authority to approve law suits, even under a mayor-council form of government. RCW 35A.12.100.

Is an Individual Commissioner or Councilmember ever a Client?

In the county context, a majority of the board of county commissioners may direct a certain course of action. But the board (or a county council) cannot employ legal counsel separate from the elected prosecutor, absent court approval. RCW 36.32.200. And see *AGLO 1974 No. 69* (authority to contract for legal services limited to the term of the board). See also *State ex.rel. Steilacoom Town Council v. Volkmer*, 73 Wn. App. 89, 867 P.2d 678 (1994); *Tukwila v. Todd*, 17 Wn. App. 401, 563 P.2d 223 (1977) (setting forth standards when a city council may hire its own lawyer and pay for such legal services, separate from the city attorney).

It is unlikely that an individual commissioner would be a separate client, unless named separately in a lawsuit. In such an event the prosecuting attorney would determine whether the office of prosecuting attorney could represent the commissioner, without creating conflict with representation of the client county.

Similarly, an attorney may legitimately reject (as a matter of law, but perhaps not for political considerations) a request for legal services by an individual councilmember. In *Ethics Opinion 2002-02* (2002), the Rhode Island Supreme Court applied RPC 1.13 and found the city attorney's client was the council as a whole. As a result, the municipal lawyer may comply with the council's request for a redacted itemized statement of prior bills, but the lawyer may not comply with an individual councilmember's requests for unredacted bills unless council, which is client, consents. See *Annotated Model Rules of Professional Conduct*, 228 (ABA, 5th ed. 2003). Lawyers may often draft ordinances at an individual councilmember's request. But the city, not an individual councilmember, controls the provision of legal services.

Neither Council Alone nor Mayor Alone Constitutes a City

Many cities contract for legal services. See RCW 35A.12.020. Most cities contract through the authority of the city council. RCW 35A.11.010. But the authority of the council to contract for legal services cannot deprive the mayor of the right to such services. This is addressed by the Office of Attorney General in *AGO 1997 No. 7*. There the Attorney General recognized that the mayor is the "chief executive and administrative officer of the city," citing RCW 35A.12.100.

> That the mayor will require legal services from time to time in fulfilling official duties cannot seriously be questioned. Nothing in chapter 35A.12 RCW authorizes the city council to exercise general supervision over the mayor's performance of these duties...
>
> For these reasons we conclude the city council generally lacks authority to contract for the provision of legal services solely under the direction of the city council.

AGO 1997 No. 7 at 4. The Attorney General balances the executive authority of the mayor over ongoing administration of the city, with that of the city council's authority to contract. The authority to contract did not limit the mayor's power to serve as the "officer who has the legitimate power to decide upon a course of action" within the scope of that executive authority. The city attorney must follow that direction under the **entity model**. If the council disagrees with the mayor (and the city attorney) in such circumstances, the council may be faced with the difficult question of its authority to engage separate legal counsel. For an example of such a situation see *State ex.rel. Steilacoom Town Council v. Volkmer*, supra (Supreme Court found city council without authority to pay for outside legal services).

This very brief column identifies the foundation for the **entity model** of municipal legal representation. It provides some examples of conflicts that may occur when municipal entity, and not an individual board or agency of the municipality, is the client. It does not begin to address the extent of issues and conflicts that arise in a government lawyer's representation of a municipal client. For guidance in resolving a conflict issue, a lawyer may call the Washington State Bar Association's Ethics Line, 206.727.8284.

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Legal Services for Municipalities

All cities and towns have occasions when the need for legal services arises. For some in local government, a conversation with an attorney is an event that occurs almost every day. For others, a call for legal advice is periodic and prompted by town meetings, major decisions or questions on the interpretation of law. In any case, there are considerations and options for municipalities when determining how to structure a relationship with legal counsel.

Evaluate Need. The first step in the process is to assess your community's level of need. This is best accomplished by reviewing and analyzing invoices for legal services over prior years. Basic information to extract includes the hourly rate and payment amount, billable hours, a description of the service provided and the date it was provided. A next step involves anticipating future events that are expected to require the input of legal counsel. Of particular note in both the historical experience and looking forward is use of and need for specialty services, e.g., from labor lawyers, real estate lawyers and litigators. In many instances, in-house or contracted municipal counsel is expected to provide these services as part of its regular hourly rate.

Organize Data. Payment detail customarily resides in the municipality's financial management software and is accessible by the accountant or auditor. The information is most useful if entered into an electronic spreadsheet or data base that allows sorting by department, case, date, etc. It is also possible that the management software can generate reports in the desired format. Note that any absence of payment detail in the financial system suggests that the community may not be receiving the information. This represents a deficiency in the community's contract with its legal counsel and should be corrected.

Consider Relationship. The projected volume and scope of future legal services can help a municipality determine whether to create an in-house staff position or enter a contractual relationship. The staff position might be full or part-time, require office space, benefits and possibly administrative support. Potential advantages are that legal advice is immediately at hand, responses may be provided more timely, costs are reasonably certain, and the attorney would have a fuller understanding of the specific needs of the municipality. However, if legal issues are beyond the expertise of the staff attorney, the municipality can expect to incur additional costs for special counsel.

Contracting with an individual attorney raises similar issues, but without an on-site presence, although limited office hours in town hall or city hall might be negotiable. A shared full-time position, with benefits, with another community might also attract a qualified attorney at a cost savings. Alternatively, a multi-service firm is likely to have sufficient resources to provide the full range of legal services. Representation is remote and unless the municipality is assured the services of an attorney of choice, various other lawyers or paralegals might handle the municipality's business. This might also be a higher cost option as the firm's overheard will be built into the fee for services.

Solicit Services. Contracts with attorneys are exempt from the procurement requirements of G.L. c. 30B, meaning neither fee quotes nor requests for proposals are necessary to solicit legal services. However, a prudent course is to issue a request for qualifications (RFQ) on the State's Central Register and through other outlets, such as statewide legal publications, municipal professional associations and newspapers of statewide circulation, in order to cast a wide net for appropriate responses. The municipality's current legal counsel should not participate in the drafting of the RFQ, since that would pose a conflict of interest. The RFQ should request, without limitation, such information as experience providing municipal legal services, attorney biographies, and significant court cases pertaining to municipal law. Respondents should provide a certificate of insurance denoting coverage limits for general liability, workers compensation and malpractice; and a list of municipal clients served by the firm, in order to research client satisfaction. Pertinent financial information including hourly rates, costs and expenses should be required and may be submitted in a separate envelope. Through an RFQ, a municipality can set, in advance, its performance expectations and score responses from multiple firms or individual practitioners. Each candidate must be evaluated according to the same, predetermined scoring system.

Attracting the most qualified candidates to an in-house staff position starts with an accurate job description and a realistic salary. An open hiring process must then conform to personnel ordinances, bylaws or policies. Cities, more often than towns, employ a staff attorney (a city solicitor), or even a multi-lawyer legal department.

Select Fee Basis. Compensation for legal counsel under contract, regardless of how calculated, must be on a pay-as-you-go basis. Agreement on an hourly rate is the norm, but it is possible that a flat fee might be negotiated in the instance of a narrowly defined assignment. Expect to provide reimbursement for travel and all out-of-pocket costs. Like any

other municipal expense, an invoice for payment is submitted, reviewed by the accountant or auditor, and approved on a warrant.

Not permitted is a retainer arrangement where the municipality pays a pre-set monthly amount, in advance, to the attorney or law firm, which then charges against the retainer at the hourly rate. This practice violates G.L. c 41, §56 which prohibits payments by municipalities before services or goods are actually received. Exceptions are only allowed by special statutory authority. This prohibition, however, does not prevent the accountant or auditor from encumbering anticipated pay-outs under an executed contract for legal services.

Establish Contract Terms. State law does not authorize a municipality to enter a personal service contract with in-house legal counsel. Like other employees, his or her compensation and benefits, if any, are appropriated in the line item budget and represent a one-year obligation. Duties and responsibilities are set out in a job description and employee obligations are enumerated in personnel bylaws, ordinances or policies. Contracts for outside legal services are typically provided in draft by the individual attorney or law firm. The agreements tend to be inclusive and relatively straight-forward. However, each community should negotiate whatever terms ensure that local needs are met and that fees are no more than those paid by other municipal clients.
Among other topics, a contract describes included and excluded services; an hourly fee for partners, associates and support personnel; specific out-of-pocket costs; the frequency of billing and invoice detail; and statements pertaining to client property. It addresses termination, conflicts of interest, indemnification clauses and recourse to resolve fee disputes and malpractice claims. If a conflict of interest arises, the municipality must be prepared to retain additional counsel to cover for the attorney with a conflict. A certificate of insurance denoting coverage limits for general liability, workers compensation and malpractice must be attached. The contract must specify that disputes are resolved under the jurisdiction of the laws of the Commonwealth of Massachusetts, in court or by arbitration.

Manage Legal Services. Whether provided by in-house counsel or under contract, legal services must be managed. Among key points, lines of communication must be clear. In cities, the city solicitor should report to the mayor and, in towns, in-house counsel is best treated as a department under the jurisdiction of the town manager, town administrator or, if none, the selectmen. If counsel is on staff, access is not a significant issue. However, when a municipality contracts-out for its legal services, cost control warrants attention. Employee access must run through the mayor's office, town manager, town administrator or the select

board chair. That person is also the designated contact for outside counsel. One option is to utilize a Request for Legal Services form to be submitted by anyone seeking access to counsel. If approved, the local designated contact may submit it to outside counsel. It is worthy of note that, under G.L. c. 41, § 26A, the board of assessors may employ legal counsel at the expense of a town that does not employ in-house counsel for matters pertaining to G.L. c. 58A and under G.L. c.71, §§ 37E and 37F. A school committee is permitted to retain its own legal counsel; and in some cities, the city council hires the city solicitor. Otherwise, unless a department has a budget line-item for legal services, it is precluded from engaging an attorney to represent its interest.

When determining whether to consult counsel, it is important to distinguish between matters of legal substance and matters of policy, which are not within the purview of counsel. Also, a process for annually evaluating the performance of counsel is advised. This involves a municipality's satisfaction with responsiveness, quality of the work and professionalism. Critical to this process is invoice detail. The municipality must insist that invoices for payment be submitted on at least a monthly basis to ensure the legal budget stays on track. Invoices must identify billable hours, the person expending the hours, the date of each service, his or her hourly rate, work completed, and municipal official contacted, if applicable. Further, a municipality benefits if it maintains a number-based, legal document filling system. If all correspondence, opinions, emails and other legal materials are also listed in an electronic format, then following case threads and searches are simplified. Lastly, the municipality must manage its contract for legal services to ensure that all obligations are met.

(The content of this article is drawn in part from the 2010 report entitled "Independent Review of Legal Services" completed for the Town of Nantucket by Financial Advisory Associates, Inc., Michael Daley, President. Attorney John Gannon, DLS Bureau of Municipal Finance Law, also contributed to this article)

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When the Interests of Municipalities and Their Officials Diverge: Municipal Dual Representation and Conflicts of Interest in § 1983 Litigation

ABSTRACT. In many cases, municipal attorneys defend both a municipality and a municipal official against § 1983 claims. Some defenses available to the two types of defendants are incompatible and may give rise to conflicts of interest. This Note analyzes the problems associated with these conflicts of interest. The Note categorizes and describes the strengths and shortcomings of existing approaches to addressing these conflicts. Finally, it proposes a hybrid approach that may better address conflicts of interest in municipal dual representation.

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NOTE CONTENTS

INTRODUCTION

Constitutional tort litigation pursuant to 42 U.S.C. § 1983 has generally increased over the past forty to fifty years,[1] particularly after the Supreme Court's decisions in *Monell v. Department of Social Services* and *Owen v. City of Independence*.[2] These decisions authorized and expanded, respectively, the liability of municipalities under § 1983. Plaintiffs can now bring claims against municipal officials or municipalities themselves for constitutional violations committed under color of law, and frequently they bring claims against both.[3] One empirical study finds that approximately 82% of constitutional tort cases involve multiple defendants,[4] which usually means a government entity has been sued along with one or more of its officials. That statistic is consistent with the experiences of an attorney in the New York City Law Department, who reported that out of approximately 1250 § 1983 lawsuits then being handled by the Department's Special Federal Litigation division, the vast majority named the City and one or more officials as defendants.[5]

Because many of the same facts and elements relate to § 1983 claims against municipalities as to § 1983 claims against municipal officials in their individual capacity, the same legal team frequently will defend both a municipality and its official in a § 1983 case.[6] This dual representation creates significant potential

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1. *See* MICHAEL AVERY, DAVID RUDOVSKY & KAREN M. BLUM, POLICE MISCONDUCT: LAW AND LITIGATION § 1.1 (2002), *available at* WL POLICEMISC s 1:1; Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 523 (1982) (discussing the growth of § 1983 litigation).

2. Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); *see* JAMES T. TURNER, HANDBOOK OF HOSPITAL SECURITY AND SAFETY 30 (1988) ("[*Monell* and *Owen*] have paved the way for the significant increase in the use of Section 1983 as a remedy for the abuse of police power."); *see also* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 100-01 tbl.4.2 (1999).

3. *E.g.*, Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009).

4. David K. Chiabi, *Police Civil Liability: An Analysis of Section 1983 Actions in the Eastern and Southern Districts of New York*, 21 AM. J. CRIM. JUST. 83, 89 (1996).

5. Telephone Interview with Muriel Goode-Trufant, Chief, Special Fed. Litig. Div., N.Y. City Law Dep't (Dec. 23, 2008) [hereinafter Goode-Trufant Interview].

6. *See* Dunton v. County of Suffolk, 729 F.2d 903, 907 (2d Cir. 1984); Goode-Trufant Interview, *supra* note 5; Memorandum from Dennis J. Herrera, City Att'y, Office of the City Att'y, City & County of S.F., on Client of the City Attorney, to Mayor-Elect Gavin Newsom 2 (Dec. 12, 2003), http://www.sandiego.gov/charterreview/pdf/deo/070907citysfmemocityattorney.pdf [hereinafter Herrera Memorandum]. In some cases, state or local law requires or encourages this dual representation. *See, e.g.*, *Dunton*, 729 F.2d at 907.

for conflicts of interest to arise between the municipality as an entity and its individual officials.

The courts that have recognized this issue have seen it as a powerful problem. Thus, a number of courts have called for special sensitivity to the risk of conflicts of interest in § 1983 suits in which a municipality and its official are dually represented by municipal attorneys.[7] Several courts have noted that the threat of a conflict of interest is inherent in § 1983 cases because of the incompatible defenses that can be asserted by the municipality and by its officials;[8] a few even call the threat "imminent" and "serious."[9]

The consequences of these potential conflicts of interest may be severe. When plaintiffs recover damages in § 1983 actions, the awards can be staggering.[10] Even settled cases generally result in damages.[11] And even if compensatory recovery against a municipal official is lower than it would be against a municipality,[12] officials still must worry about the possibility that the jury will award substantial punitive damages against them.[13] Moreover, when a plaintiff sues a municipal official in his individual capacity, courts levy the

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7. *E.g.*, Wilson v. Morgan, 477 F.3d 326, 345 (6th Cir. 2007); Johnson v. Bd. of County Comm'rs, 85 F.3d 489, 493-94 (10th Cir. 1996); Ross v. United States, 910 F.2d 1422, 1432 (7th Cir. 1990); Marderosian v. Shamshak, 170 F.R.D. 335, 340 (D. Mass. 1997).

8. *E.g.*, Patterson v. Balsamico, 440 F.3d 104, 114 (2d Cir. 2006); Arthur v. City of Galena, No. 04-2022-KHV-DJW, 2004 U.S. Dist. LEXIS 20148, at *10-11 (D. Kan. June 2, 2004); Minneapolis Police Officers Fed'n v. City of Minneapolis, 488 N.W.2d 817, 819 (Minn. Ct. App. 1992).

9. *Dunton*, 729 F.2d at 907; Van Ooteghem v. Gray, 628 F.2d 488, 495 n.7 (5th Cir. 1980); Smith v. City of New York, 611 F. Supp. 1080, 1087 (S.D.N.Y. 1985); Shadid v. Jackson, 521 F. Supp. 87, 89 (E.D. Tex. 1981).

10. *See* ALTHEA LLOYD, MONEY DAMAGES IN POLICE MISCONDUCT CASES: A COMPILATION OF JURY AWARDS AND SETTLEMENTS 5 (1983); Chiabi, *supra* note 4, at 92; Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987); Stephen F. Kappeler & Victor E. Kappeler, *A Research Note on Section 1983 Claims Against the Police: Cases Before the Federal District Courts in 1990*, 11 AM. J. POLICE 65, 71 (1992).

11. *See* Chiabi, *supra* note 4, at 92, 100.

12. Of course, if juries assume that municipal officials will be indemnified, they might render higher compensatory awards against the officials than they otherwise would. *See* Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1243-46 (2001).

13. *E.g.*, Keenan v. City of Philadelphia, 983 F.2d 459, 472 (3d Cir. 1992) (upholding a jury's punitive damages award of over $600,000 across three individual defendants).

damage award against the official's personal assets;[14] a single finding of liability under § 1983 can bankrupt an official.[15]

With such high amounts at stake, there can be great temptation or pressure for a municipal attorney to favor one or the other of her clients when their interests come into conflict. In light of the strong relationships between municipal attorneys and municipalities as compared to those between the attorneys and individual officials, municipal attorneys not infrequently may favor the municipality's interests despite ethical obligations to do otherwise. Sadly, because § 1983 municipal liability doctrine is rather complex, many officials may not realize when their attorneys have subverted their interests,[16] and courts may not realize either unless someone brings the issue to their attention. A court instead may assume the municipal attorney made various strategic choices simply because the evidence in the case supported those choices.

Thus, despite their importance, conflicts of interest in municipal dual representation are "frequently overlooked by litigants" in § 1983 cases, and the issue "has received scant attention in appellate opinions."[17] Legal scholarship has also left this topic virtually unaddressed.[18]

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14. *See* Kentucky v. Graham, 473 U.S. 159, 166 (1985).

15. *Cf.* William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1129 (1996) (referring to the effect of "the pall of personal liability" on federal employees).

16. *E.g.*, Dunton v. County of Suffolk, 729 F.2d 903, 907-08 (2d Cir. 1984).

17. AVERY ET AL., *supra* note 1, § 4.26, *available at* WL POLICEMISC s 4:26; *see* Gordon v. Norman, 788 F.2d 1194, 1199 n.5 (6th Cir. 1986).

18. A few works mention conflicts of interest in dual representation of governments and their officials, but do not analyze the specific sources of these conflicts (for example, the conflicting defenses available to municipalities and their officials in § 1983 suits) in much depth. *See, e.g.*, PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 84-85 (1983). Most recent legal scholarship on dual representation conflicts has failed to mention municipal dual representation, *see, e.g.*, Debra Lyn Bassett, *Three's a Crowd: A Proposal To Abolish Joint Representation*, 32 RUTGERS L.J. 387 (2001), with the exception of two brief student notes, both published in 1997. One of these notes focused almost exclusively on the Tenth Circuit's 1996 decision in *Johnson v. Board of County Commissioners*. Ann M. Scarlett, Note, *Representing Government Officials in Both Their Individual and Official Capacities in Section 1983 Actions After* Johnson v. Board of County Commissioners, 45 U. KAN. L. REV. 1327 (1997). The other primarily described how municipal conflicts of interest impact various stages of § 1983 litigation. Nicole G. Tell, Note, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a § 1983 Police Misconduct Suit*, 65 FORDHAM L. REV. 2825 (1997). Both propose banning municipal dual representation, Scarlett, *supra*, at 1327; Tell, *supra*, at 2828, an approach that this Note evaluates and rejects.

To remedy the gap in the literature, this Note examines more closely the nature of the conflicts of interest that arise when a municipal attorney defends both a municipality as an entity and a municipal official sued in his individual capacity against § 1983 claims for damages predicated on the same facts. The Note proposes a solution to assist the municipal attorneys who litigate such claims and the courts that hear them.

Part I explains the features of municipal dual representation that most often give rise to conflicts of interest. Specifically, it examines how incompatible defenses available only to the municipality, or available only to its official, may pressure attorneys to assert defenses that advance the interests of one client at the expense of the other—a course of action likely to favor the municipality over the municipal official.

Part II discusses and evaluates existing approaches to prevent these conflicts of interest, and to handle them after they arise. It particularly focuses on three main approaches that courts have employed: (1) imposing per se bans on dual representation, (2) waiting until actual conflicts of interest arise before intervening to impose requirements, and (3) requiring municipalities to make advance commitments that align the interests of the municipality and its officials.

Part III proposes a hybrid solution to address problems associated with these conflicts of interest while preserving municipal officials' access to attorneys and minimizing taxpayer expense. The proposal recommends that municipal attorneys more explicitly inquire into potential conflicts in particular cases upfront, and obtain specific informed consent to the potential conflicts from each client at the outset of the litigation. Where the potential conflict does not yet pose a "significant risk" of materially limiting the attorney's representation, dual representation may continue, and if the municipal official chooses not to be dually represented, he should pay for his own counsel regardless of the municipality's obligation to pay for his outside counsel in the event of a conflict. If the potential conflict comes to comprise a "significant risk," the municipal attorney must obtain further consent for dual representation to continue; if such consent is not given, the municipality must either permit separate representation (and pay for the official's outside counsel if state or municipal law so requires) or align its interests with those of its official. Finally, in the event that a municipality and its official choose definitively to assert conflicting defenses, no waiver of the conflict should be permitted and the municipality should be required to permit separate representation (and pay for the official's outside counsel if state or municipal law so requires) or to align its interests with those of its official.

I. THE PROBLEM OF CONFLICTS OF INTEREST IN DUAL REPRESENTATION OF MUNICIPALITIES AND THEIR OFFICIALS

A. The Municipal Liability Landscape

42 U.S.C. § 1983 provides that "every person" under color of state law who deprives a person within U.S. jurisdiction of rights secured by the Constitution or certain federal laws shall be liable to the party injured.[19] Congress enacted § 1983 as part of the Civil Rights Act of 1871,[20] but courts have only firmly established municipal liability under § 1983 over the last thirty years.[21] Indeed, between 1961 and 1978, the Supreme Court's decision in *Monroe v. Pape*[22] precluded the liability of municipalities, and of municipal officials sued in their official capacity,[23] under § 1983. It was only in 1978 that the Supreme Court overturned *Monroe* in *Monell v. Department of Social Services*, which held that municipalities in fact constitute "persons" for the purposes of § 1983.[24]

Meanwhile, it had been clear even before *Monell* that municipal officials, when sued in their *individual* capacity,[25] constitute "persons" under § 1983.[26] As one example, even as the Court in *Monroe* dismissed the § 1983 complaint against the City of Chicago because the City was not a "person," it reversed the lower court's dismissal of the complaint against the individual city officials.[27]

For the most part, the elements of a § 1983 claim against a municipality are identical to the elements of such a claim against an individual municipal official. Against both types of defendants, plaintiffs must prove (1) that the deprivation of a federally protected right occurred, (2) that a particular person's (or persons') conduct caused the deprivation, and (3) that the conduct was

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19. 42 U.S.C. § 1983 (2006).

20. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified at 42 U.S.C. § 1983).

21. *See Dunton*, 729 F.2d at 907 .

22. 365 U.S. 167 (1961).

23. Suits against municipal officials in their official capacity are treated as suits against the municipality, and damages are awarded from the municipality's funds. *See* Hafer v. Melo, 502 U.S. 21, 25 (1991).

24. 436 U.S. 658 (1978).

25. For the remainder of this Note, when I refer to suits against municipal officials, I am referring to § 1983 suits for damages against municipal officials in their individual capacity, unless otherwise indicated.

26. *See, e.g.*, Ybarra v. Los Altos Hills, 503 F.2d 250, 253 (9th Cir. 1974).

27. 365 U.S. at 192.

committed "under color of law."[28] I will refer to these requirements as the "deprivation" requirement, the "causation" requirement, and the "under color of law" requirement, respectively.

There is one additional element of a § 1983 claim against a municipality not required for a claim against a municipal official. When suing a municipality, the plaintiff must additionally prove the deprivation of his federal right occurred as a result of the enforcement of a municipal policy or custom,[29] which I will refer to as the "policy or custom" requirement.[30] This requirement finds its genesis in the Supreme Court's holding that municipalities, unlike private employers,[31] cannot be held liable for their employees' actions within the scope of employment under a theory of respondeat superior.[32] Instead, municipal liability attaches under § 1983 only if deliberate[33] action attributable to the municipality itself[34] is the "moving force"[35] behind deprivation of the plaintiff's federal rights.[36]

The municipality will most plainly be liable when an established municipal policy harmed the plaintiff. Policies embodied in a "policy statement, ordinance, regulation, or decision officially adopted and promulgated" by the municipality's main lawmaking body obviously qualify.[37] Yet many other things can constitute municipal policies under § 1983. To comprise a municipal policy, "a deliberate choice to follow a course of action [must be] made from among various alternatives by the official or officials responsible [under state

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28. *See* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES: 2007-1 SUPPLEMENT, § 1.04[A], at 1-17 to -18 (4th ed. 1997); SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 4 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3d ed. 2006) [hereinafter SWORD AND SHIELD]. Most Supreme Court cases list only two main elements of a § 1983 claim because they group multiple elements together. *See* West v. Atkins, 487 U.S. 42, 48 (1988).

29. *Monell*, 436 U.S. at 694.

30. The "policy or custom" requirement has met significant criticism. *See, e.g.*, City of Okla. City v. Tuttle, 471 U.S. 808, 834-42 (1985) (Stevens, J., dissenting); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 254-55, 259-63; Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753 (1989).

31. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 & cmt. b (2006); RESTATEMENT (SECOND) OF TORTS § 895E cmt. c(2) (2006).

32. *Monell*, 436 U.S. at 663 n.7, 691.

33. Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) (plurality opinion).

34. City of Canton v. Harris, 489 U.S. 378, 385 (1989); *Monell*, 436 U.S. at 692.

35. *Monell*, 436 U.S. at 694.

36. Bd. of County Comm'rs v. Brown, 520 U.S. 397, 400 (1997).

37. *Monell*, 436 U.S. at 690.

law] for establishing final policy with respect to the subject matter in question."[38] Officials who possess final policymaking authority with respect to the subject matter of their position include some local sheriffs and police chiefs,[39] some city councils,[40] some mayors,[41] some heads of agencies,[42] and some other high-ranking local government officials. Additionally, in some cases, higher-ranking officials may delegate final policymaking authority to lower-ranking officials to take certain actions,[43] or may ratify lower-ranking officials' actions after the fact,[44] rendering those actions as "policies." Only for officials with final policymaking authority can a single edict or act constitute a municipal policy under § 1983.[45]

Liability can also attach when a municipal custom deprives the plaintiff of rights. To constitute a "custom," a practice need not have received formal approval through any governmental body's official decisionmaking channels,[46] and it may contradict local law or regulations,[47] though it must be "permanent and well settled."[48] "Whether a practice is sufficiently persistent to constitute a custom [will] depend on such factors as how longstanding the practice is, the number and percentage of officials engaged in the practice, and the gravity of the conduct."[49] A policymaker must have actual or constructive knowledge of the unconstitutional practice and must acquiesce in its continuance for it to constitute a "custom" under § 1983.[50]

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38. *Pembaur*, 475 U.S. at 483-84; *see* City of Okla. City v. Tuttle, 471 U.S. 808, 823 (1985).

39. *E.g.*, Cooper v. Dillon, 403 F.3d 1208, 1223 (11th Cir. 2005); Turner v. Upton County, 915 F.2d 133, 137 (5th Cir. 1990).

40. *E.g.*, Church v. City of Huntsville, 30 F.3d 1332, 1343 (11th Cir. 1994).

41. *E.g.*, Patterson v. City of Utica, 370 F.3d 322, 331 (2d Cir. 2004); DePiero v. City of Macedonia, 180 F.3d 770 (6th Cir. 1999).

42. *E.g.*, Altman v. City of Chicago, No. 99 C 6496, 2000 U.S. Dist. LEXIS 16632, at *7 (N.D. Ill. Oct. 24, 2000).

43. *See Pembaur*, 475 U.S. at 483; Spell v. McDaniel, 824 F.2d 1380, 1387 (4th Cir. 1987).

44. City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988).

45. *Praprotnik*, 485 U.S. at 123; *Pembaur*, 475 U.S. 469.

46. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-91 (1978).

47. *Praprotnik*, 485 U.S. at 130-31; *e.g.*, Wright v. Newsome, 795 F.2d 964 (11th Cir. 1986); Anela v. City of Wildwood, 790 F.2d 1063, 1067, 1069 (3d Cir. 1986).

48. *Monell*, 436 U.S. at 691.

49. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 7.16, at 79 (2003).

50. *E.g.*, Am. Postal Workers Union, Local 96 v. City of Memphis, 361 F.3d 898, 902 (6th Cir. 2004); McNabola v. Chi. Transit Auth., 10 F.3d 501, 511 (7th Cir. 1993).

The Supreme Court has further recognized an alternative route to proving § 1983 municipal liability: the plaintiff can demonstrate that the municipality's inadequate training policies caused the deprivation of his protected rights.[51] To proceed in this manner, the plaintiff must show that the municipality's failure to train reflects deliberate indifference to its inhabitants' rights, and that the failure to train actually caused the deprivation at issue in the case.[52]

The plaintiff must identify a specific deficiency in the municipality's training program.[53] Because of the policy or custom requirement, a municipality—unlike an individual official—may defend a § 1983 action by claiming that no such policy or custom existed. This is the first difference between the standards for § 1983 liability of municipalities and those for their officials that gives rise to a high likelihood of conflicts of interest in dual representation.

The second important difference in liability standards for municipality defendants and municipal official defendants is the defense of qualified immunity. Supreme Court precedent has clearly established that municipal officials, but not municipalities, may assert the qualified immunity defense.[54] The current standard to determine whether an official may plead qualified immunity against a § 1983 claim for civil damages is whether he was "performing [a] discretionary function[]" and his "conduct d[id] not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[55] Qualified immunity is presently available to officials only for actions taken within the scope of their official duties.[56]

The last relevant difference between the § 1983 liability of municipalities and their officials regards the availability of punitive damages. Simply put, juries can award punitive damages against municipal officials,[57] but not against municipalities.[58] An official may be liable for punitive damages when his conduct "is outrageous, because of [his] evil motive or his reckless indifference to the rights of others. . . . [P]unitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness,

51. City of Canton v. Harris, 489 U.S. 378 (1989).

52. *Id.* at 388, 391-92.

53. *Id.* at 391.

54. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Owen v. City of Independence, 445 U.S. 622, 638 (1980).

55. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

56. *Id.* at 819 n.34; *e.g.*, Hogan v. Twp. of Haddon, 278 F. App'x 98, 104 (3d Cir. 2008); Dunn v. City of Elgin, 347 F.3d 641 (7th Cir. 2003).

57. *See* Smith v. Wade, 461 U.S. 30 (1983).

58. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

serious indifference to or disregard for the rights of others, or even gross negligence."[59]

B. The Conflicts of Interest in Municipal Dual Representation

This Section describes how the different defenses available to municipalities and to their officials identified in Section I.A. may be incompatible, and thus how they give rise to conflicts of interest. It also describes some of the difficulties associated with rectifying these conflicts of interest once they arise.

1. Model Rule 1.7(a) and Concurrent Conflicts of Interest

When a municipal attorney simultaneously defends both a municipality and an official in a suit involving § 1983 claims against them based on the same set of facts, there is real potential for a concurrent conflict of interest as defined by Rule 1.7 of the Model Rules of Professional Conduct and its state equivalents.[60] Model Rule 1.7(a), which defines a "concurrent conflict of interest," reads as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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59. *Smith*, 461 U.S. at 46-48 (emphasis omitted) (internal quotation marks and citation omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1979)).

60. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2008). As of April 2009, Model Rule 1.7 had been adopted almost verbatim or reproduced in substantially similar form by the vast majority of states (forty-five states) and the District of Columbia. *E.g.*, D.C. RULES OF PROF'L CONDUCT R. 1.7 (2007); ILL. SUPREME COURT RULES OF PROF'L CONDUCT R. 1.7 (2009); MASS. RULES OF PROF'L CONDUCT R. 1.7 (2009). "Substantially similar form" means that the slight differences between the state's rule and Model Rule 1.7 are irrelevant for the purposes of this Note. New Jersey's rule is almost identical except that it precludes municipalities from consenting to concurrent conflicts of interest. N.J. RULES OF PROF'L CONDUCT R. 1.7 (2009). New York's rule is similar to Model Rule 1.7 but it prohibits the attorney from representing multiple clients without written informed consent if "the representation will involve the lawyer in representing *differing interests*." N.Y. RULES OF PROF'L CONDUCT R. 1.7 (2009) (emphasis added). California forbids lawyers from representing clients whose interests "potentially conflict" or "actually conflict" without written informed consent. CAL. RULES OF PROF'L CONDUCT R. 3-310(C) (2009). Note that for § 1983 suits in federal court, the rules of the state in which the federal district court is located generally will apply. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000).

> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[61]

Dual representation of municipalities and their officials does not usually produce situations in which the clients' interests are "directly adverse" within the meaning of Rule 1.7. Direct adversity in civil litigation generally implies either that one client is a plaintiff while another is a defendant in a single lawsuit,[62] or that one client is a witness against another,[63] and neither generally occurs in municipal dual representation.

Instead, municipal dual representation frequently fits the description of a concurrent conflict of interest contained in Model Rule 1.7(a)(2)—that is, there is often a significant risk that the conflict will materially limit the lawyer's ability to serve both clients. As Comment 23 to Rule 1.7 clarifies,

> [S]imultaneous representation of parties whose interests in litigation may conflict, such as . . . codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, *incompatibility in positions in relation to an opposing party* or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.[64]

While the possibility exists for substantial discrepancy in testimony or different possibilities of settlement, the primary potential for a "material limitation" conflict in municipal dual representation lies in the high likelihood of "incompatibility in positions," as courts have begun to recognize.

2. The Incompatible Defenses

As Section I.A. discussed, the two most important differences in the defenses available to municipalities and their officials are as follows: (1) a municipality, but not an official, can defeat § 1983 liability by disproving the existence of a municipal policy or custom that caused the deprivation of the

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61. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2008).

62. 1 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIT, THE LAW OF LAWYERING § 11.8, at 11-22 (3d ed. Supp. 2004).

63. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2008).

64. *Id.* R. 1.7 cmt. 23 (emphasis added).

plaintiff's rights; and (2) an official, but not a municipality, can defeat § 1983 liability by asserting qualified immunity. These defenses ultimately may prove incompatible in a few ways.

First, an official's attempt to establish qualified immunity will usually require that the official show that he was acting within the scope of his official duties,[65] but the evidence introduced on this front may help to show that he was acting pursuant to a municipal policy or custom. Meanwhile, just as the official has incentive to show that he was acting within the scope of his duties, the municipality has incentive to show that the official was acting *outside* the scope of his official duties, in order to support its claim that no municipal policy or custom existed to give rise to § 1983 liability.[66] The Second Circuit succinctly explained this incompatibility in *Dunton v. County of Suffolk*:

> A municipality may avoid liability by showing that the employee was not acting within the scope of his official duties, because his unofficial actions would not be pursuant to municipal policy. The employee, by contrast, may partially or completely avoid liability by showing that he was acting within the scope of his official duties. If he can show that his actions were pursuant to an official policy, he can at least shift part of his liability to the municipality. If he is successful in asserting a [qualified] immunity defense, the municipality may be wholly liable because it cannot assert the [qualified] immunity of its employees as a defense to a section 1983 action.[67]

There are several ways that the question of whether a municipal official was acting within or outside the scope of his duties may relate to the question of whether a municipal policy or custom existed. For example, a municipal official who acts outside the scope of his duties is less likely to have final policymaking authority with respect to his actions because his actions can more easily be characterized as "purely personal" rather than occurring in areas over which state law has given him final policymaking authority.[68] If he lacks final policymaking authority with respect to his actions, then his isolated acts cannot

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65. *See supra* note 56 and accompanying text.

66. *See* Manganella v. Keyes, 613 F. Supp. 795, 797 n.1 (D. Conn. 1985).

67. Dunton v. County of Suffolk, 729 F.2d 903, 907 (2d Cir. 1984). Courts discussing conflicts of interest in municipal dual representation often quote *Dunton*'s influential passage. *E.g.*, Patterson v. Balsamico, 440 F.3d 104, 114 (2d Cir. 2006); Coleman v. Smith, 814 F.2d 1142, 1147 (7th Cir. 1987).

68. Roe v. City of Waterbury, 542 F.3d 31, 41 (2d Cir. 2008); *see, e.g.*, *id.* at 37; Bennett v. Pippin, 74 F.3d 578, 581, 586 (5th Cir. 1996).

be characterized as a policy or custom.[69] As another example, the municipality may use facts that show that the official acted outside the scope of his duties in order to demonstrate that municipal policy or custom did not cause or was otherwise not the "moving force" behind the deprivation of the plaintiff's rights.[70]

To be sure, asserting that the municipal official was off-duty or acting beyond the scope of his duties may also support a defense that both municipalities and their officials can assert: that the official was not acting under color of law.[71] Yet this defense is often unsuccessful because courts frequently hold that even off-duty officials or those who act beyond the scope of their duties are acting under color of law if other indicia are present—for example, if the official were wearing his badge at the time or using municipal equipment or his official position to deprive the plaintiff of rights.[72] Nevertheless, municipalities may be more willing than their officials to assert the defense on the chance that it might be successful because municipalities do not face the main risk of this defense[73]—losing eligibility for qualified immunity—that municipal officials do.[74] Thus conflicts can occur in the many cases in which an official would be better off asserting that he was acting within the scope of his duties.

The second potential incompatibility between the municipality's desire to assert a "policy or custom" defense and the official's desire for qualified immunity arises from the potential for the municipal official to claim that he was "just following orders." At least seven circuits have decided that while "following orders" does not automatically excuse a municipal official from liability—particularly if he violates an unambiguously established right—plausible instructions from a superior official, or sometimes even from a fellow

69. *See supra* notes 38, 45 and accompanying text.

70. *E.g.*, *Roe*, 542 F.3d at 38; Batiste v. City of Beaumont, No. 1:05-CV-109, 2006 U.S. Dist. LEXIS 21865, at *12 (E.D. Tex. Mar. 10, 2006).

71. *See* Burris v. Thorpe, 166 F. App'x 799, 802 (6th Cir. 2006); *see, e.g.*, Latuszkin v. City of Chicago, 250 F.3d 502 (7th Cir. 2001); Barna v. City of Perth Amboy, 42 F.3d 809 (3d Cir. 1994); *Dunton*, 729 F.2d at 906-07.

72. *E.g.*, Pickrel v. City of Springfield, 45 F.3d 1115, 1118 (7th Cir. 1995); United States v. Tarpley, 945 F.2d 806, 809 (5th Cir. 1991); Cassady v. Tackett, 938 F.2d 693, 695 (6th Cir. 1991).

73. *See Dunton*, 729 F.2d at 907; *see, e.g.*, Medina v. City of Osawatomie, 992 F. Supp. 1269, 1272 (D. Kan. 1998).

74. *See* Rambo v. Daley, 68 F.3d 203, 205 (7th Cir. 1995).

official, can support qualified immunity.[75] Thus, an individual official has reason to claim he was just following orders given by his superior.[76]

Yet if the official asserts such a claim, the plaintiff can often use the evidence supporting it to show that the municipality had a policy or custom that caused the deprivation. Indeed, if the superior who gave the order possessed final policymaking authority with respect to the subject matter at stake, his orders may constitute a municipal policy because they may reflect "a deliberate choice to follow a course of action . . . made from among various alternatives."[77] If the orders given by the official with final policymaking authority were sufficiently broad, they might constitute a delegation of final policymaking authority to the subordinate official. Under such circumstances, even the subordinate official's isolated actions in effectuating the orders could constitute policies on behalf of the municipality.[78] Finally, the claim that the official was following orders on this occasion could help to establish that other officials followed these orders on multiple occasions; a court could consequently characterize the official's conduct as consistent with a custom under § 1983.

Similar kinds of conflicts can occur if the official claims qualified immunity because a municipal law or policy permitted or required his conduct, or because the municipality inadequately trained him for the particular circumstance. Such claims can assist the official by helping to demonstrate the objective legal reasonableness of his actions.[79] But the contention that such a policy or

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75. *See* Harvey v. Plains Twp. Police Dep't, 421 F.3d 185 (3d Cir. 2005); Brent v. Ashley, 247 F.3d 1294, 1306 (11th Cir. 2001); Jacobs v. W. Feliciana Sheriff's Dep't, 228 F.3d 388 (5th Cir. 2000); Lauro v. Charles, 219 F.3d 202, 216 n.10 (2d Cir. 2000); Bilida v. McCleod, 211 F.3d 166, 174 (1st Cir. 2000); Villanueva v. George, 659 F.2d 851, 855 (8th Cir. 1981); Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981).

76. *See* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 870 n.102 (2001); Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 60 (1980); *see also* Dina Mishra, Comment, *Municipal Interpretation of State Law as "Conscious Choice": Municipal Liability in State Law Enforcement*, 27 YALE L. & POL'Y REV. 249 (2008) (discussing the circumstances under which *municipalities* should be held liable for damages for unconstitutional acts when they are "just following orders" – specifically, when they are required to enforce state law).

77. Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) (plurality opinion); *see, e.g.*, Konits v. Valley Stream Cent. High Sch. Dist., No. 01-CV-6763, 2006 U.S. Dist. LEXIS 5610 (E.D.N.Y. Jan. 28, 2006); Hubbard v. City of Middletown, 782 F. Supp. 1573 (S.D. Ohio 1990); *see supra* note 38 and accompanying text.

78. *E.g.*, Diamond v. Chulay, 811 F. Supp. 1321, 1327-28 (N.D. Ill. 1993); *see supra* notes 43, 45, and accompanying text.

79. *See* Roska v. Peterson, 328 F.3d 1230, 1251-52 (10th Cir. 2003); Karen M. Blum, *Qualified Immunity: Discretionary Function, Extraordinary Circumstances, and Other Nuances*, 23 TOURO

inadequate training existed would seriously undermine the municipality's interests.[80]

These incompatibilities illustrate why dual representation of municipalities and their officials is likely to produce conflicts of interest. But the incompatibilities are essentially moot when the municipality bears the cost of the municipal official's liability—that is, when the municipality completely indemnifies the municipal official for all damages assessed under § 1983.[81] In such cases, the individual capacity suit against the official becomes indistinguishable—from a conflicts of interest perspective—from a lawsuit against the municipal official in his official capacity. This is because complete indemnification causes the municipality to bear the official's costs of liability as well as its own. The municipality, therefore, has no reason to assert defenses that would shift liability off of itself and onto the municipal official, just as the official has little reason to assert defenses that would shift liability onto the municipality: either way, the municipality will pay.[82]

These indemnification arrangements are fairly common. At least twenty-two states' codes require municipalities to indemnify their officials for liability under certain conditions.[83] At least eight others explicitly permit such

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L. REV. 57, 65-81 (2007); Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining* Monell *in Police Brutality Cases*, 44 HASTINGS L.J. 499, 508-09 (1993).

80. *See* Atchinson v. District of Columbia, 73 F.3d 418, 427 (D.C. Cir. 1996).

81. *See* Manganella v. Keyes, 613 F. Supp. 795, 799 (D. Conn. 1985).

82. Of course, even with indemnification, municipal officials may face nonpecuniary costs of liability that municipalities do not, because the officials may lose their jobs and face social stigma or fewer outside employment opportunities as a result of being found liable under § 1983. And municipalities may face public legitimacy costs of liability that officials do not face. But simply having a different amount or type of stake in the action does not automatically give rise to a conflict, so long as the attorney has incentive to present the case in a way that would represent both of his clients' interests. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 & cmt. 23 (2008). Furthermore, the nonpecuniary costs may not be tied to liability as much as to the mere accusation of the official's alleged wrongdoing, in which case any approach to resolving conflicts of interest in representation might be too late and irrelevant to diminish those costs.

83. CAL. GOV'T CODE § 825 (West 1995); CONN. GEN. STAT. ANN. § 7-465(a) (West 2008); IDAHO CODE ANN. § 6-903(b)(i) (2004); IND. CODE. ANN. § 34-13-3-5 (West 2008); IOWA CODE ANN. § 669.21 (West 1998); KAN. STAT. ANN. § 75-6109 (1997); KY. REV. STAT. ANN. § 65.2005 (LexisNexis 2004); MINN. STAT. ANN. § 466.07 (West 2008); MISS. CODE ANN. § 11-46-7 (LexisNexis 2002); MONT. CODE ANN. § 2-9-305 (2007); NEB. REV. STAT. § 13-1801 (2007); NEV. REV. STAT. ANN. § 41.0349 (LexisNexis 2006); N.H. REV. STAT. ANN. § 29-A:2 (LexisNexis 2008); N.M. STAT. ANN. § 41-4-4 (LexisNexis 2004); N.Y. PUB. OFF. LAW § 18 (McKinney 2008); N.D. CENT. CODE § 32-12.1-04 (1996); OKLA. STAT. ANN. tit. 51, § 162 (West 2008); OR. REV. STAT. § 30.285 (2007); 42 PA. CONS. STAT. § 8548(a) (West 2007); W. VA. CODE ANN. § 29-12A-11 (LexisNexis 2008); WIS. STAT. ANN. § 895.46 (West 1983); WYO. STAT. ANN. § 1-39-104 (2009).

indemnification.[84] But permissive indemnification does not fully align the interests of the municipality and its officials: the municipality may still assert its own defenses, shift liability to the official, and avoid paying the liability by ultimately opting not to indemnify. Of course, the individual municipality separately may be required to indemnify officials pursuant to a municipal ordinance,[85] or by contractual or labor agreements[86] with officials or their unions.

Even if indemnification of municipal officials is available from a number of municipalities, however, it generally is not complete.[87] At least four states explicitly prohibit municipalities from indemnifying for punitive damages.[88] Moreover, at least sixteen states preclude indemnification for *any* damages—compensatory or punitive—if the conduct giving rise to the liability for those damages meets a particular standard of egregiousness—for example, if it is "willful," "wanton," "reckless," or "malicious."[89]

Particularly since juries cannot award punitive damages directly against municipalities,[90] when municipalities do not indemnify for punitive damages, they have little incentive to vigorously defend officials against such damages,[91] other than the desire to maintain the officials' morale or to sustain the

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84. GA. CODE ANN. § 45-9-22 (2002); 745 ILL. COMP. STAT. ANN. 10/2-302 (West 2002); ME. REV. STAT. ANN. tit. 14, § 8112 (2003); MASS. GEN. LAWS ANN. ch. 258, § 9 (West 2004); N.J. STAT. ANN. § 59:10-4 (West 2006); S.D. CODIFIED LAWS § 3-19-1 (2008); TENN. CODE ANN. § 29-20-310(d) (2000); TEX. CIV. PRAC. & REM. CODE ANN. § 102.002(a) (Vernon 2005).

85. *See, e.g.*, URBANA, ILL., CODE OF ORDINANCES art. IX, §§ 2-171 to -176 (2008), *available at* http://www.city.urbana.il.us/urbana/city_code/10209000.htm; NEWTON, MASS., REV. ORDINANCES § 2-116 (2007), *available at* http://www.ci.newton.ma.us/Legal/Ordinance/Chapter-2.pdf; JERSEY CITY, N.J, MUNICIPAL CODE § 27-7 (2008), *available at* http://www.municode.com/Resources/gateway.asp?pid=16093&sid=30.

86. *See, e.g.*, Hudson v. Coleman, 347 F.3d 138, 140-41 (6th Cir. 2003).

87. *See* Hassan v. Fraccola, 851 F.2d 602 (2d Cir. 1988); Doolittle v. Ruffo, No. 88-CV-1175, 1996 U.S. Dist. LEXIS 4706 (N.D.N.Y. Apr. 11, 1996).

88. 745 ILL. COMP. STAT. ANN. 10/2-302 (West 2002); KAN. STAT. ANN. § 75-6109 (1997); N.Y. PUB. OFF. LAW § 18 (McKinney 2008); OKLA. STAT. ANN. tit. 51, § 162 (West 2008).

89. CONN. GEN. STAT. ANN. § 7-465(a) (West 2008); IDAHO CODE ANN. § 6-903(c) (2004); IOWA CODE ANN. § 669.21 (West 1998); KY. REV. STAT. ANN. § 65.2005 (LexisNexis 2004); ME. REV. STAT. ANN. tit. 14, § 8112(1)-(2)(A) (2003); MASS. GEN. LAWS ANN. ch. 258, § 9 (West 2004); MINN. STAT. ANN. § 466.07 (West 2008); MONT. CODE ANN. § 2-9-305(6)(a) (2007); NEV. REV. STAT. ANN. § 41.0349 (LexisNexis 2006); N.H. REV. STAT. ANN. § 29-A:2 (LexisNexis 2008); N.M. STAT. ANN. § 41-4-4E (LexisNexis 2004); N.Y. PUB. OFF. LAW § 18 (McKinney 2008); OKLA. STAT. ANN. tit. 51, § 162 (West 2008); OR. REV. STAT. § 30.285 (2007); 42 PA. CONS. STAT. ANN. § 8550 (West 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 102.002(c) (Vernon 2005).

90. *See supra* note 58 and accompanying text.

91. *See* Ill. Mun. League Risk Mgmt. Ass'n v. Seibert, 585 N.E.2d 1130, 1139 (Ill. App. Ct. 1992).

municipality's ability to recruit officials in the future.[92] Worse, if a municipality believes it can shift liability from itself to the individual official, and that such liability would primarily take the form of punitive damages rather than compensatory damages, which is often plausible,[93] it may have incentive to argue in ways that *favor* a finding of unusually egregious behavior on the part of the individual official.[94] This tactic is particularly tempting for municipalities, and particularly detrimental for individual officials, because many municipalities are relieved from the obligation to indemnify the official for *any* damages if the court finds that the official acted recklessly, willfully, or wantonly[95]—the same type of finding that would justify imposing punitive damages on the individual official.[96]

Similarly, many states' laws forbid municipalities from indemnifying their officials for liability attributable to their actions outside the scope of their employment.[97] Importantly, many facts that would support a finding that an official was outside the scope of his employment also would support a finding that he was outside the scope of his official duties, and vice versa.[98] As a result, municipalities experience a triple benefit from presenting evidence that an individual official was acting outside the scope of his duties and employment: First, they may undermine the plaintiff's assertion that the official was acting under the color of law. Second, they may undermine a finding that the official's actions constituted or were pursuant to a municipal policy or custom. Third, they may escape the obligation to indemnify the official for damages. Unfortunately for the official, when the municipality pursues such arguments, it deals the official a double blow: First, he may lose his chance at qualified immunity. Second, he may lose the guarantee of indemnification.

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92. *See* Mell v. New Castle County, No. 20003-NC, 2003 Del. Ch. LEXIS 40, at *17 (Del. Ch. Apr. 11, 2003).

93. *E.g.*, Amato v. City of Saratoga Springs, 170 F.3d 311, 313 & n.2 (2d Cir. 1999); *see* Alexander v. Riga, 208 F.3d 419, 430 (3d Cir. 2000); *Seibert*, 585 N.E.2d at 1139. Of course, in most cases punitive damages against an official are associated with a large compensatory award against the municipality, so absent special circumstances municipalities might avoid arguing in ways that would increase the official's punitive damages.

94. *See Seibert*, 585 N.E.2d at 1138-39.

95. *See id.*; *supra* note 89 and accompanying text.

96. *See* Smith v. Wade, 461 U.S. 30, 51 (1983); Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1263 (10th Cir. 1995).

97. *E.g.*, CONN. GEN. STAT. ANN. § 7-465(a) (West 2008); 745 ILL. COMP. STAT. ANN. 10/2-302 (West 2002); MD. CODE ANN., CTS. & JUD. PROC. § 5-302 (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 258, § 9 (West 2004); N.Y. PUB. OFF. LAW § 18 (McKinney 2008); TEX. CIV. PRAC. & REM. CODE ANN. § 102.002(a) (Vernon 2005).

98. *See, e.g.*, Hibma v. Odegaard, 769 F.2d 1147, 1151-52 (7th Cir. 1985).

This discussion illustrates that municipal indemnification may not fully align the sometimes-incompatible defenses of denying the existence of a policy or custom (on behalf of the municipality) and claiming qualified immunity (on behalf of the individual official). It further illustrates that indemnification standards may provide municipalities with additional incentives to advocate positions detrimental to municipal officials. In many cases, therefore, these incompatibilities create a significant risk that the municipal attorney's ability to effectively represent his clients will be materially limited.[99] The appropriate course of action for each defendant if considered individually would be to assert all available and plausible defenses. But if the attorney dually representing those defendants asserts all defenses, he risks undercutting one or both of his clients' chances of success; the evidence provided to support one client's defense would contradict the evidence provided to support the other client's defense. Indeed, this "conflict in effect forecloses alternatives that would otherwise be available to the client"[100]—namely, specific defenses or the potential success thereof.

Ultimately, there is a real likelihood that conflicting interests will arise in municipal dual representation. As discussed above, many jurisdictions limit indemnification in ways that cause the municipality's interests to conflict with the interests of its officials. In addition, the incompatible defenses discussed above are central to § 1983 liability. The question of whether a policy or custom caused the deprivation of the plaintiff's rights is crucial to establishing a required element of the plaintiff's case for municipal liability and so must come up in any plausible § 1983 municipal liability suit. The defense of qualified immunity is frequently asserted and frequently serves as the basis for a successful individual capacity defense.[101] All this explains why courts have declared that conflicts of interest are "inherent" to municipal dual representation in § 1983 suits.[102]

3. Problems Associated with Rectifying a Concurrent Conflict of Interest

The problems associated with a concurrent conflict of interest in municipal dual representation are exacerbated if the conflict is permitted to persist. If a conflict is discovered after representation has been undertaken and it cannot be cured or waived, the attorney "ordinarily must withdraw from the

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99. *See* MODEL RULES OF PROF'L CONDUCT R.1.7 cmt. 8 (2008).

100. *Id.*

101. *See* SWORD AND SHIELD, *supra* note 28, at 46.

102. *See supra* note 8 and accompanying text.

representation."[103] Under such circumstances, a municipal attorney usually withdraws from representing the official and continues to represent the municipality, since he is employed by the municipality for its purposes.[104] But "tremendous hardship [is] imposed on the court and all parties alike [when] separate counsel [has] to be retained in the middle of litigation."[105] If the municipality does not pay for outside counsel, the official is seriously burdened, because he may not be able to afford his own attorney, and may have lost the opportunity to settle the claim or to prepare to represent himself pro se. Even if the municipality pays, the individual official still must rush to obtain new counsel and familiarize the counsel with the litigation.

Additionally, when an attorney withdraws after a conflict is discovered, the withdrawal creates problems relating to confidences previously shared with the attorney. When an attorney has learned information from a former client, he may not thereafter reveal or use information relating to the representation to disadvantage the former client unless the information has become generally known or the rules of ethics otherwise require or permit the disclosure.[106] Instead, he "must continue to protect the confidences of the client from whose representation the [attorney] has withdrawn."[107] But following this command is particularly difficult when litigation revolves around the former client's conduct, as is usually the case in municipal § 1983 litigation.[108] These difficulties are compounded as the litigation advances and discovery is conducted, because the likelihood increases that large quantities of confidential information have been shared.[109]

In some states, municipal attorneys will have additional difficulty protecting the confidences of former-client officials because of the "joint client" or "common interest" exception to attorney-client privilege.[110] This exception—which provides that "[w]here two or more clients have retained or

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103. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 4 (2008).

104. *See, e.g.*, NAPA, CAL., MUNICIPAL CODE § 2.24.050 (2008), *available at* http://www.cityofnapa.org/images/cityclerk/MunicipalCode/Title2/Sections/24/050.pdf; *see also infra* Section I.C.

105. Shadid v. Jackson, 521 F. Supp. 87, 89 (E.D. Tex. 1981).

106. MODEL RULES OF PROF'L CONDUCT R. 1.9(c) (2008).

107. *Id.* R. 1.7 cmt. 5.

108. *See Shadid*, 521 F. Supp. at 89; Tell, *supra* note 18, at 2860.

109. *See* Atchinson v. District of Columbia, 73 F.3d 418, 427 (D.C. Cir. 1996); *see, e.g.*, Miller v. Alagna, 138 F. Supp. 2d 1252, 1257 (C.D. Cal. 2000).

110. *See* Robert B. Cummings, *Get Your Own Lawyer! An Analysis of In-House Counsel Advising Across the Corporate Structure After* Teleglobe, 21 GEO. J. LEGAL ETHICS 683, 689-91 (2008); Nicole Garsombke, Note, *A Tragedy of the Common: The Common Interest Rule, Its Common Misuses, and an Uncommon Solution*, 40 GA. L. REV. 615 (2006).

consulted a lawyer upon a matter of common interest, none of them . . . may claim a privilege" against the other[111] – may apply to communications made by the individual official to the attorney in the course of dual representation.[112] Thus, the attorney may not be able to protect the individual official's confidential communications if he is subpoenaed to testify about facts relating to the individual's conduct for the purposes of an indemnification proceeding, for example.

These problems ultimately may require more than the disqualification of the municipal attorney from representing the municipal official after a conflict arises. Indeed, the municipality also may need to reassign the attorney so that he no longer represents the municipality in the § 1983 suit relating to which he obtained the individual official's confidences. While the risk of a conflict that might necessitate the attorney's withdrawal from representing the official poses potential problems once the litigation begins that compound as the litigation progresses, the risk may also contribute to broader public policy problems even before any litigation arises. Specifically, uncertainty about conflicts of interest and attorney withdrawal may reduce officials' likelihood of taking necessary risks on the job.[113] Because individual officials tend to be risk-averse and may overestimate the probability of being sued ex ante,[114] they may react to additional uncertainty about potential conflicts of interest and attorney withdrawal by behaving in ways that minimize their risk of being sued at the expense of the social benefits that their positions were designed to provide.[115]

C. *Municipal Attorneys' Temptations and Pressures To Favor Municipalities over Municipal Officials*

There are a few reasons why municipal attorneys may favor their municipality clients over their municipal official clients when the clients' interests conflict. First, law seemingly requires many municipal attorneys to treat the municipality as their primary client.[116] As a result, municipal attorneys

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111. Zador Corp. N.V. v. Kwan, 37 Cal. Rptr. 2d 754, 759 (Cal. Ct. App. 1995) (internal quotation marks and citation omitted).

112. *See Miller*, 138 F. Supp. 2d at 1256; Bassett, *supra* note 18, at 434-35 & n.204.

113. SCHUCK, *supra* note 18, at 68-77.

114. *Id.* at 69-70.

115. *Id.* at 70-73.

116. *See, e.g.*, L.A., CAL., CITY CHARTER, art. II, § 272 (2008), *available at* http://www.amlegal.com/library/ca/losangeles.shtml; Montgomery County v. Walsh, 336 A.2d 97, 113 (Md. 1975); Rinaldi v. Mongiello, 71 A.2d 398, 401 (N.J. Super. Ct. Law Div.

may feel obligated to prioritize the municipality's interests. Furthermore, they may select defenses to assert based on the notion that disloyalty to the municipality poses greater personal legal risk (risks of violating ethics rules *and* acting contrary to state or municipal law) than does disloyalty to the municipal official (risk only of violating ethics rules).

Additionally, some courts have decided that in conversations between municipal officials and municipal attorneys, the municipality is presumed to be the client for the purposes of attorney-client privilege unless the individual official *clearly* claims he is seeking legal advice in his individual capacity.[117] Such holdings may prompt some municipal attorneys to compromise ethical rules about keeping the confidences of officials who approach them for advice regarding § 1983 claims: the municipal attorney may claim that she shared the confidential information with the municipality because the official did not clearly indicate that he was seeking legal advice for himself rather than on behalf of the municipality.

Second, municipal attorneys are employed directly by the municipality and are likely to represent the municipality again in the future. The municipal attorney's salary and career advancement depend on his ability to please his superiors, who represent the municipality, not the individual official. The municipal attorney therefore has "a previously established relationship with one client, the anticipation of future business from one client, . . . greater personal identification with one client, . . . [and] the desire to impress one client on a personal or professional level."[118] In addition, the municipal attorney may feel an allegiance to his colleagues and their work-related goals; those goals usually will be aligned with the municipality's goals, rather than the goals of any particular official. In a sense then, the municipal attorney may feel greater "personal feelings of friendship"[119] with the municipality, despite the fact that, ultimately, that client is a governmental entity rather than a person.

Of course, most municipal attorneys will be inclined to defend both of their clients to the best of their ability, based on conscience, a sense of obligation, or a feeling of professional pride in succeeding in any client's defense. Also,

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1949); *see also* Herrera Memorandum, *supra* note 6, at 1 ("In general, the City Attorney has a single client – the City and County of San Francisco . . . .").

117. *See, e.g.*, Ross v. City of Memphis, 423 F.3d 596, 605 (6th Cir. 2005).

118. Bassett, *supra* note 18, at 450; *cf.* Gen. Dynamics Corp. v. Superior Court, 876 P.2d 487, 491-92 (Cal. 1994) (describing how corporate in-house counsel's "inevitably close professional identification with the fortunes and objectives of the corporate employer" can subject the in-house attorney to "unusual pressures to conform to organizational goals" that may irresistibly tempt her to bend ethical norms).

119. Bassett, *supra* note 18, at 450.

because the municipality itself has incentives to provide effective representation to its officials—for example, to maintain officials' good will in ongoing working relationships, and to maintain its ability to recruit, hire, and retain other municipal officials[120]—those incentives are likely to motivate municipal attorneys to some extent.

Even so, competing motivations can operate both consciously and unconsciously on an attorney to favor the municipality. Psychological studies suggest that self-serving bias can operate to influence even a professionally trained expert's decisions in favor of his primary client, so long as there is sufficient ambiguity about the correct choice.[121] Given the elaborate legal doctrine surrounding the incompatible defenses available to municipalities and their officials in § 1983 suits and the complex sets of facts often involved in these cases, there frequently will be ambiguity about which evidence to present and when, or how to frame the story of what happened. Similarly, researchers have found that repeated and close interactions with a client can promote bias toward that client.[122] Municipal attorneys clearly have repeated contact with the municipality and its representatives, but not much with any particular municipal official.

Ultimately, however, it is of little importance which type of defendant is more likely to be harmed. What matters is that municipal dual representation likely harms the interests of at least one client. Indeed, the underlying problem with such conflicts of interest is not just that they may cloud municipal attorneys' judgment and lead them to favor one client over the other. Rather, it is that the conflicts set up these attorneys for failure: attorneys must either pursue only one of the incompatible defenses, or must instead present both and risk turning the jury against both defendants because of the inconsistent story being presented by the defendants' single attorney or set of attorneys. "The rule against representing conflicting interests is designed not only to prevent the dishonest lawyer from fraudulent conduct, but also to prevent the honest lawyer from having to choose between conflicting duties, rather than to enforce to their full extent the legal rights of each client."[123]

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120. *See supra* note 92 and accompanying text.

121. *See, e.g.*, Max H. Bazerman, Kimberly P. Morgan & George F. Loewenstein, *The Impossibility of Auditor Independence*, SLOAN MGMT. REV., Summer 1997, at 89.

122. *See id.*

123. Miller v. Alagna, 138 F. Supp. 2d 1252, 1255-56 (C.D. Cal. 2000) (internal quotation marks omitted) (quoting *In re* Jaeger, 213 B.R. 578, 584 (C.D. Cal. 1997)).

II. EXISTING APPROACHES TO ADDRESS THE CONFLICTS OF INTEREST

This Part describes and evaluates the main approaches taken by state ethics rules, state and municipal laws, and federal and state courts to address the conflicts of interest that arise from municipal dual representation.

A. Description of Existing Approaches

Under Model Rule 1.7 and its state equivalents, determining that a conflict of interest exists is only the first step in ultimately deciding whether an attorney must be barred from dual representation. Indeed, the rule provides that a lawyer may continue to represent two clients, despite a conflict, if particular conditions are met.[124] Specifically, Model Rule 1.7(b) permits municipal attorneys to dually represent municipalities and their officials so long as they obtain written informed consent from all clients and reasonably believe they can provide competent and diligent representation to all clients.[125] It is unclear, however, whether the inherent nature of the conflict in such dual representation makes it unreasonable for an attorney to believe he can serve both of his clients adequately.

Several state statutes and municipal ordinances prescribe additional procedures for municipal attorneys to follow when dealing with conflicts of interest. Because many municipalities are legally obligated to provide for the defense of their employees under certain conditions, many jurisdictions provide for the hiring of outside counsel for the individual official, at the municipality's expense, if a conflict of interest would prevent the municipal attorney from representing the employee.[126] A few laws prohibit indemnification when the official's defense would create a conflict of interest between the municipality and the official.[127]

In light of these state and municipal rules, at least thirteen different courts, including at least four federal appellate courts, have considered the potential

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124. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2008).

125. *Id.*

126. *E.g.*, GA. CODE ANN. § 45-9-21(a), (e)(2) (2002); ME. REV. STAT. ANN. tit.14, § 8112 (2003); N.Y. PUB. OFF. LAW § 18(3)(a), (b) (McKinney 2008); URBANA, ILL., CODE OF ORDINANCES art. IX §§ 2-173(a), (b) (1998), *available at* http://www.city.urbana.il.us/urbana/city_code/10209000.htm; PLANDOME HEIGHTS, N.Y., VILLAGE CODE § 19-3(A), (B) (2008), *available at* http://www.plandomeheights-ny.gov/Codes/Defense and Indemnification.htm.

127. *E.g.*, WALDWICK, N.J., MUNICIPAL CODE § 16-4(C) (2004), *available at* http://www.waldwickpd.org/code/Chapter%2016.pdf.

conflicts of interest that can arise from municipal dual representation in § 1983 suits.[128] Numerous other cases have noted the potential for such conflicts.[129]

Generally, courts have adopted or recommended one of three approaches to address these conflicts of interest. A few have imposed a per se ban on dual representation in § 1983 claims for damages. At the other extreme, most courts avoid intervening at all when the conflict is merely potential; these courts instead "wait and see" whether an actual conflict will materialize, at which time they permit the representation to continue only if the attorney meets Model Rule 1.7(b)'s requirements. Finally, a few courts have adopted an intermediate approach: they permit the attorney to represent both defendants, but require him to take steps to align their potentially conflicting interests. I will refer to these three approaches as the "per se ban" approach, the "wait and see" approach, and the "align the interests" approach, respectively. Also in the mix is the fact that some courts, mostly those that use the align the interests approach, have additionally required that the attorney obtain consent from both the municipality and its official at the beginning of the dual representation after informing them of the potential for the specific conflicts of interest prevalent in this area.

1. The Per Se Ban Approach

The per se ban approach is most clearly exemplified by the Eastern District of Texas decision in *Shadid v. Jackson*[130] and by *Opinion 552* of the New Jersey

128. *E.g.*, Wilson v. Morgan, 477 F.3d 326, 344-46 (6th Cir. 2007); Patterson v. Balsamico, 440 F.3d 104, 114-16 (2d Cir. 2006); Galindo v. Town of Silver City, 127 F. App'x 459, 467-68 (10th Cir. 2005); Hutcherson v. Smith, 908 F.2d 243, 245-46 (7th Cir. 1990); Almonte v. City of Long Beach, No. CV 04-4192, 2007 U.S. Dist. LEXIS 21782, at *7-13 (E.D.N.Y. Mar. 27, 2007); Bonneville v. Kitsap County, No. C06-5228RJB, 2006 U.S. Dist. LEXIS 40200, at *4-7 (W.D. Wash. June 14, 2006); Arthur v. City of Galena, No. 04-2022, 2004 U.S. Dist. LEXIS 20148, at *3-11 (D. Kan. June 2, 2004); Kounitz v. Slaatten, 901 F. Supp. 650, 658-59 (S.D.N.Y. 1995); Smith v. Daggett County Bd. of Educ., 650 F. Supp. 44, 46-48 (D. Utah 1986); Manganella v. Keyes, 613 F. Supp. 795 (D. Conn. 1985); Clay v. Doherty, 608 F. Supp. 295, 300-05 (N.D. Ill. 1985); Shadid v. Jackson, 521 F. Supp. 87 (E.D. Tex. 1981); *In re* Petition for Review of Opinion 552 of the Advisory Comm. on Prof'l Ethics, 507 A.2d 233 (N.J. 1986).

129. *E.g.*, Chavez v. New Mexico, 397 F.3d 826, 839-40 (10th Cir. 2005); Bennett v. Pippin, 74 F.3d 578, 581-83 (5th Cir. 1996); Atchinson v. District of Columbia, 73 F.3d 418, 427 (D.C. Cir. 1996); Mercurio v. City of New York, 758 F.2d 862, 864-65 (2d Cir. 1985); Richmond Hilton Assocs. v. City of Richmond, 690 F.2d 1086, 1088-90 (4th Cir. 1982); Van Ooteghem v. Gray, 628 F.2d 488, 495 n.7 (5th Cir. 1980).

130. 521 F. Supp. 87 (E.D. Tex. 1981).

Supreme Court Advisory Committee on Professional Ethics,[131] which was later substantially modified by the New Jersey Supreme Court.[132] A few scholars have recommended broader adoption of the per se ban approach.[133]

In *Shadid*, the court found that the facts of the case created an "obvious" and "serious" potential for a conflict of interest between a city and a city police officer.[134] As a result of the conflicting defenses available, "an attorney seeking to represent both of these defendants with utmost zeal might find himself in an untenable position" and might "find it difficult to protect the confidences of his individual client while serving the interests of the city."[135] The court further explained that tremendous hardship would be imposed on both it and the parties if an actual conflict were to materialize and necessitate separate counsel later in the litigation. As a result, the court required separate counsel before trial.[136] In addition, it declared that "[t]he potential for abuse is far too serious to permit joint representation to continue, even in the face of an apparent waiver signed by both of these defendants."[137] The court lamented that its decision would prevent the individual litigant from retaining the attorney of his choice, but it emphasized its obligation to take measures against unethical conduct in its courtroom and its belief that a waiver could not "cure the unfairness inherent in the multiple representation of clients with potentially adverse interests."[138]

The decision in *Shadid* remains unique. *Shadid* has never been overturned, but as a district court decision, it lacks precedential value. Additionally, the decision was based upon the then-current conflict of interest rule in Texas that has since changed somewhat in phrasing, if not in substance.[139] Notably, *Shadid* failed to inspire other courts to adopt the per se ban approach; courts most often cite the case nowadays when they explicitly decline to adopt a per se ban.[140]

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131. 115 N.J.L.J. 96 (1985).

132. *See In re* Petition for Review of Opinion 552 of the Advisory Comm. on Prof'l Ethics, 507 A.2d 233.

133. Bassett, *supra* note 18; Tell, *supra* note 18.

134. 521 F. Supp. at 88-89.

135. *Id.* at 89.

136. *Id.* at 89-90.

137. *Id.* at 90.

138. *Id.*

139. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06 (2008).

140. *See, e.g.*, Johnson v. Bd. of County Comm'rs, 85 F.3d 489, 493 (10th Cir. 1996) (citing *Shadid*, 521 F. Supp. at 90).

In *Opinion 552*, the New Jersey Supreme Court's Advisory Committee on Professional Ethics ruled "that it is never proper for an attorney simultaneously to represent a governmental entity and any of its officials or employees when they are co-defendants in [a § 1983] action."[141] The Committee wrote that an attorney who undertakes such dual representation faces a potential conflict of interest, and indeed, it believed that such conflicts are "almost invariably present" in such situations.[142] Consequently, it absolutely prohibited such multiple representations, deciding that "an *ad hoc* avoidance of conflicts of interest on an individual, case-by-case basis was too uncertain and inconsistent to be the basis for a satisfactory and workable rule."[143]

Just one year later, however, the New Jersey Supreme Court decided to modify *Opinion 552*'s ban.[144] The court first stated that *Opinion 552* was overbroad in barring multiple-client representation in nearly all § 1983 civil rights actions, and explained that no conflict of interest is likely when representation of the governmental official is in his official capacity, when only injunctive relief is sought, or when only compensatory damages are claimed and the government must indemnify.[145] The court acknowledged significant potential for conflicts of interest, however, "whenever the claims asserted could subject the individual defendant to personal liability for which indemnification is unavailable"—for example, when the plaintiff seeks punitive damages, or compensatory damages in cases for which municipality need not indemnify.[146]

The court mentioned several other reasons to retreat from the dual representation ban. First, it declared that multiple representation is a fact-bound issue best addressed by the individual attorney handling the case. Second, it noted that the ban imposes "severe financial strains" on local governments and individual employees who are forced to obtain independent counsel, and that separate representation imposes an "increased litigational burden" on courts and the parties.[147] Third, it explained that the ban gives opportunistic plaintiffs the chance to improve their bargaining position with the government defendant by adding many individual defendants to the lawsuit who would each need to obtain separate counsel (potentially at the government's expense). In lieu of a per se ban, the New Jersey Supreme Court

141. *In re* Petition for Review of Opinion 552 of the Advisory Comm. on Prof'l Ethics, 507 A.2d 233, 234 (N.J. 1986).

142. *Id.* at 235.

143. *Id.*

144. *Id.*

145. *Id.* at 235-36.

146. *Id.* at 236-37 & n.1.

147. *Id.* at 239-40.

adopted an approach that is difficult to characterize, as it seems to have features of the wait and see and align the interests approaches.[148]

2. *The Wait and See Approach*

Most federal appellate cases on municipal dual representation have advanced the wait and see approach.[149] The approach is popular among federal district courts as well,[150] and at least one state ethics commission has endorsed it.[151]

Under the wait and see approach, courts wait until an actual conflict has arisen before intervening to require the attorney either to meet the standards of Model Rule 1.7(b) (or its state equivalent) or to provide separate representation. While these courts recognize potential conflicts of interest in dual representation, they conclude that such potential falls short of constituting an actual conflict that triggers Model Rule 1.7(b).[152] They sometimes reach this

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148. Some language in the New Jersey Supreme Court's decision overturning *Opinion 552* suggests the court adopted a wait and see approach. *See id.* at 239. But because the New Jersey Rules of Professional Conduct bar governmental entities from consenting to conflicts of interest in representation, *see* N.J. RULES OF PROF'L CONDUCT R.1.7(b)(2) (2009); *In re Petition for Review of Opinion 552*, 507 A.2d at 238, the approach differs from a wait and see approach when a conflict of interest arises because a conflict waiver is not permitted. Rather than ban all dual representation in that event, however, the court indicated that a municipality can provide dual representation if it aligns the interests of the municipality and its official. 507 A.2d at 240.

149. *See, e.g.*, Wilson v. Morgan, 477 F.3d 326, 345-46 (6th Cir. 2007); Patterson v. Balsamico, 440 F.3d 104, 114-16 (2d Cir. 2006); Galindo v. Town of Silver City, 127 F. App'x 459, 467-68 (10th Cir. 2005); Moskowitz v. Coscette, 51 F. App'x 37, 39 (2d Cir. 2002); Rodick v. City of Schenectady, 1 F.3d 1341, 1350 (2d Cir. 1993); Coleman v. Smith, 814 F.2d 1142, 1147-48 (7th Cir. 1987).

150. *See, e.g.*, Almonte v. City of Long Beach, No. CV 04-4192, 2007 U.S. Dist. LEXIS 21782, at *18-19 (E.D.N.Y. Mar. 27, 2007); Noyce v. City of Iola, No. 89-4092-R, 1990 U.S. Dist. LEXIS 3771, at *2-5 (D. Kan. Mar. 28, 1990); Coleman v. Frierson, 607 F. Supp. 1566, 1572-74 (N.D. Ill. 1985); Clay v. Doherty, 608 F. Supp. 295, 303-04 (N.D. Ill. 1985); Sherrod v. Berry, 589 F. Supp. 433, 437-38 (N.D. Ill. 1984).

151. *See* MASS. STATE ETHICS COMM'N, COMMISSION ADVISORY NO. 84-03: MUNICIPAL LAWYERS REPRESENTING BOTH A MUNICIPAL EMPLOYEE AND A MUNICIPALITY IN THE SAME SUIT (Sept. 25, 1984), *available at* http://www.mass.gov/ethics/adv8403.htm.

152. *See, e.g.*, *Coleman v. Smith*, 814 F.2d at 1148; Gordon v. Norman, 788 F.2d 1194, 1198-99 (6th Cir. 1986); *Clay*, 608 F. Supp. at 303. There is an exception: the California state rule regarding conflicts of interest in litigation prohibits representing clients whose interests only "potentially" conflict. *See* CAL. RULES OF PROF'L CONDUCT R. 3-310(c)(1) (2008). Consequently, at least one court has decided that "[t]he duty to avoid conflicts arises at the beginning of the representation" such that the disclosure of the conflict and informed consent or separate representation must be effected immediately, rather than upon the

conclusion even when such conflicts of interest seem to fit the definition of a concurrent conflict of interest under Model Rule 1.7(a)(2)—that is, when the potential conflict seems to create "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."[153]

For example, in *Clay v. Doherty*, a case often cited by courts adopting the wait and see approach,[154] the Northern District of Illinois stated that "it is for defendants to choose their own theory of their case, and until it reasonably appears their choice gives rise to actual and *unreasonable* conflicts, their choice of counsel should not be disturbed."[155] *Clay* and other cases suggest that it is not until the defendants have settled upon their ultimate theory of their case, where their theory clearly includes the assertion of incompatible defenses, that the potential conflict becomes actual.

As justification for this approach, some courts emphasize that disqualification of an attorney to represent a particular client is a drastic measure that should be imposed only when absolutely necessary,[156] and highlight the importance of respecting "an individual's right to the counsel of her choice."[157] Additionally, they claim that courts are a poor forum for adjudicating alleged ethical lapses, and that instead federal and state bar authorities should administer that task.[158] They also cite cases in which attorneys dually representing municipalities and municipal officials have vigorously asserted all defenses available to the individual officials despite the potential conflict, suggesting that it is unlikely that an individual defendant will actually be prejudiced by any conflict.[159] Through these arguments, the courts contend that they need not intervene to disqualify an attorney or require action until an actual conflict, constituted by the defendants' decisions to assert incompatible defenses, has materialized.

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ultimate decision by the defendants as to what defenses to assert. *See* Miller v. Alagna, 138 F. Supp. 2d 1252, 1256 (C.D. Cal. 2000).

153. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2008).

154. *See, e.g.*, *Gordon*, 788 F.2d at 1197-98; *Coleman v. Frierson*, 607 F. Supp. at 1572.

155. 608 F. Supp. at 303-04.

156. *See, e.g.*, Noyce v. City of Iola, No. 89-4092-R, 1990 U.S. Dist. LEXIS 3771, at *4 (D. Kan. Mar. 28, 1990); *Clay*, 608 F. Supp. at 303.

157. *See, e.g.*, Almonte v. City of Long Beach, No. CV 04-4192, 2007 U.S. Dist. LEXIS 21782, at *9 (E.D.N.Y. Mar. 27, 2007).

158. *See Gordon*, 788 F.2d at 1199 n.5 ("The *bar* should be aware of potential ethical violations and possible malpractice claims."); *Almonte*, 2007 U.S. Dist. LEXIS 21782, at *9.

159. *See, e.g.*, Patterson v. Balsamico, 440 F.3d 104, 115 (2d Cir. 2006); Rodick v. City of Schenectady, 1 F.3d 1341, 1350 (2d Cir. 1993).

3. The Align the Interests Approach

A few courts have declared or suggested that municipal dual representation may be permitted so long as the municipality takes affirmative steps to align the interests of the defendants.[160] At least two of these courts have declared that if a municipality "chooses to reduce its legal costs by providing joint representation," it is necessary that it "take steps to reduce or eliminate" any potential conflicts of interest.[161] Some of these courts require the municipality to completely indemnify the municipal official, such that the municipal attorney's temptation to favor one defendant over the other is eliminated because the municipality bears the full cost of either defendant's liability.[162] Alternatively, some require the municipality to stipulate to the truth of certain facts that would eliminate the incompatibility in the defenses—for example, that the official was acting within the scope of his duties.[163] When these conditions have not been met by the time the court considers the potential conflict, the court generally requires that they be met within a short time period thereafter and attested to by formally filed waivers and affidavits; otherwise, it will grant the motion to disqualify defense counsel from the dual representation.[164] In all of these cases, the municipality and its official could choose instead to employ separate representation. The courts that impose these conditions for dual representation justify the imposition by stating that the conditions are necessary to prevent potential conflicts of interest from actualizing.[165]

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160. *See* Kounitz v. Slaatten, 901 F. Supp. 650, 659 (S.D.N.Y. 1995); Manganella v. Keyes, 613 F. Supp. 795, 798 (D. Conn. 1985); Smith v. City of New York, 611 F. Supp. 1080 (S.D.N.Y. 1985); *In re* Petition for Review of Opinion 552 of the Advisory Comm. on Prof'l Ethics, 507 A.2d 233, 240 (N.J. 1986).

161. *Manganella*, 613 F. Supp. at 798; *In re Petition for Review of Opinion 552*, 507 A.2d at 240.

162. *See Manganella*, 613 F. Supp. at 799; *In re Petition for Review of Opinion 552*, 507 A.2d at 240.

163. *See Kounitz*, 901 F. Supp. at 659; *Manganella*, 613 F. Supp. at 797 n.1; *Smith v. City of New York*, 611 F. Supp. at 1088. In *Kounitz*, however, the court provided the county attorney with the option to file the affidavit stating that the individual defendants were acting within the scope of their employment and duties *or* to file ex ante specific waivers of the potential conflicts signed by the individual defendants after being provided with information about the nature of the potential conflicts. 901 F. Supp. at 659.

164. *See Kounitz*, 901 F. Supp. at 659; *Manganella*, 613 F. Supp. at 797.

165. *See, e.g.*, *Manganella*, 613 F. Supp. at 798.

4. Ex Ante Specific Waivers

Some courts, particularly those that require municipalities to align the interests of dual representation defendants, have additionally required that any joint defense attorney obtain an ex ante waiver of the potential conflict early in the representation, well before the defendants have decided which defenses to assert.[166] Based on the application of this requirement by a decision in the Southern District of New York,[167] some courts have called this the "Second Circuit's procedure,"[168] although it has not consistently been applied in recent Second Circuit cases.[169]

Courts that require an ex ante waiver generally require the attorney to notify the district court and defendants of the potential conflict.[170] Additionally, such courts demand that the affected clients be "fully informed of possible adverse consequences of joint representation,"[171] which requires that the attorney explain to the defendants the "nature of the conflict,"[172] including the inherency of the potential conflict[173] and the specific incompatible defenses.[174] The courts also generally require the attorney to inform the defendant official that "it is advisable that he or she obtain independent counsel on the individual capacity claim."[175] The affidavit filed with the court to document the official's waiver of the potential conflict must indicate to the court that the defendant has received adequate notice of and "fully

166. *See* Johnson v. Bd. of County Comm'rs, 85 F.3d 489, 494 (10th Cir. 1996); Ra v. Rossi, No. 1:04CV2108, 2005 U.S. Dist. LEXIS 9463, at *2-3 (N.D. Ohio May 11, 2005); Arthur v. City of Galena, No. 04-2022-KHV-DJW, 2004 U.S. Dist. LEXIS 20148, at *9-10 (D. Kan. June 2, 2004); *Kounitz*, 901 F. Supp. 650; Ricciuti v. N.Y. City Transit Auth., 796 F. Supp. 84 (S.D.N.Y. 1992); *Manganella*, 613 F. Supp. 795.

167. *Kounitz*, 901 F. Supp. at 659.

168. *Johnson*, 85 F.3d at 494; *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *9.

169. *See, e.g.*, Patterson v. Balsamico, 440 F.3d 104, 115 (2d Cir. 2006); Moskowitz v. Coscette, 51 F. App'x 37 (2d Cir. 2002).

170. *See, e.g.*, *Manganella*, 613 F. Supp. at 797.

171. *Id.* at 799.

172. *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *10; *Kounitz*, 901 F. Supp. at 659.

173. *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *10-11; *Kounitz*, 901 F. Supp. at 659; *Manganella*, 613 F. Supp. at 799.

174. *See Arthur*, 2004 U.S. Dist. LEXIS 20148, at *8.

175. Johnson v. Bd. of County Comm'rs, 85 F.3d 489, 494 (10th Cir. 1996); *see Arthur*, 2004 U.S. Dist. LEXIS 20148, at *9; *Manganella*, 613 F. Supp. at 799.

understands" the potential conflict,[176] and that he "has chosen to continue to retain the municipality's attorney as his counsel."[177]

Courts requiring ex ante specific waivers emphasize the importance of adequately informing the individual defendant so that he can make a wise choice about whether to accept dual representation.[178] They point to the explanation in *Dunton* that an individual defendant, as a layperson, cannot be expected to understand which defenses he needs to prove or that his counsel may take positions contrary to his interests, unless informed of these facts.[179] But courts also note that ex ante specific waivers permit the individual official to choose his own counsel, which is less invasive and more respectful of the official's preferences.[180]

B. Weaknesses in Existing Approaches

There are several weaknesses in existing approaches to addressing conflicts of interest in municipal dual representation. The per se ban approach has two primary weaknesses: it is expensive and inefficient, and it undermines the litigants' ability to choose their own counsel.

Requiring a per se ban is expensive and inefficient because two different sets of attorneys must be paid to defend claims predicated on an identical set of facts and many similar elements.[181] Many § 1983 claims are frivolous or easily disposed of on a motion to dismiss or for summary judgment.[182] Not all such dispositions would implicate the incompatible defenses: an attorney could defend both the municipality and its official by claiming that the plaintiff was not deprived of rights, that the official's conduct did not cause the deprivation, or that the conduct alleged never occurred, for example. Additionally, a per se ban imposes significant costs on taxpayers and, in many cases, on the

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176. *Johnson*, 85 F.3d at 494; *Kounitz*, 901 F. Supp. at 659; *see Arthur*, 2004 U.S. Dist. LEXIS 20148, at *10; *Manganella*, 613 F. Supp. at 799.

177. *Manganella*, 613 F. Supp. at 799; *see* Ra v. Rossi, No. 1:04CV2108, 2005 U.S. Dist. LEXIS 9463, at *2-3 (N.D. Ohio May 11, 2005); *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *10-11; *Kounitz*, 901 F. Supp. at 659.

178. *See, e.g.*, *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *8.

179. Dunton v. County of Suffolk, 729 F.2d 903, 907-08 (2d Cir. 1984); *e.g.*, *Manganella*, 613 F. Supp. at 799.

180. *See, e.g.*, *Manganella*, 613 F. Supp. at 799.

181. *See In re* Petition for Review of Opinion 552 of the Advisory Comm. on Prof'l Ethics, 507 A.2d 233, 240 (N.J. 1986).

182. *See* Fisher v. City of Detroit, No. 92-1759, 1993 U.S. App. LEXIS 23277, at *16 (6th Cir. Sept. 9, 1993).

individual officials the ban seeks to protect. Where municipalities are bound to provide for the official's defense, the cost of hiring outside counsel is significant, and it is paid on top of the cost of hiring a municipal attorney to defend the city.[183] If the municipality is not bound to pay for outside counsel, the official must pay for counsel himself. In many cases, he will not be able to afford to do so, and thus he may be faced with the difficult choice between trying to settle the claim for an amount that he can afford, regardless of the merits of the underlying lawsuit, or attempting to defend himself pro se.[184]

Given these unattractive alternatives, many municipal officials might prefer to be defended by a municipal attorney, despite the potential for conflict. A municipal attorney may be more experienced and familiar with § 1983 defense, or may be more talented than the local private sector alternatives.[185] A municipal attorney is a particularly attractive alternative when the potential for conflict is low in light of the facts of the case. Yet the per se ban approach would deny officials the opportunity to select municipal representation. The per se ban, therefore, might produce worse outcomes for individual officials, rather than better ones. Furthermore, the ban's denial of the official's choice disrespects his autonomy. Given that the official bears such a large stake in the suit's outcome, he should be able to choose who will represent him.

The wait and see approach has serious weaknesses as well. When municipal attorneys are not required to warn individual officials upfront about the high potential for conflicts, there is no guarantee that officials will get the information they need to make wise choices about their representation.[186] Indeed, unless required to explain the potential conflict, many municipal attorneys may decline to do so, fearing that such explanation could take significant time and could undermine the individual defendant's trust in the lawyer-client relationship. Additionally, some municipal attorneys might be overconfident about their ability to balance incompatible defenses and obtain an optimal outcome for both defendants, or about their ability to overcome the self-serving biases that might cloud their professional judgment.[187] There is

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183. *See In re Petition for Review of Opinion 552*, 507 A.2d at 239-40; Richard C. Solomon, *Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer*, 25 SW. U. L. REV. 265, 316, 327, 329 (1996).

184. *See* Johnson v. Bd. of County Comm'rs, 85 F.3d 489, 491 (10th Cir. 1996).

185. *See* Goode-Trufant Interview, *supra* note 5 (noting that the New York City Law Department's Special Federal Litigation Division specializes in § 1983 defense of law enforcement officers).

186. *See* Atchinson v. District of Columbia, 73 F.3d 418, 427 (D.C. Cir. 1996).

187. *Cf.* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1091-95 (2000) (describing generally the phenomena of psychological overconfidence and self-serving

also a risk that unless individual officials receive sufficient advance information about potential conflicts, they may share confidences with the municipal attorney that the attorney might later use to their detriment.[188] In fact, if such information is disclosed, attorneys may be *required* to share this information with representatives of the municipality so that those representatives can make informed choices about settlement and similar decisions.[189]

The wait and see approach problematically depends on a private party or an attorney to bring an actual conflict to the court's attention. Without informing the municipal official in advance about the potential for conflict and the defenses that he might wish to assert, the official may not even know if his attorney has determined not to assert a particular defense on his behalf, or has decided not to support such a defense with appropriate evidence that the defendant knows to be available.[190] To be sure, the plaintiff might still raise the issue with the court,[191] particularly if he has a strategic reason to seek disqualification of the municipal attorney.[192] Some municipal attorneys might responsibly raise the issue with the court if they think each of the incompatible defenses is plausible, such that their incompatibility poses an actual conflict. Yet the individual official, if properly informed, would be far better situated to police his own interests. His judgment, unlike that of the municipal attorney, is not clouded by the conflict. Also, he may have access to more evidence that supports his defense than does the plaintiff, and so would better know whether his defenses are being shortchanged.

Even after an actual conflict arises, and the municipality and official decide they wish to assert separate defenses, the wait and see approach continues to impose costs on the defendants. The defendants must go through the painful separation process, requiring the court to spend time approving and monitoring the attorney's withdrawal, allowing the official to obtain new counsel, and permitting or requiring the municipality to assign new counsel to itself if shared confidences necessitate such action. Even when an individual official gives informed consent to the conflict, it is questionable whether one

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biases, and their prevalence in various contexts); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1182-84 (1997) (same).

188. *See supra* notes 106-112 and accompanying text.

189. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2008).

190. *See* Dunton v. County of Suffolk, 729 F.2d 903, 907-08 (2d Cir. 1984).

191. *E.g.*, Galindo v. Town of Silver City, 127 F. App'x 459, 467-68 (10th Cir. 2005); Chavez v. New Mexico, 397 F.3d 826, 839-40 (10th Cir. 2005); Kounitz v. Slaatten, 901 F. Supp. 650, 658-60 (S.D.N.Y. 1995).

192. *See In re* Petition for Review of Opinion 552 of the Advisory Comm. on Prof'l Ethics, 507 A.2d 233, 240 (N.J. 1986).

could reasonably believe that the actual conflict will not be problematic; even if the attorney's judgment is not affected, it may be impossible for him to assert effectively both defenses.

As for the align the interests approach, requiring a municipality to make major commitments at the start of every dual representation is excessive. Requiring complete indemnification in all cases would impose extremely significant costs on taxpayers for some actions that are egregious, willful, or malicious, and ultimately the individual defendant's fault alone. In addition, it could create moral hazard problems wherein some municipal officials might see less reason to avoid conduct that deprives a citizen of protected rights. Even worse, a few municipal officials with bad intentions might be willing to commit even more egregious actions than they would otherwise, because the municipality would be bound to indemnify them.[193]

Similarly, if the municipality must stipulate early in the litigation to facts that would obviate the incompatibility in the defenses, it cannot make a choice adequately informed by the evidence. Early on, the municipality may have only partial information about whether the official was acting within the scope of his duties. The full evidence is not revealed until discovery begins, particularly because the official may have misrepresented what occurred. Requiring the municipality to stipulate to facts that ultimately might be false is not in the interests of the court, which seeks to determine the truth of what occurred. And from a broader social perspective, resolving cases on ultimately untrue stipulations is problematic because doing so makes it difficult for voters to know whether deprivations of federal rights were caused by widespread or high-level policies or customs of the municipality, or whether they were instead caused by a rogue official. Providing accurate information to the electorate in these § 1983 cases serves the statute's tort function of deterring violations of constitutional and federally protected rights,[194] by permitting the voters to hold the proper authorities accountable.

The ex ante specific waiver, in contrast, seems to be a particularly useful tool. By informing the individual defendant of the potential conflict, the waiver permits him to monitor his representation to ensure it is appropriately advancing defenses and evidence available to him. Ex ante specific waivers cost

193. *See* Seth J. Chandler, *The Interaction of the Tort System and Liability Insurance Regulation: Understanding Moral Hazard*, 2 CONN. INS. L.J. 91 (1996) (discussing generally the problem of moral hazard when tortfeasors are indemnified for their liability, including liability for gross negligence).

194. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 495 (1986) (Powell, J., dissenting); Owen v. City of Independence, 445 U.S. 622, 651 (1980).

relatively little[195] and are easy to administer once developed. They preserve the litigants' rights to choose their counsel and simultaneously ensure better choices of counsel.

Nonetheless, such waivers cannot make incompatible defenses compatible. Thus, there are situations in which individual defendants might agree to an ex ante waiver, and even to an ex post waiver once an actual conflict exists, but the conflict of interest may still be irreconcilable, with the result that it undermines the proper determination of liability. There are broader social interests in avoiding litigation when an attorney operates under a concurrent conflict of interest that inevitably compromises his representation of one or both clients: first, an interest in determining the truth, so that remedial actions can be taken to address the actual cause of the deprivation of rights, thereby preventing future violations;[196] and second, an interest in using the adversarial system as the best means to determine that truth, rather than relying on an individual attorney's own balancing of conflicting interests among his clients in the absence of (and prior to) the plaintiff's presentation of the facts before a court.[197] In some cases, then, an ex ante waiver is insufficient.

III. PROPOSED APPROACH

The following proposal seeks to take the best features of the existing approaches while avoiding some of their most fundamental weaknesses.

The proposal first recommends requiring ex ante specific waivers, accomplished after an explicit upfront inquiry and information session by the municipal attorney. At the session, the attorney should determine the likelihood that defenses will conflict in the particular case, and should communicate that likelihood—along with information about the nature of potential conflicts of interest—both to the individual official and to the municipality.

A similar inquiry occurs already on the federal level, when federal government attorneys handle a *Bivens* claim filed against an individual federal official that is predicated on similar facts as a Federal Tort Claims Act claim

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195. *See* Miller v. Alagna, 138 F. Supp. 2d 1252, 1256 (C.D. Cal. 2000).

196. *See supra* note 194.

197. *See* Alderman v. United States, 394 U.S. 165, 184 (1969); 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 27 (2d ed. 1923) (describing cross-examination's role in our system and stating that it "is beyond any doubt the greatest legal engine ever invented for the discovery of truth"); Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57 (1998) (discussing the benefits of adversary-based fact presentation).

simultaneously proceeding against the federal government. Federal regulations explicitly require that, upon receiving an official's request for representation, "the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States."[198] The Department of Justice (DOJ) takes very seriously the determination of whether representation of an individual employee meets the "scope and interests" inquiry.[199] Generally, the employing agency will forward all available factual information to the DOJ along with a recommendation as to whether the representation meets the "scope and interests" inquiry.[200] Federal government attorneys, who are bound by the same state rules of ethics that bind municipal government attorneys,[201] often use the initial "scope and interests" inquiry to determine not only whether federal attorneys' representation of the individual official is consistent with the *United States*'s interests, but also whether such representation is likely to produce conflicts that harm the individual employee's interests.[202] The government can still withdraw from representation later if it determines that representing the official is not in fact within the interests of the United States,[203] but the initial required inquiry into the interests of the two clients makes later withdrawal far less likely to occur.

Many municipalities implement a similar initial inquiry for the purpose of determining whether representation may or must be offered under state or municipal law. For example, New York City attorneys must initially determine whether the individual defendant "was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred" in order to decide whether to represent him.[204] This inquiry helps to reduce the likelihood that facts will later come to light that might encourage the City to vigorously argue that the individual employee was acting outside the scope of his duties. But the City's approach does relatively little to answer

198. 28 C.F.R. § 50.15(a)(2) (2008).

199. Telephone Interview with Zachary Richter, Att'y, Constitutional Torts Staff, Torts Section, Civil Div., Dep't of Justice (Dec. 12, 2008) [hereinafter Richter Interview].

200. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 4-5.412(C)(1) (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/5mciv.htm#4-5.412; *see* Richter Interview, *supra* note 199.

201. *See* 28 U.S.C. § 530B(a) (2006).

202. *See* Richter Interview, *supra* note 199.

203. *See id.*

204. N.Y. GEN. MUN. LAW § 50-k(2) (McKinney 2007).

questions about potential conflicts stemming from disputes about whether the individual was following orders or acting on the basis of a city policy, custom, or inadequate training. As a result, attorneys for municipalities like New York City should be required to take a broader view in their initial inquiry, inquiring generally into the question of whether it is in the interests of both clients for the municipal attorney to represent the individual rather than hiring outside counsel. In addition, that inquiry should focus on whether there is significant likelihood that the conflicts discussed above will materialize.

The federal government's prompt information requirement provides a good starting point for my proposal about providing advance information to individual defendants about the potential conflict. Upon determining that the federal attorney will represent the official, federal regulations explicitly require the attorney to promptly inform the official of several important features and limitations of the representation: (1) that the DOJ must represent the United States and the official and that the attorney will assert all appropriate and legal defenses on behalf of the United States and the official;[205] (2) that the attorney will *not* assert any defenses on behalf of the official that are not in the United States's interests;[206] and (3) that while no conflict yet seems to exist, if such conflict should arise the attorney will promptly advise the official and take specific steps to resolve it.[207] This upfront information is extremely helpful to the individual defendant, as it makes him aware of the risks associated with government representation.

A few large municipalities have developed ex ante form waivers that must be executed by individual officials upon the outset of their representation by the municipal attorney. These waivers provide similar information to that required at the federal level. For example, the New York City form waiver states that "[t]he Corporation Counsel's Office functions primarily as the City's lawyer, and its principal obligation is to represent the City's interests."[208] It also mentions generally the potential for conflicts of interest and the steps

205. 28 C.F.R. § 50.15(a)(8)(i) (2008).

206. *Id.* § 50.15(a)(8)(ii).

207. *Id.* § 50.15(a)(8)(v). The attorney must explain the specific steps that are taken in the event of a conflict of interest, which are outlined elsewhere in the regulations. *See id.* § 50.15(a)(6), (9), (10); *id.* § 50.16.

208. Letter from Gary Shaffer, Ass't Corporate Counsel, Tort Div., N.Y. City Law Dep't, to Anne Pejovich 1 (Sept. 23, 2002), *available at* http://www.parentadvocates.org/nicemedia/documents/contract.pdf [hereinafter Pejovich Waiver].

that would be taken to resolve them.[209] In addition, it discusses the terms of indemnification, including the exception for intentional wrongdoing.[210]

Even so, it appears that the New York City waivers for representation offered to employees in § 1983 suits do not discuss the specific nature of the conflicts of interest that are most likely to arise, including the specific incompatible defenses available to the City and to the officials.[211] Nor do they mention that the City will not advance defenses contrary to its interest.[212] This Note proposes to require municipalities to inform their individual clients about the primacy of the government client, the government attorney's inability to assert defenses contrary to the government's interest, the general potential for conflicts of interest, and steps that would be taken to resolve such conflicts. Yet that is not all it would mandate. More stringently, it advises that courts require municipal attorneys to obtain ex ante *specific* waivers in which they inform individual officials of the nature and likelihood of the specific available defenses that may be incompatible, and to obtain a written affidavit from each official indicating that he fully understands and wishes to be represented by the municipal attorney regardless.[213]

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209. *Id.*

210. *Id.* at 1-2.

211. *See, e.g., id.* (neglecting to mention the potential conflicts between the City's policy or custom defense and the individual employee's qualified immunity defense); *see also* Combier v. Biegelson, No. 03 CV 10304, 2005 U.S. Dist. LEXIS 3056, at *1-2 (S.D.N.Y. Feb. 25, 2005) (confirming that the case in which this individual city employee was represented involved § 1983 claims against him in his individual capacity and against the City of New York); Elizabeth Betsy Combier, Advocacy Comes with a Steep Price—Maybe Too Steep, PARENTADVOCATES.ORG, http://www.parentadvocates.org/index.cfm?fuseaction=article&articleID=3727 (last visited Sept. 6, 2009) (providing further information about the case from the plaintiff's perspective).

212. Pejovich Waiver, *supra* note 208.

213. Ex ante waivers could have limited effectiveness if municipal officials lack knowledge of, or ability to understand, the legal content of such waivers, *see* Bassett, *supra* note 18, at 437 n.215, or if they feel pressure to sign the waivers to retain their municipal employment. Still, such waivers, rather than per se bans on dual representation, preserve litigant choice and permit cost-efficient dual representation in cases where conflicts are unlikely to arise. Furthermore, requiring *specific* ex ante waivers—through which officials are informed of the particular incompatible defenses available to them and the municipality—improves the likelihood that their consent to dual representation will be fully informed. While individual officials are far from the most sophisticated of legal clients, they at least may have more experience with the law than the average citizen, because those who tend to be sued under § 1983 are generally involved in applying one or more areas of the law on a daily basis. *See* Lewis A. Kornhauser, *A World Apart? An Essay on the Autonomy of the Law*, 78 B.U. L. REV. 747, 750 (1998) (explaining that administrative officials like police officers and social workers often must apply the law). Thus they likely are more capable of understanding the nature of their legal defenses and the content of an ex ante waiver if both are explained by

If such an ex ante specific waiver is signed, this Note proposes that dual representation should be permitted even if there is a "significant risk" that the defendants would reasonably wish to assert conflicting defenses. If the individual defendant refuses to sign the waiver, however, dual representation should not continue and the individual defendant must obtain separate counsel. In that event, when the municipality is required by law to provide outside counsel to the official in the event of a conflict, and the likelihood that the defendants would reasonably wish to assert incompatible defenses given the information available constitutes a "significant risk,"[214] the court should treat the situation as a concurrent conflict of interest and require the municipality to choose between two options: (1) provide outside counsel, or (2) take affirmative steps to eliminate the possibility of the incompatible defenses by "aligning the interests" of the defendants, as the previous Part discussed. When the likelihood that the defendants will reasonably wish to assert incompatible defenses is low, however, the court should decide that the municipality need not provide outside counsel because no conflict of interest yet exists, with the result that the individual must pay for his own counsel if he chooses separate representation.[215] If the official chooses dual representation,

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the attorney. *Cf.* Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97, 134-35 (2009) (discussing sophisticated clients and advance waivers of conflicts). As for the possibility of employment pressure that may induce the waiver, at a minimum, this Note's proposal protects officials when a municipality and an official choose to assert directly conflicting defenses, because it requires separate representation or alignment of interests (and does not permit a conflict waiver) under those circumstances. And prior to that point, the often greater risk of personal liability produced by municipal dual representation may outweigh the slighter pressure the official faces to select municipal representation in order to please the municipal employer.

214. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2008).

215. One could argue that cities should be obligated from the start of the litigation to pay for outside counsel for an official who prefers it, so that no uncertainty about eligibility for continued municipal representation or payment of legal expenses would exist to undermine the quality of officials' day-to-day policy decisions. *See supra* notes 113-115 and accompanying text. Yet most state and municipal laws governing the municipal obligation to pay for outside counsel impose that obligation only in the event of a conflict of interest, *see supra* note 126 and accompanying text, and a conflict of interest exists in this context only if there is a "significant risk" that the attorney's representation of either client will be materially limited, MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2008). Such a "significant risk" may not arise until later in the litigation, because at the outset it may be probable that the dual representation could rely solely on a defense consistent with both the municipality's and its official's interests (for example, the defense that no constitutional violation occurred). Thus, it seems inappropriate for a state or federal court to require the municipality to pay for outside counsel before the "significant risk" arises, although it might be wise policy to revise state or municipal law to require municipalities to offer the official the option of outside counsel at the municipality's expense regardless of whether a conflict of interest has arisen.

from that point on the court should adopt a wait and see approach, remaining vigilant to the possibility that the potential for the conflicting defenses to be asserted could become a "significant risk."

This proposal for handling the potential for conflicts of interest at the outset takes the best of the ex ante specific waiver, wait and see, and align the interests approaches. The proposal preserves litigant choice by permitting the individual defendant to consent to a conflict that may never materialize. It avoids the significant expense associated with requiring separate representation in all § 1983 cases in which both a municipality and its official are defendants. It also avoids requiring alignment of interests too early in the litigation, when a municipality might commit to costly and overbroad indemnification that could cause moral hazard, or might stipulate to facts that bear a significant likelihood of being untrue. By only requiring alignment when a significant risk of conflict has emerged, this proposal makes it more likely that the municipality's choice of how to align, and whether to align (rather than opt for separate representation), will be informed by additional fact development. Indeed, under this proposal, a "significant risk" of conflicting defenses generally would not exist unless facts were available to suggest it. Furthermore, the proposal protects individual defendants by informing them at the outset of the specific conflicting defenses, which enables them to be vigilant in monitoring their representation by the municipal attorney. It also protects such defendants by ensuring that if conflicting defenses are sufficiently likely to be asserted, action will be taken either to preclude those conflicting defenses (stipulating as to facts) or to dissipate their potential harm (committing to complete indemnification).

However, if at any time it becomes apparent that the defendants definitely intend to assert incompatible defenses, the calculus changes. Under such circumstances, whether they arise early or late in the litigation, courts should decide that it is unreasonable to believe that the attorney can provide competent and diligent representation to both clients within the meaning of Model Rule 1.7(b)(1).[216] An attorney cannot be expected to capably advocate for two opposing findings on a single factual question, and hence cannot be expected to successfully advance two clients' interests when they have decided to assert incompatible defenses. If the likelihood of conflicting defenses reaches that point of complete certainty, the defendants should not be permitted to waive the conflict by giving informed consent. Instead the court should give the municipality the same choice it would have in the event of a "significant risk" that incompatible defenses would be asserted, with the exclusion of the option to obtain a conflict waiver: the municipality should choose between (1)

216. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1) (2008).

providing outside counsel if required by law (or permitting separate counsel paid for by the official, if the municipality is not obligated by law to pay); or (2) curing the conflict by aligning the interests of the defendants (assuming that state and municipal law would permit the required alignment).[217]

This proposal, therefore, carefully balances interests to determine when individual officials should be permitted to consent to conflicts of interest. Litigant choice should be preserved, and is to the extent possible by this proposal. But other interests are at stake as well. As described above, the court and broader society have reasons not to permit an attorney to advance directly conflicting defenses. The court has an interest in establishing the truth of what occurred, and in establishing it through an adversarial proceeding in which the adversity and determination of truth occurs *between* the attorneys before the court, not within one.[218] As a result, this proposal optimally permits litigants to have their choice of counsel when the risk that defendants will wish to assert conflicting defenses is merely significant, but does not permit the individual municipal official defendant to consent to the certain simultaneous assertion of two directly conflicting defenses.[219]

CONCLUSION

This Note discusses the issue of conflicts of interest in municipal attorneys' dual representation of municipalities and their officials in § 1983 suits for damages. The Note explains the potentially severe consequences of this problem, particularly for individual defendants, and the broader implications it has for public accountability and consequently for the prevention of rights deprivations. Yet the problem has been largely ignored thus far. Only a handful of cases address the issue, but the frequency of § 1983 litigation involving

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217. For two reasons, it is not enough to apply an approach whereby different attorneys within a municipality's legal department would represent the official and the municipality in the face of a clear conflict in intended defenses, with an ethical wall erected between the attorneys so that neither is privy to information about the other's client. First, many smaller municipalities' legal departments employ no more than a handful of attorneys, making it difficult to isolate each attorney and his client's information. Second, because most municipal attorneys are frequently engaged in litigating on behalf of the municipality, and because their continued employment depends on the municipality's satisfaction with their work, a municipal attorney representing a municipal official may face difficulty setting aside his allegiance to the municipality in order to represent the official's interests when the two directly conflict. *See supra* Section I.C.

218. *See supra* notes 196-197 and accompanying text.

219. Only one court's approach resembles my hybrid approach. The Southern District of New York, in *Kounitz v. Slaatten*, 901 F. Supp. 650, 659 (S.D.N.Y. 1995), permitted the municipality to *either* align the interests *or* obtain an ex ante specific waiver.

municipal defendants and the difficulty of determining whether an individual official's defenses have been shortchanged suggest that many more cases have been affected.

Municipal attorneys may be permitted to proceed despite significant potential conflicts of interest for many reasons. Because taxpayers bear the costs of § 1983 judgments against cities and counties and information about many of the largest such judgments is salient, the public may react quickly and angrily when a municipal attorney loses a § 1983 suit on behalf of the municipality. But the public may be less concerned about the importance of a vigorous defense for the municipal official, who as an individual may be easier to vilify for his conduct. While there are broad social benefits to providing a strong defense for a municipal official, these benefits are delayed and less salient, which may account for the public's lack of concern on the issue. For example, the long-term and subtle benefits to providing a strong defense include maintaining the good will and morale of current municipal officials, the ability to recruit officials who otherwise would fear liability or the stigma of losing a § 1983 claim, and the likelihood that the ultimate court decision will reflect underlying realities and hold proper authorities responsible for rights deprivations. These benefits operate through complex mechanisms that are easily overlooked by members of the public.

Consequently, one scholar writes that "government lawyers [are] accorded significantly more latitude to continue to represent clients in the face of alleged concurrent and former client conflicts than is the case with regard to private practitioners."[220] But this is simply not appropriate. Municipal attorneys, as government actors, should be held to higher standards, not lower ones, than private sector attorneys, because of their duty to serve the general public interest.[221]

This Note, therefore, offers a proposal to balance the many interests at stake in this question. Courts should ensure that municipal attorneys communicate upfront the potential for the specific conflicts of interest in dual representation of municipalities and their officials in § 1983 suits for damages. Courts should also require individual officials to indicate their understanding of these potential conflicts and their desire to be represented by municipal counsel before dual representation can begin. Officials should have the option

220. Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow from Civil Government Lawyers' General Duty To Serve the Public Interest*, 42 BRANDEIS L.J. 13, 47 (2003).

221. *See* People *ex rel.* Clancy v. Superior Court, 705 P.2d 347, 351 (Cal. 1985); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1421 (1981).

to consent to a "significant risk" that incompatible defenses will or should be asserted, in order to preserve their choice of counsel. But if they decline to consent, separate counsel or the municipality's actions taken to align the interests and cure the conflict are necessary to ensure that individual officials can assert all defenses to which they are entitled. Finally, if the defendants ultimately reach an impasse in that each wishes to assert his or its own incompatible defense, courts should not permit waiver of that actual conflict. Municipal attorneys should not advocate fundamentally inconsistent positions in the same litigation, because permitting them to do so would undermine the forum of the court and its ability to properly determine truth and assign liability.