INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION
2015 Annual Conference
Las Vegas, Nevada

Work Session IX: "The Role of Outside Counsel" The need for specialization in ever increasing complex legal situations. How can this relationship be managed to meet expectations, what are the benefits and pitfalls in such relationships

Josh Reid
City Attorney
Henderson, Nevada

©2015 City of Henderson, NV

©2015 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2015 Annual Conference, held October 3-7, 2015 in Las Vegas, NV. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

RETAINER AGREEMENT
LEGAL SERVICES

THIS AGREEMENT ("Agreement") is made and entered into by and between the City of Henderson, Nevada, a municipal corporation and political subdivision of the State of Nevada ("CITY"), and _____ ("CONTRACT COUNSEL") for legal services ("Services").

RECITALS

WHEREAS, The City Council has authorized the City Attorney to engage outside attorneys on behalf of the CITY to assist the City Attorney's Office in its representation of the CITY and its officers and employees; and

WHEREAS, CITY may seek to assign outside counsel to provide legal representation, support and resources, as well as specialized legal advice to the CITY; and

WHEREAS, CONTRACT COUNSEL is experienced in providing legal representation in the areas of the law deemed necessary by the City Attorney.

NOW, THEREFORE, the parties agree as follows:

SECTION 1. SCOPE OF SERVICE

A. The CITY hereby retains and employs CONTRACT COUNSEL to provide legal representation of the CITY, its duly authorized officers, employees, and volunteers, as the ATTORNEY's expertise and experience may allow.

B. Before CONTRACT COUNSEL may engage in legal representation on behalf of the CITY on a new matter, CONTRACT COUNSEL shall send the CITY an engagement letter for each specific matter ("Matter Engagement Letter"). The Matter Engagement Letter shall outline the specific scope of CONTRACT COUNSEL's representation of the CITY on the new matter and any specialized rates or fees needed for the matter not included in this Agreement. CONTRACT COUNSEL shall not engage in any new matter until the City Attorney signs the Matter Engagement Letter acknowledging the CITY's engagement of CONTRACT COUNSEL on the new matter.

C. CONTRACT COUNSEL will provide these Services in accordance with the City of Henderson Legal Representation Guidelines, which are attached hereto and incorporated herein by this reference.

D. CONTRACT COUNSEL will work in conjunction with the City Attorney in the performance of Services hereunder.

E. CONTRACT COUNSEL will observe and abide by the terms and conditions of all applicable law, regulations, rules of professional conduct, ordinances and rules of the United States, of the State of Nevada, or any political subdivision thereof, or of any duly constituted public authority or agency.

F. All materials developed, prepared or acquired during the performance of Services under this Agreement, including without limitation, all finished or unfinished documents, research, pleadings, memoranda, briefs, data, studies, surveys, drawings, manuals, maps, models, photographs, and reports (hereinafter collectively called "Documents") shall be available to the CITY upon request. No documents prepared for the CITY shall be released by CONTRACT COUNSEL to any third party without the CITY's written permission.

G. The Services provided pursuant to the Agreement are nonexclusive and the CITY is not limited by this Agreement from entering into other agreements for legal services with other attorneys, nor is the City required by this Agreement to assign any specific legal matters or volume of legal matters to CONTRACT COUNSEL.

H. CONTRACT COUNSEL will not affect a final compromise of any matter, nor assert any conflict waivers without the prior written approval of the CITY or its designated representative.

I. The CITY reserves the right to request, and to object to, representation by specific attorneys within CONTRACT COUNSEL's firm.

J. CONTRACT COUNSEL shall abide by the budget, as outlined in the Legal Representation Guidelines, approved by the CITY for each of the matters it is assigned. CONTRACT COUNSEL shall report monthly on the status of its approved budget. The CITY is not responsible for budget overruns unless they have been pre-approved in writing by the City Attorney.

SECTION 2. TERM

CITY agrees to retain CONTRACT COUNSEL from the date of this Agreement through June 30, 2018. CONTRACT COUNSEL will undertake to represent the CITY to the conclusion of each matter assigned, even if the conclusion extends beyond the term of this Agreement.

Within sixty (60) days prior to the expiration of this Agreement, the CITY may exercise the option to renew this Agreement for up to three (3) additional, one-year periods, unless this Agreement is earlier terminated under the provisions hereof. Any renewals of this Agreement will be executed by the City Attorney.

SECTION 3. ATTORNEY FEES

CONTRACT COUNSEL will provide the CITY with Services under this Agreement at the following rates and charges, unless amended by a CITY approved Matter Engagement Letter. Hours of service shall be billed based on increments of one/tenth of an hour and shall represent actual time spent, rather than a standard charge for the activity performed.

A. Hourly Rates:

Regional Managing Partner:	$ 0.00 per hour
Blended Rate for Partners and of-counsel:	$ 0.00 per hour
Blended Rate for Associates	$ 0.00 per hour
Paralegals	$ 0.00 per hour

B. Standard Charges:

Copies:	$ 0.10 per page
Postage:	reasonable at cost
Telephone:	actual, necessary long distance phone call charges
Facsimile:	actual long distance charges for outgoing faxes (not pay per page or flat rate).

The CITY will not pay for the cost of legal search engines such as Westlaw and LexisNexis. Legal search tools are part of CONTRACT COUNSEL's overhead costs and are already factored into the hourly rate.

SECTION 4. COSTS OF ACTION

All costs in connection with legal representation shall be paid by the CITY in accordance with the CITY's Legal Representation Guidelines.

SECTION 5. BILLING

A. Attorney Fees:

The CONTRACT COUNSEL will provide monthly itemized billings to the City Attorney's Office ("CAO") for all Services provided during the preceding month, in accordance with CITY's Legal Representation Guidelines. The CITY agrees to make payment for CONTRACT

COUNSEL's Services and costs within sixty (60) days after receipt of such billings.

SECTION 6. EXPERTS AND INVESTIGATORS

The CONTRACT COUNSEL may employ experts and investigators only upon prior written approval of the CITY in accordance with the CITY's Legal Representation Guidelines.

SECTION 7. REIMBURSEMENT OF TRAVEL EXPENSES

CONTRACT COUNSEL must obtain prior written approval from the CITY concerning the number of employees to be sent by CONTRACT COUNSEL each time travel is required in performing this Agreement. The CITY will reimburse CONTRACT COUNSEL for travel expenses paid or incurred on its behalf as follows:

A. Meals, incidentals and lodging reimbursements shall not exceed rates established by the U.S. General Services Administration (GSA) for the primary destination. For current rates, refer to: http://www.gsa.gov/perdiem. GSA rates vary by location, and for some locations, by time of year. If a city/county is not listed, then the GSA standard rate for continental U.S. applies. Reimbursement for lodging taxes is in addition to this rate but only up to the lodging taxes applicable based on the GSA rate.

B. Travel to the CITY in performing this Agreement where overnight lodging is necessary must be arranged at hotels located within the City of Henderson.

C. Air travel costs will be limited to coach or economy class only; original receipts required.

D. Mileage will be limited to direct routes and reimbursed at IRS standard business rates. Other ground transportation (taxi, shuttle, bus, rental car) at actual costs; original receipts required. Rental car reimbursement is limited to midsize sedan or equivalent; original receipts required.

E. Original receipts are required as stated herein and no reimbursement will be allowed for costs not solely related to the furtherance of CONTRACT COUNSEL's business with the CITY.

SECTION 8. TERMINATION

This Agreement may be terminated by either party upon written notice. Notice of termination of this Agreement on behalf of the CITY may be given at any time at the discretion of the City Attorney.

In the event of termination, CONTRACT COUNSEL shall be paid compensation for Services performed and properly billed pursuant to the terms of this Agreement to the effective termination date.

The CITY reasonably believes that funds can be obtained to make all payments according to the approved budget during the term of this Agreement. If, however, the CITY does not allocate funds to continue the legal representation, this Agreement shall automatically terminate when appropriated funds expire.

SECTION 9. EVENTS UPON TERMINATION OR EXPIRATION

Upon the expiration or termination of this Agreement, the CITY, at its discretion, may Require CONTRACT COUNSEL to return all litigation files to the CITY or its designated representative and execute the necessary Substitution of Counsel, which CONTRACT COUNSEL shall not unreasonably refuse, including if a payment dispute is pending at the time of expiration or any other termination of this Agreement.

SECTION 10. BOOKS AND RECORDS

CONTRACT COUNSEL shall maintain all books, documents, papers, accounting reports and other evidence relating to the Services, and shall permit the CITY and its authorized representatives access to and the right to inspect all such books, documents, papers, accounting reports, and other evidence at all reasonable times during the Agreement period and for seven (7) years from the date of final payment.

SECTION 11. OWNERSHIP OF DOCUMENTS

All files, pleadings, discovery, reports, documents and other records prepared or kept by CONTRACT COUNSEL in the performance of its obligations under this Agreement shall be the exclusive property of the CITY and all such materials shall be remitted to the CITY by CONTRACT COUNSEL upon expiration or termination of this Agreement. All such materials shall be retained by CONTRACT COUNSEL for a minimum of seven (7) years from the date any and all appeal rights expire. At the end of this retention term, the CITY shall be notified and given sixty (60) days to reclaim each file prior to its destruction by CONTRACT COUNSEL.

SECTION 12. CONFIDENTIALITY

All personnel records, personal data and protected health information (PHI) received, stored or viewed by CONTRACT COUNSEL shall be kept in the strictest confidence by CONTRACT COUNSEL and its employees and contractors. All such information shall be used and disclosed only for the proper management of the Services assigned and may not be used or further disclosed, other than as necessary, in the furtherance of the Services.

CONTRACT COUNSEL shall use appropriate safeguards to prevent the use or disclosure of such confidential information outside the scope of the Services, and shall

report to the CITY any inappropriate or unauthorized use or disclosure of the information as soon as it learns of such use or disclosure.

CONTRACT COUNSEL acknowledges that its services will be subject to termination if CONTRACT COUNSEL is found to be in violation of the confidentiality terms of this Agreement by the CITY, in its sole discretion.

SECTION 13. ASSIGNMENT AND SUBCONTRACTING

CONTRACT COUNSEL shall not assign, transfer or delegate any rights, obligations or duties under this Agreement, nor shall CONTRACT COUNSEL subcontract the provision of Services under this Agreement, without prior written consent of the CITY.

SECTION 14. ATTORNEY'S EMPLOYEES

CONTRACT COUNSEL shall be responsible for maintaining satisfactory standards of employee competency, conduct and integrity, and shall be responsible for taking such disciplinary action with respect to its employees as may be necessary. In the event CONTRACT COUNSEL fails to remove any employee from the contract work whom the CITY, in the CITY's sole discretion, deems incompetent, careless, or insubordinate, or whose continued employment on the work is deemed by the CITY to be contrary to the public interest, the CITY reserves the right to require such removal as a condition for the continuation of this Agreement.

SECTION 15. AMENDMENT AND MODIFICATION

No provision of this Agreement will be deemed waived, amended or modified by either party unless such waiver, amendment or modification is in writing and signed by the City Attorney and the authorized agents of CONTRACT COUNSEL.

SECTION 16. APPLICABLE LAW

This Agreement shall be governed by and interpreted according to the laws of the State of Nevada.

SECTION 17. COMPLIANCE WITH LAWS

CONTRACT COUNSEL shall, in the performance of its obligations hereunder, comply with all applicable laws, rules and regulations of all governmental authorities having jurisdiction over the performance of this Agreement, including the Federal Occupational Health and Safety Act and all state and federal laws prohibiting and/or related to the discrimination by reason of race, sex, age, sexual orientation, religion or national origin.

SECTION 18. INSURANCE

CONTRACT COUNSEL, upon request, shall furnish the CITY within ten (10) business days with a Certificate of Insurance signed by an authorized representative, as well as any

endorsements affecting the coverage required by this clause. All deductibles and self-insured retentions(s) shall be fully disclosed in the Certificates of Insurance.

Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not diminish/reduce CONTRACT COUNSEL'S liability to the CITY.

All insurance coverage required herein must be written by a company with a current A.M. Best's rating of not less than A:VII

A. General Liability: $1,000,000 per occurrence for bodily injury and $2,000,000 in the aggregate and $1,000,000 per occurrence for property damage and $2,000,000 in the aggregate.

B. Automotive Liability (owner or non-owned automobiles): $1,000,000 combined single limit for bodily injury and property damage for each occurrence.

C. Professional Liability Insurance (Errors and Omissions): $5,000,000 per occurrence and $10,000,000 in the aggregate.

D. Workers' Compensation: In a form acceptable to the Insurance Commissioner, State of Nevada, statutory limits and Employer's Liability of $1,000,000 per occurrence, per accident for bodily injury or disease.

The general and automotive liability policies are to contain, or be endorsed to contain, the following:

A. The CITY, its officers, employees, agents, and volunteers are to be covered as respects: liability arising out of activities performed by or on behalf of CONTRACT COUNSEL; products and completed operations of the CONTRACT COUNSEL, premises occupied or used by CONTRACT COUNSEL (its officers, employees, agents and attorneys). The coverage shall contain no special limitations on the scope of protection afforded to the CITY.

B. For any claims related to this Agreement, CONTRACT COUNSEL'S coverage shall be primary as respects the CITY, its officers, employees and agents.

C. CONTRACT COUNSEL'S insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability.

D. Should any of the described policies be canceled before the expiration date thereof, notice will be delivered in accordance with the policy provisions

(pursuant to ISO ACORD Form 25, current revision), and in such event CONTRACT COUNSEL shall promptly provide written notice to the CITY. In the event that any of the insurance coverage required hereunder is canceled and not replaced, reduced or restricted, the CITY reserves the right to terminate this Agreement.

If CONTRACT COUNSEL fails to maintain the insurance coverage required herein, then the CITY will have the option to declare CONTRACT COUNSEL in breach, or may purchase replacement insurance or pay the premiums that are due on existing policies in order that the required coverage may be maintained. CONTRACT COUNSEL is responsible for any expenses paid by the CITY to maintain such insurance and the CITY may collect the same from CONTRACT COUNSEL or deduct the amount paid from any sums due CONTRACT COUNSEL under this Agreement.

The insurance requirements specified herein do not relieve CONTRACT COUNSEL of its responsibility or limit the amount of its liability to the CITY or other persons and CONTRACT COUNSEL is encouraged to purchase such additional insurance as it deems necessary.

Regardless of the coverage provided by any insurance policy, CONTRACT COUNSEL shall indemnify, defend, and hold harmless the CITY, its officers, agents, employees and volunteers from any and all claims, demands, actions, attorney's fees, costs, and expenses based upon or arising out of alleged errors, omissions or acts of CONTRACT COUNSEL or his principals, employees, subcontractors, or other agents while performing services under this Agreement.

SECTION 19. INDEMNITY

CONTRACT COUNSEL shall indemnify, defend and hold harmless the CITY, its officers, officials, employees and agents from and against any liability, loss, damage, expense and cost (including without limitation attorney fees, costs, and any other fees of litigation) of every nature to the extent arising out of or in connection with work negligently performed hereunder or its failure to comply with any of its obligations contained in the Agreement, except such loss or damage which was caused by the gross negligence or willful misconduct of the CITY.

SECTION 20. ETHICS OF ATTORNEY

CONTRACT COUNSEL shall abide by and perform his duties in accordance with the ethics of the legal profession and all federal, state and municipal laws, regulations and ordinances regulating the practice of law.

CONTRACT COUNSEL shall, without additional compensation, immediately correct or revise any deficiencies, errors, or omissions caused by CONTRACT COUNSEL in its analysis, reports, and services. It is also understood and agreed by both parties that if any error is found, CONTRACT COUNSEL will expeditiously make the necessary

correction, at no expense to the CITY, except when such error is the sole cause of the CITY.

SECTION 21. CONFLICTS

During the term of this Agreement, CONTRACT COUNSEL may not represent a client whose position may be adverse to the CITY without obtaining the CITY'S prior written consent to the adverse representation in accordance with Nevada Rules of Professional Conduct 1.7 and 1.8.

SECTION 22. INDEPENDENT CONTRACTOR

CONTRACT COUNSEL is an independent contractor and not an employee of the CITY. No permitted or required approval by the CITY of documents or Services of CONTRACT COUNSEL shall be construed as making the CITY responsible for the manner in which CONTRACT COUNSEL performs Services or for any negligence, errors or omissions of CONTRACT COUNSEL. Such approvals are intended only to give the CITY the right to satisfy itself with the quality of the service performed by CONTRACT COUNSEL.

SECTION 23. EXCLUSIVE BENEFIT OF THE PARTIES/NO THIRD PARTY RIGHTS

Except as specifically provided in this section, this Agreement is not intended to create any rights, benefits, powers or interests in any third party and this Agreement is entered into for the exclusive benefit of the CITY and CONTRACT COUNSEL.

SECTION 24. SEVERABILITY

If any portion of this Agreement is found to be invalid, the remainder of the Agreement remains in effect.

SECTION 25. PROHIBITION AGAINST CONTINGENT FEES

CONTRACT COUNSEL warrants that no person or entity has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee. For breach or violation of this warrant, the CITY shall have the right to annul this Agreement without liability or, in its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such commission, percentage brokerage or contingent fee.

SECTION 26. ARBITRATION

All claims, disputes, and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof will be decided by arbitration. Arbitration will be used in accordance with the rules of the American Arbitration Association unless the parties mutually agree otherwise. No arbitration, arising out of or relating to this Agreement, shall include, by consolidation, joinder or in

any other manner, any additional person not a party to this Agreement except by written consent containing a specific reference to this Agreement and signed by the CITY and CONTRACT COUNSEL, and any other person sought to be joined. Any consent to arbitration involving any additional person or persons shall not constitute consent to arbitration of any dispute not described therein or with any person not named or described therein. This Agreement to arbitrate and any agreement to arbitrate with any additional person or persons duly consented to by the parties of this Agreement shall be specifically enforceable under the prevailing arbitration law.

SECTION 27. NOTICES

Any notice required or permitted to be given under this Agreement shall be deemed to have been given when received by the party to whom it is directed by personal service, hand delivery or United States Mail at the following addresses:

TO CITY:

TO CONTRACT COUNSEL:
BILLING:

LEGAL MATTERS:

Either party may, at any time and from time to time, change its representative or address by written notice to the other.

SECTION 28. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties and may only be modified, supplemented or amended by a written agreement signed by both parties.

SECTION 29. FISCAL FUNDING

Funding of this Agreement is dependent on budget appropriations set each fiscal year. If necessary funds to continue with the specified services are not allocated by the City, this Agreement shall automatically terminate at the expiration of the appropriated funds.

SECTION 30. TIME OF ESSENCE

Time is of the essence as to each and every provision of this Agreement.

SECTION 31. AUTHORITY

CONTRACT COUNSEL represents and warrants that the person signing this Agreement on behalf of the CONTRACT COUNSEL has all requisite authority to bind the CONTRACT COUNSEL to the terms and obligations of this Agreement.

SECTION 32. EXHIBITS

Each of the Exhibits referenced in this Agreement is incorporated herein by reference. In the event of an inconsistency between any provision of this Agreement and the terms and conditions of the Exhibits, the provision of this Agreement shall govern.

[THE REMAINDER OF THIS PAGE HAS BEEN INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the CITY has made and executed this Agreement and caused the seal of said CITY to be affixed hereto, and the CONTRACT COUNSEL has hereinto set its hand this day and year below.

CITY COUNCIL APPROVAL:

_____
Date

CITY OF HENDERSON
CLARK COUNTY, NEVADA

_____
City Manager

ATTEST:

_____
City Clerk

APPROVED AS TO CONTENT AND FORM

_____
City Attorney

_____
CAO Review

APPROVED AS TO FUNDING

_____
Chief Financial Officer

A _____ (State of incorporation/formation),

_____ (corporation, limited liability company, etc)

_____
Date

EXHIBIT A
CITY OF HENDERSON LEGAL REPRESENTATION GUIDELINES

These Legal Representation Guidelines ("Guidelines") set forth the procedures that govern City of Henderson City Attorney's Office's ("CITY") relationship with its contracted counsel ("CONTRACT COUNSEL") and CITY's expectations when retaining CONTRACT COUNSEL to represent CITY.

CITY regards its relationship with each retained attorney and its firm as contractual. Adherence to these Guidelines is a condition of maintaining that relationship. CITY expects CONTRACT COUNSEL to maintain the highest ethical standards and to comply with all applicable laws, rules, and regulations governing ethical conduct. Nothing contained in these Guidelines is intended to, nor shall it, restrict CONTRACT COUNSEL's exercise of professional judgment or infringe upon the attorney-client relationship in any manner.

CITY expects CONTRACT COUNSEL, and any para-professionals working on CITY's claims, to read and comply with these Guidelines. These Guidelines supersede any previously provided Guidelines.

I. GENERAL CONTRACT COUNSEL REQUIREMENTS

1. Upon receipt of a matter referral, CONTRACT COUNSEL will perform a conflict check along with the preliminary review of the referral. If a conflict exists that prevents acceptance of the assignment, CONTRACT COUNSEL will promptly notify the City Attorney.

2. If no conflict exists, within five (5) days of receipt of the case, CONTRACT COUNSEL will send a specific Matter Engagement Letter letter to the City Attorney and any named employee(s) represented by CONTRACT COUNSEL regarding willingness to represent the CITY on the new matter. The Matter Engagement Letter shall outline the scope of legal services for the new matter, as well as any specialized legal rates not included in CONTRACT COUNSEL's Retainer Agreement for Legal Services with the CITY. If the CITY agrees to the scope of the legal services and any specialized legal rates, the Matter Engagement Letter shall be signed by the City Attorney on behalf of the CITY and a copy transmitted to CONTRACT COUNSEL.

3. CONTRACT COUNSEL shall provide the CITY a proposed budget of the proposed costs and fees for the case assigned to it within fifteen (15) days of receipt of the new matter. Upon written approval of the budget by the City Attorney on behalf of the CITY, CONTRACT COUNSEL shall not exceed the approved budget. The CITY is not responsible for payment of fees and costs to CONTRACT COUNSEL that exceed the approved budget.

4. All statistical, financial, confidential, and/or personal data received, stored or viewed by CONTRACT COUNSEL shall be kept in the strictest confidence by CONTRACT COUNSEL and its employees and contractors.

5. CONTRACT COUNSEL shall use and disclose protected health information (PHI) for the proper management of all claims and matters assigned and shall execute the CITY's Business Associate Agreement in that regard.

6. CONTRACT COUNSEL acknowledges that CITY reserves the right to request, and to object to, representation by specific attorneys within Contracted Counsel's firm.

II. LITIGATION PLAN/CASE MANAGEMENT

One goal of litigation management is to timely identify those claims for which there is a liability and identify and discuss settlement opportunities early in the litigation. Those activities necessary to defend a claim, prosecute a claim, and/or bring it to resolution should be identified and implemented early in the litigation.

If a new matter given to CONTRACT COUNSEL involves litigation, within ninety (90) days of the assignment of a litigation matter, CONTRACT COUNSEL should prepare a Litigation Plan that outlines the anticipated course of action based on the assumption that the case will go to trial. The Litigation Plan shall include, at a minimum, the following:

1. Causes of actions and Defendants.

2. Summary of facts and anticipated testimony.

3. An assessment of opposing counsel, fact and expert witnesses, and trial judge.

4. Estimated verdict range.

5. Assessment exposure.

6. Estimated settlement range.

7. Attorney's recommendations as to trial or settlement.

III. DISCOVERY

Discovery must be completed promptly and efficiently. Counsel will meet with and interview any named employee(s) and/or relevant employee(s) within ninety (90) days of

the new matter assignment, unless otherwise approved by the City Attorney. The City Attorney shall be advised in advance of the date and time of such meeting(s).

Counsel should conduct general discovery and investigation activities which minimally include:

1. Obtaining relevant documents.

2. Deposing key witnesses.

3. Identifying any potentially culpable parties.

4. Identifying damages.

5. Identifying case strengths and weaknesses.

6. Propound interrogatories and requests for production tailored to the case.

7. Evaluate all discovery responses, including those from any co-defendants.

8. Recommend appropriate expert witnesses.

9. Propound requests for admission as appropriate.

10. Notify the CAO whenever discovered information warrants a change to the Litigation Plan.

IV. PARA-PROFESSIONAL SERVICES

Use of the skills of paralegals is an efficient and cost-effective practice. The CITY encourages the use of paralegals to perform such activities as:

1. Gathering factual information from which answers to interrogatories may be prepared.

2. Preparing materials to be sent to expert(s) for review.

3. Preparing routine computerized documents such as: interrogatories, production requests, and subpoenas.

4. Summarizing medical or other voluminous records.

The above activities list should not be viewed as exhaustive.

V. EXPERTS AND OTHER PROFESSIONAL SERVICE PROVIDERS

CONTRACT COUNSEL is expected to recommend the appropriate experts. Absent exigent circumstances, the decision to hire experts and other professional service providers must only be made in consultation with and the approval of the City Attorney, prior to retention. For each expert, CONTRACT COUNSEL will send the City Attorney a copy of the expert's C.V. and charges/fee schedule. All experts and other professional service providers should be screened for conflicts of interest.

Expert fees should conform with fees charged by similarly qualified experts in the same specialty, and should be considered in light of the extent of CITY's exposure in the matter.

VI. MATTER STATUS REPORTING

In addition to the Initial Litigation Plan for litigation matters, matter status reporting is requested as follows:

1. **Status Reports**

   Concise written status reports regarding the procedural posture of each matter being handled by CONTRACT COUNSEL will be provided to the City Attorney at six month intervals following the engagement on a new matter. Subsequent status reports should only emphasize developments since the last report and review whether the matter is proceeding in line with any Litigation Plan. If there have been no changes or developments since the last status report, the report should so state.

2. **Budget Reporting**

   On or before the 30th of each month, CONTRACT COUNSEL shall email _____ with a budget status report that shall include the following information:

   a. Projected fees and costs for the current month.
   b. Current accounts receivable.
   c. The amount remaining in the approved budget.

3. **Case Closure**

   Upon final resolution of any litigation matter assigned, CONTRACT COUNSEL will submit a Final Case Status Report to the City Attorney, along with copies of all executed and filed settlement documentation.

VII. BILLING

CITY's goal is to obtain the best resolution of legal matters at the lowest reasonable cost. Consistent with that goal, CONTRACT COUNSEL is expected to manage time carefully and to adhere to the following billing guidelines.

1. As described in Section I above, upon taking a new matter on behalf of the CITY, CONTRACT COUNSEL and CITY shall agree upon a budget for that matter. CONTRACT COUNSEL is responsible for tracking its billings in accordance with the approved budget. The CITY shall not be responsible for payment of invoices from CONTRACT COUNSEL that exceed the approved budget for a particular matter, unless the budget in modified in writing by the City Attorney.

2. **Invoices**

a. All billings shall reflect the proper case caption and case number and be directed to City Attorney.

b. Bills for legal services should be sent monthly from the date of assignment.

c. Fees will be in accordance with the approved fee schedule as set forth in the Retainer Agreement for Legal Services, Matter Engagement Letter and the approved budget for each matter.

d. A grand total is to appear on the last line of the statement.

e. Final invoices should be submitted within ninety (90) days of conclusion of a matter. The invoice should be identified as a "Final Invoice."

3. **Invoice Format**

a. Heading: The first page of the bill must state the firm's Tax Identification Number and the caption of the case.

b. Body: The bill must be prepared with daily entries showing:

i) the date the work was performed;

ii) the initials of the person providing the service;

iii) description of the work performed (single activities); and

iv) the actual time in tenths of an hour.

c. End of Bill Summary: The bill must include:

i) The full name of each attorney, or paralegal whose time is being billed;

ii) their hourly rate(s); and

iii) the total hours and total amount charged for each during the billing period.

4. Charges for Service

a. Time Charges:

i) All charges for services must be recorded based on actual time in one-tenth hour increments. All charges must be at billing rate as provided for in the Retainer Agreement for Legal Services and the Matter Engagement Letter.

ii) The CITY will pay only for the actual time spent completing a task, with the time rounded to the nearest tenth of an hour. (For example, when creating a letter which takes 17 minutes, the billing entry should be 0.4.) However, if the same letter is used again and only the address is changed which takes about 2 minutes, the subsequent entry should be 0.1.

b. Block Billing: Grouping multiple activities under a single time charge is not permitted. The time for each activity must be stated separately.

c. Descriptions of Services: Descriptions of services should identify the nature, purpose, and/or subject of the work performed.

d. Multiple Attendance:

i. Only one attorney should attend court appearances, depositions, witness interviews, settlement conferences, mediations and other functions without prior approval from the City Attorney.

ii. At trial, CONTRACT COUNSEL may bill for only one attorney attending trial absent prior authorization from the City Attorney.

e. Legal Research: CONTRACT COUNSEL should advise the City Attorney before undertaking a legal research project requiring over six (6) hours of research. Copies of all research memoranda will be provided to CITY upon request.

f. Legal Research Tools: CONTRACT COUNSEL shall not charge, and the CITY shall not pay for, electronic legal search engines such as Westlaw and LexisNexis.

g. In-Firm Conferences: Reasonable and necessary in-firm meetings between CONTRACT COUNSEL and another attorney or para-professional to discuss substantive or procedural aspects of the case that result in a more effective defense will be reimbursed, provided that sufficient detail of the subject of the meeting demonstrates relevance and value.

h. Travel involving air travel, rental cars, or an overnight stay: Travel expenses are subject to prior approval by the City Attorney with reimbursement for travel costs being limited by CONTRACT COUNSEL's Retainer Agreement for Legal Services (*See* Section 7 Reimbursement of Travel Expenses). CONTRACT COUNSEL must advise the City Attorney of the expense to be incurred and obtain CITY's approval for the rate prior to incurring any travel costs, rental vehicle costs or room reservations.

5. Attorney time NOT Covered:

a. Attorneys performing administrative tasks.

b. More than one firm attendee at a trial, hearing, court appearance, arbitration, mediation, deposition, meeting, or similar event unless approved in advance.

c. Excessive or unnecessary polishing, review, or modification of documents or files.

d. Excessive internal conferencing.

e. Preparing bills and invoices.

f. Routine or elementary legal research, including issues considered to be common knowledge among reasonably experienced counsel in the local jurisdiction. (For example, Monell claims).

g. Legal research and/or preparation of motions which exceed six total hours unless approved in advance by the City Attorney. Motions, responses, briefs, or discovery is subject to this limit. Written authorization of approval for additional time must be obtained from the City Attorney.

h. Sanctions ordered by the Court as a result of attorney conduct which is not attributable to CITY responsiveness, support or conduct in the course of the litigation.

i. Excessive, unreasonable, or unapproved expenses not incurred in accordance with these guidelines.

j. Secretarial and routine clerical functions.

k. Local telephone charges.

l. Cellular phone charges.

m. Employee courier services, law clerk runners or other personnel who perform functions such as delivering documents, checking court dockets, and filing papers or their expenses.

n. Books, materials and CLE, unless previously authorized by City Attorney.

o. Office Supplies.

p. Unilateral rate increases.

q. Responding to billing inquiries/review of this policy Agreement.

r. Indexing deposition transcripts other than when trial is imminent. This work should be performed by paralegals.

s. More than 0.1 hours for reviewing preprinted or computer generated forms.

t. Reviewing or analyzing conflicts issues.

u. Interoffice or Intra-office communications and/or meetings.

v. Trial preparation when trial is not imminent.

w. Non-attorney/non-paralegal work.

x. Arranging travel/accommodations.

y. Opening or closing files, organizing files, Bates stamping, filing.

z. Copying, legal research printing and fax time.

aa. Excessive, unreasonable, or unapproved expenses not incurred in accordance with these guidelines.

bb. Any fee, cost or expense that exceeds the approved budget for a matter.

6. Invoices and/or receipts to support reimbursements are required to receive reimbursement for any expenses incurred.

7. The City Attorney reserves the right to reduce bills for excessive billing, duplicate billings, etc. and to request back up documentation for any activity billed or reimbursement requested. The City Attorney also reserves the right to deny payment of all or part of any statements reflecting services or expenses incurred which are not in compliance with these litigation guidelines, or that exceed the approved budget for a particular matter.

[THE REMAINDER OF THIS PAGE HAS BEEN INTENTIONALLY LEFT BLANK]

VIII. ACKNOWLEDGEMENT

The undersigned representative of CONTRACT COUNSEL, being duly authorized to execute this acknowledgement and acceptance of the foregoing terms of the CITY Guidelines, hereby acknowledges that the Guidelines have been read and understood and that CONTRACT COUNSEL agrees to abide by these Guidelines in the performance of legal services to CITY.

DATED this _____ day of _____, 20___.

_____

_____

By: _____

Authorized Signature

Bar No.:_____

134 F.3d 351
United States Court of Appeals,
Sixth Circuit.

John W. REED; Henry Sharber, Plaintiffs–Appellants,
v.
David BAXTER, Individually; City of Murfreesboro, Defendants–Appellees.

No. 96–6384. | Argued Sept. 11, 1997. | Decided Jan. 9, 1998. | Rehearing and Suggestion for Rehearing En Banc Denied March 5, 1998. *

White firefighters brought action alleging that city violated Title VII by promoting African-American firefighter to rank of captain without regard to respective qualifications of candidates. The United States District Court for the Middle District of Tennessee, John T. Nixon, C.J., dismissed action. White firefighters appealed. The Court of Appeals, Merritt, Circuit Judge, held that: (1) white firefighters preserved for appeal the issue of whether statements made during meeting between city attorney and city council members were protected by attorney-client privilege, but (2) council members participated in meeting as third parties, not as clients of city attorney, and such meeting thus was not held in confidence and was not subject to attorney-client privilege.

Vacated; remanded.

Jones, Circuit Judge, dissented and filed opinion.

West Headnotes (8)

[1] Federal Courts
Mode and sufficiency of presentation

City employees preserved for appeal in Title VII action the issue of whether statements made during meeting between city attorney and city council members were protected by attorney-client privilege, even though employees failed to make complete offer of proof as to statements made during meeting; lack of evidence in record regarding content of meeting was attributable primarily to confusion caused by district court's broad rulings excluding in advance any inquiry into evidence that might be covered under privilege, and district court was aware of substance and significance of excluded evidence. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Evid.Rule 103(a), 28 U.S.C.A.

4 Cases that cite this headnote

[2] Privileged Communications and Confidentiality
Government and government employees and officers

City council members participated in meeting with city attorney, city manager, and fire chief as third parties, not as clients of city attorney, and such meeting, which had been called by one council member in response to complaints about firefighter's promotion, thus was not held in confidence and was not subject to attorney-client privilege in Title VII action challenging such promotion; interests of council members, who had played no role in promotion and were seeking to inquire into basis for promotion, were adverse to those of city manager and fire chief, who were participating in meeting as agents of city responsible for making promotion that had led to lawsuit against city. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6 Cases that cite this headnote

[3] Federal Courts
Witnesses

Question of whether attorney-client privilege applies is mixed question of law and fact, subject to de novo review.

20 Cases that cite this headnote

[4] Privileged Communications and Confidentiality
Elements in general; definition

Elements of attorney-client privilege are as follows: (1) Where legal advice of any kind is sought (2) from professional legal adviser in

his or her capacity as such, (3) communications relating to that purpose, (4) made in confidence (5) by client, (6) are at his or her instance permanently protected (7) from disclosure by himself or herself or by legal adviser, (8) unless protection is waived.

102 Cases that cite this headnote

[5] Privileged Communications and Confidentiality

Purpose of privilege

Attorney-client privilege is based on two related principles, the first being that loyalty forms intrinsic part of relationship between lawyer and client and that this loyalty is offended if lawyer is subject to routine examination regarding client's confidential disclosures, and the second being that privilege encourages clients to make full disclosure to their lawyers, and a fully informed lawyer can more effectively serve client and promote administration of justice.

9 Cases that cite this headnote

[6] Privileged Communications and Confidentiality

Corporations, partnerships, associations, and other entities

Private corporations and other organizations may constitute clients for purposes of attorney-client privilege.

14 Cases that cite this headnote

[7] Privileged Communications and Confidentiality

Attorney-Client Privilege

It is appropriate to recognize attorney-client privilege only to very limited extent that excluding relevant evidence has public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

5 Cases that cite this headnote

[8] Privileged Communications and Confidentiality

Communications Through or in Presence or Hearing of Others; Communications with Third Parties

Attorney-client privilege will not shield from disclosure statements made by client to his or her attorney in presence of third party.

47 Cases that cite this headnote

Attorneys and Law Firms

***352** Phillip L. Davidson (argued and briefed), Nashville, TN, for Plaintiffs–Appellants.

Thomas L. Reed, Jr., Office of the City Attorney, Murfreesboro, TN, Larry G. Trail (argued and briefed), Trail & Taylor, Murfreesboro, TN, for Defendants–Appellees.

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

MERRITT, J., delivered the opinion of the court, in which NORRIS, J., joined. JONES, J. (pp. 358–60), delivered a separate dissenting opinion.

OPINION

MERRITT, Circuit Judge.

In this reverse discrimination case, two white firefighters appeal the dismissal of their action brought against the City of Murfreesboro, Tennessee and the city's fire chief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The plaintiffs allege and offer some evidence to show that an African–American man was promoted to the rank of captain purely on the basis of his race, without regard to the respective qualifications of the candidates. They maintain that the District Court misapplied the law of the attorney-client privilege in two ***353** rulings regarding a meeting among the city attorney and other city officials. The plaintiffs contend that these rulings excluded crucial evidence that would have allowed them to prevail at trial. In response, the defendants argue that the plaintiffs have waived their right to appeal the District Court's rulings by failing to offer proof sufficient to preserve the issue for appeal. Although the

plaintiffs failed to take steps that would have more clearly preserved the privilege issue for appeal, we conclude that they did enough in light of the District Court's broad rulings. The District Court's rulings rested on a misapplication of the law of the attorney-client privilege and denied plaintiffs the full opportunity to present their case at trial. Therefore, we vacate the judgment of the District Court and remand the case for further proceedings.

I.

In 1992 the Murfreesboro Fire Department took steps to fill a captain's position left vacant when Henry Knox, a black man, was fired. The Department notified prospective candidates that it would select three finalists for promotion to the position based on a combination of test scores, length of service, and number of state certifications. Defendant Baxter was to interview the finalists and recommend one of them to City Manager Roger Haley for the promotion.

In December 1992, the plaintiffs and others took a written test created by the Department's Training Officer, Billy Vinson. After the test was graded, Vinson transmitted to the Chief a list of the three applicants most qualified for the position based on the initial promotion criteria—plaintiff Henry Sharber, another white applicant, and an African–American candidate. Vinson then double-checked the results and determined that the list he had sent to Chief Baxter failed to include one candidate who should have ranked among the top three. Chief Baxter requested a list of the top five candidates based on the original criteria. The new list, also prepared by Vinson, included the two plaintiffs, one other white applicant, and two African–American candidates.

As the process continued, more problems arose with the test. The Chief received a grievance by an applicant who claimed that the test was unfair because several of the questions contained multiple correct answers. The Promotion Board determined that five of one hundred questions had multiple correct answers and recommended that all applicants be given credit for those questions. The Department's Grievance Committee recommended to the Chief that the test results be set aside. In the meantime, Training Officer Vinson determined that at least four other tests had been incorrectly scored.

In light of problems with this and other previously administered tests, Chief Baxter looked into the possibility of obtaining a professionally prepared test. After concluding that cost and time concerns precluded that option, Baxter asked Vinson to determine whether all of the applicants had achieved a passing score on the test. Upon learning that they had, Baxter decided to nullify the test by giving all applicants equal credit. He then instructed Vinson to prepare a list of the top three candidates using the other two criteria—length of service and number of state certifications.

The finalists on this list included Thomas Adams, who is white, and Thomas McClain and Emmet Young, both of whom are African–Americans. Young had not appeared on any of the prior lists. Chief Baxter interviewed these three individuals and recommended Young to City Manager Haley for promotion. On December 15, 1992, Haley promoted Young, who at the time had eighteen years of service and who had served as an Instructor/Captain in 1987.

On December 16, 1992, the day after the promotion, City Attorney Thomas Reed, Councilmen Christopher Bratcher and Jack Ross, City Manager Haley, and Chief Baxter met in Haley's office. Ross Dep. at 13, R. 26, J.A. at 80. Councilman Ross called the meeting to inquire into the circumstances surrounding Young's promotion. The plaintiffs contend that statements made during this meeting reveal that Young received the promotion purely because of his race. They say that during the meeting, City Attorney Reed informed Councilmen Ross and Bratcher ***354** that he had advised the Department to promote an African–American because of the controversy that had arisen out of Henry Knox's termination. The defendants concede that during the meeting Reed disclosed the legal advice he had given City Manager Haley and Chief David Baxter regarding the promotion. Haley Aff. at 1–2, R. 8, J.A. at 53–54; Defs.' Mot. in Limine at 1–2, R. 30.

The plaintiffs filed this action in District Court on December 8, 1993, alleging that the defendants violated Title VII by promoting a less qualified African–American to the captain's position purely on the basis of race. During discovery, the plaintiffs issued subpoenas to depose City Attorney Reed, and Councilmen Bratcher and Ross. The defendants moved to quash the subpoenas or for a protective order, contending that the depositions would inquire into a conversation protected by the attorney-client privilege.

The District Court denied the defendants' Motion to Quash but invoked its power under Fed.R.Civ.P. 26(c) to grant a protective order instructing the plaintiffs not to inquire into

areas protected by the attorney-client privilege or the work product doctrine. Acknowledging that the scope of these areas was unclear, the District Court ordered that the depositions be sealed until it could rule on objections to specific testimony. The court based its order on the following findings: (1) that the parties to the December 16, 1992 meeting discussed pending litigation (i.e., an EEOC claim filed by Henry Knox following his termination) in which the city was a named party; (2) that Reed was acting as city attorney during the meeting; and (3) that Ross and Bratcher were city councilmen at the time of the meeting.

The plaintiffs deposed Councilmen Ross and Bratcher but did not depose Reed. During his deposition, Ross testified that he believed, based on statements made during the meeting of December 16, 1996, that race may have been one of many reasons Emmet Young received the promotion. Bratcher testified that the same statements had given him reason to believe that Young received the promotion because of his race. Neither Ross nor Bratcher discussed specific statements made during the meeting.

During a pretrial hearing, the District Court granted the defendants' motion in limine to exclude the opinions of Councilmen Ross and Bratcher regarding the promotion and testimony regarding statements made during the December 1992 meeting. The court did not state the basis for its ruling, but the parties assume it was based in substantial part on the attorney-client privilege. The plaintiffs sought interlocutory appeal of this ruling. This Court dismissed that appeal for lack of a final appealable order.

A bench trial was held on June 16, 1996. The District Court dismissed the case on September 3, 1996, for lack of merit, holding that the plaintiffs had failed to establish a prima facie case of discrimination. The court stated that even if the plaintiffs had been able to make a prima facie case, they could not have carried their burden of persuasion.

II.

[1] The defendants assert that even if the District Court's rulings constitute reversible error, the plaintiffs waived their right to appeal by failing to make a complete offer of proof as required under Fed.R.Evid. 103(a). The defendants accurately point out that the plaintiffs failed to offer testimony for the record from Councilman Ross or City Attorney Reed. They also contend that although Bratcher did testify, the plaintiffs made no offer of proof regarding any statements made during the December 1992 meeting. The only offer of proof attempted by the plaintiffs regarded Bratcher's opinion about the promotion determination, which the trial court rejected as irrelevant. Tr. at 21, R. 69, J.A. at 135.

Moreover, the defendants point out that although plaintiffs filed the depositions of Ross and Bratcher with the court during the motion in limine arguments, they never offered these items into evidence at trial. Relying on *Worsham v. Duke*, 220 F.2d 506, 509 (6th Cir.1955), they argue that the plaintiffs may therefore not attempt to use these depositions as evidence of the testimony that would have been offered regarding the meeting. The defendants assert that without the depositions, there is no direct evidence before ***355** this Court regarding the substance of the testimony the plaintiffs sought to introduce. They further contend that even if the depositions are considered, the testimony constitutes statements of the councilmen's opinions regarding the promotion, which are irrelevant with respect to the ultimate issue in the case.

Although the plaintiffs failed to take steps that would have more clearly preserved the attorney-client privilege issue for appeal, the lack of evidence in the record regarding the content of the meeting is attributable primarily to the confusion caused by the District Court's broad rulings excluding in advance any inquiry into evidence that may be covered under the privilege. Confusion over the scope of the court's protective order is evident in the depositions of Councilmen Ross and Bratcher. During the Bratcher deposition, counsel for the defendants objected as soon as it appeared the plaintiffs' attorney was going to ask about statements made during the December 1992 meeting. Defense counsel stated, “I think the order prohibits you from inquiring directly into things that are covered by [the attorney client privilege],” and “the Court has clearly ruled that the meeting itself was privileged.” Bratcher Dep. at 8, R. 27, J.A. at 99. After some debate over the order, plaintiffs' counsel appeared to concede that in light of the court's broad ruling, he could not ask about the meeting. Rather, he simply asked Councilman Bratcher whether he had reason to believe that Young had been promoted because of his race. Bratcher Dep. at 8–9, R. 27, J.A. at 99–100. The same confusion was apparent during the Ross deposition. When plaintiffs' counsel attempted to elicit testimony about the content of statements made at the meeting, Councilman Ross refused to answer on the basis of the protective order. Ross Dep. at 20–21, R. 26, J.A. at 87–88. While plaintiffs' counsel may have been able to extract

more specific testimony regarding the meeting through more aggressive questioning, the court's unclear order limited the plaintiffs' ability to put evidence into the record.

The proposed Pre–Trial Order states that "[i]t is the Plaintiffs' position that ... what was said at [the December 16, 1992] meeting will clearly show that the reason for the promotion of a less qualified black employee over the two more qualified white employees was based on race...." Proposed Pre–Trial Order at 2 (docketed Dec. 1, 1994). In one of their motions in limine, the defendants argued that the conclusions of Ross and Bratcher regarding the role race played in the promotion "are wholly derived from statements made by City Attorney Thomas L. Reed, Jr. in a meeting of December 16, 1992...." Defs.' Mot. in Limine at 1–2, R. 30. The District Court was aware of the substance and significance of the excluded evidence. In light of the confusion caused by the District Court's orders, we believe that the plaintiffs took steps sufficient to preserve their right to raise this issue on appeal. *Waltzer v. Transidyne Gen. Corp.*, 697 F.2d 130, 134 (6th Cir.1983) (excusing failure to make offer of proof where trial court was made aware of general nature of excluded evidence).

III.

[2] The plaintiffs maintain that the District Court's rulings rested on misapplication of the law regarding the attorney-client privilege. They contend that Councilmen Ross and Bratcher participated in the December 1992 meeting as third parties rather than as clients. The plaintiffs maintain that the discussion was not held in confidence and is therefore not entitled to protection from disclosure under the attorney-client privilege. They also contend that the disclosures made at the meeting by the city executive officials had the effect of waiving the privilege.

[3] **[4]** The question of whether the attorney-client privilege applies is a mixed question of law and fact, subject to de novo review. *See In re Grand Jury Proceedings October 12, 1995*, 78 F.3d 251, 253–54 (6th Cir.1996). Questions of privilege are to be determined by federal common law in federal question cases. Fed.R.Evid. 501. The elements of the attorney-client privilege are as follows: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his ***356** instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived. *Fausek v. White*, 965 F.2d 126, 129 (6th Cir.1992) (citing *United States v. Goldfarb*, 328 F.2d 280, 281 (6th Cir.1964)).

[5] The privilege is based on two related principles. The first is that loyalty forms an intrinsic part of the relationship between a lawyer and client in our adversary system. This loyalty is offended if the lawyer is subject to routine examination regarding the client's confidential disclosures. Kenneth S. Broun, et al., *McCormick on Evidence* § 87, at 205–06 (3rd ed.1984). The second principle is that the privilege encourages clients to make full disclosure to their lawyers. A fully informed lawyer can more effectively serve his client and promote the administration of justice. *Id.* § 87, at 205; *id.* § 89, at 212.

The privilege serves these purposes, but it comes with substantial costs. The privilege excludes relevant evidence and stands "in derogation of the search for the truth." *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974). When an organization such as a corporation is the client, the costs imposed by application of the privilege increase. Given the number of employees who may have information relevant to litigation by or against a corporation, administration of the privilege by the courts proves difficult. More significantly, "[w]here corporations are involved, with their large number of agents, masses of documents, and frequent dealings with lawyers, the zone of silence grows large." David Simon, *The Attorney–Client Privilege as Applied to Corporations*, 65 Yale L.J. 953, 955 (1956); s*ee also* 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5476, at 189 (1986); *id.* § 5476, at 29 (1997 Supp.) (noting that corporations may use the privilege to prevent the disclosure of information useful to adversaries simply by funneling it through lawyers).

[6] Despite these doubts, it is now well settled that private corporations and other organizations may constitute clients for purposes of the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Proposed Federal Rule of Evidence 503 would have extended this rule to municipal corporations and other governmental entities by defining "client" to include "a person, public officer, or corporation, association, or other organization or entity, either public or private...." Proposed Fed.R.Evid. 503(a)(1) (1972) (rejected by Congress), *reprinted in* Michael H. Graham, *Handbook of Federal*

Evidence § 503.1 (4th ed.1996); *see also Restatement (Third) of the Law Governing Lawyers* § 124 (Proposed Final Draft No. 1, 1996) ("[T]he attorney-client privilege extends to a communication of a governmental organization...."). Although we have assumed that a governmental entity such as a municipal corporation may invoke the attorney-client privilege, *see In re Grand Jury Subpoena (United States v. Doe),* 886 F.2d 135 (6th Cir.1989), we have never explicitly so decided. Because we find that the requirements of the privilege have not been satisfied in the present case, we need not resolve this question today.

[7] Assuming that the privilege applies, "[i]t is appropriate to recognize a privilege 'only to the very limited extent that ... excluding relevant evidence has a public good transcending the normally predominant principal of utilizing all rational means for ascertaining truth.' " *Trammel v. United States,* 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980), *quoted in In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 918 (8th Cir.) (internal quotation marks omitted), *cert. denied sub nom. Office of President v. Office of Indep. Counsel,* 521 U.S. 1105, 117 S.Ct. 2482, 138 L.Ed.2d 991 (1997). Guided by this principle, courts and commentators have cautioned against broadly applying the privilege to governmental entities. *See Restatement (Third) of the Law Governing Lawyers* § 124, cmt. b; 24 Wright and Graham § 5475, at 126. The recognition of a governmental attorney-client privilege imposes the same costs as are imposed in the application of the corporate privilege, but with an added disadvantage. The governmental privilege stands squarely in conflict with the strong public interest in open and honest government. *In re Grand Jury Subpoena Duces Tecum (Office of President v.* ***357** *Office of Indep. Counsel),* 112 F.3d at 916, 920–21.

[8] Councilmen Ross and Bratcher participated in the December 1992 meeting, along with the city attorney, the city manager, and the fire chief. It is clear that the attorney-client privilege will not shield from disclosure statements made by a client to his or her attorney in the presence of a third party, 8 John Henry Wigmore, *Wigmore on Evidence* § 2311 (3d ed.1940), but there is little authority about which agents of an organizational client are the client for purposes of the attorney-client privilege. In *In re Grand Jury Subpoena (United States v. Doe),* 886 F.2d 135 (6th Cir.1989), our only case to address the issue in a governmental context, we found that the Detroit City Council was a client of the city's attorney with respect to closed condemnation hearings held pursuant to the city code. Accordingly, we held that the District Court had erred in concluding that the city council could not invoke the attorney-client privilege to protect the minutes of the meetings. *Id.* at 138.

In *Doe,* the city attorney called meetings of the full city council pursuant to a provision of the city code providing for formal council approval of condemnation proceedings. *Id.* at 137–38. Because the city code required the city council itself to initiate such proceedings, the *Doe* court concluded that the city and the city council were the same entity for purposes of the attorney-client privilege. *Id.* at 138. The court held that under these circumstances the city council was the client of the city attorney and could invoke the privilege. *Id.* The *Doe* court then remanded the case to the district court to determine whether the privilege would apply, a question that depended on the confidentiality of the communications at issue. *Id.* at 139.

The factors that led the *Doe* court to reach its conclusions are not present in this case. The December 1992 meeting was not a full meeting of the city council called pursuant to any provision of the city code. Councilman Ross called the meeting in response to complaints he had received from constituents about the promotion process. Ross Dep. at 7, R. 26, J.A. at 74. The interests of the councilmen and the interests of the city executives were not the same. The councilmen were not clients at a meeting with their lawyer. Rather, they were elected officials investigating the reasons for executive behavior.

The Eighth Circuit's recent decision in *In re Grand Jury Subpoena Duces Tecum (Office of President v. Office of Indep. Counsel), supra,* is helpful. In that case, the Independent Counsel moved to compel the production of notes taken during meetings pertaining to several Whitewater-related subjects and attended by White House lawyers, the President's wife, and her lawyers. Both the White House and the President's wife moved to block production of the notes on the basis of the attorney-client privilege. They relied in part on the common-interest doctrine, which expands the coverage of the attorney-client privilege where two or more clients with a common interest in a matter are represented by separate lawyers and agree to exchange information concerning the matter. In such instances, a communication of any such client that otherwise would qualify as privileged is privileged as against third parties. 112 F.3d at 922 (citing *Restatement (Third) of the Law Governing Lawyers* § 126(1) (Proposed Final Draft No. 1, 1996)).

Writing for a divided panel, Judge Bowman rejected the assertion of the privilege in part because of disparity of interest between the White House and the President's wife. 112 F.3d at 922–23. Judge Bowman noted that the common interest necessary to invoke the privilege under such circumstances may be "either legal, factual, or strategic in character," but held that the standard had not been satisfied. *Id.* at 922 (citation omitted). He concluded that while the primary interest of the President's wife in the investigation was avoiding criminal conviction, the White House as an institution faced no such threat. *Id.* at 923.

Although the defendants have not asserted the common-interest doctrine in this case, the same sort of disparity of interest that led to the rejection of the privilege with respect to the White House meetings is also present here. This divergence precludes us from concluding that Councilmen Ross and Bratcher acted as clients of the city's lawyer ***358** during the December 1992 meeting. City Manager Haley and Chief Baxter participated in the discussion as the agents of the city responsible for making the promotion that led to this lawsuit. As fire chief, Baxter was the person ultimately responsible for devising and applying the Department's promotional policy. Exercising the discretion afforded him by the city charter, Haley accepted Baxter's recommendation and promoted Young. Thus, it is the conduct of Baxter and Haley that threatens to expose the city to liability.

Contrary to the statements made by our dissenting colleague, Councilmen Ross and Bratcher played no role in the promotion of Emmet Young. At the time of Young's promotion, the Murfreesboro city council served as a review board for appeals arising out of the hiring and firing of most city employees, including firefighters. There is no indication whatever in the record that the city council or individual councilmen played any role in firefighter promotions. In fact, in response to plaintiff Reed's EEOC complaint, the defendants stated that under the city charter, "the authority for promotions rests with the City Manager, exclusively." City's Resp. to EEOC charge, Baxter Dep. Ex. 21, R. 28. The factual representations to the contrary made in the dissenting opinion are in error. Councilmen Ross and Bratcher initiated the December 1992 conversation not to obtain the advice of the city attorney—who apparently participated in the meeting at the request of Haley and Baxter, Ross Dep. at 13–14, R. 26, J.A. at 80–81—but to inquire into the basis for the promotion of Young, which had apparently been challenged by their constituents as based on race.

In sum, the interests of Ross and Bratcher were adverse to those of Haley and Baxter, and the two councilmen were not clients of the city attorney with respect to the meeting of December 16, 1992. Because Councilmen Ross and Bratcher participated in the meeting as third parties, the discussion was not held in confidence for purposes of the attorney-client privilege. *See* 8 *Wigmore* § 2311 ("One of the circumstances[ ] by which it is commonly apparent that the communication is not confidential is the presence of a third person...."). Their discussion is not shielded from disclosure by the attorney-client privilege.

The attorney-client privilege issue should be decided only on the basis of neutral principles of law, and not on the basis of the racial considerations recited in the last paragraph of the dissenting opinion. The situation might very well be in reverse—an African–American plaintiff could well be claiming discrimination in promotion. Our ruling on the attorney-client privilege should not be made to depend on "the remedial purposes behind the Civil Rights Act" or whether the city needs to "maintain diversity," as our dissenting colleague suggests. Our ruling on this narrow issue should be color blind and not personal, subjective, or based on multi-cultural considerations.

The District Court's protective order and pretrial ruling rested on a misapplication of the law of the attorney-client privilege and denied plaintiffs the opportunity to develop their case fully at trial. We therefore VACATE the judgment of the District Court and REMAND the case for further proceedings consistent with this opinion.

DISSENT

NATHANIEL R. JONES, Circuit Judge, dissenting.

The issue before this Court is one of first impression. The majority found that two city councilmen, acting in their official capacities, were third parties in a confidential meeting with the city attorney, and were thus not covered by the attorney-client privilege. Because I feel that the majority construed the attorney-client privilege too narrowly in this context, I respectfully dissent.

It is well settled that agents of a client are covered by the attorney-client privilege to the same extent as the client. *See, e.g., John Labatt Ltd. v. Molson Breweries,* 898 F.Supp. 471, 473 (E.D.Mich.1995) (noting general rule

that attorney-client privilege covers communications between client's representatives and client's lawyer). Additionally, the majority has recognized that private corporations and other organizations who are analogous to governmental entities may constitute ***359** clients for purposes of the attorney-client privilege. The majority has even recognized that this court has, in its only case addressing the attorney-client privilege in the governmental context, held that a city and city council were the same entity for the purposes of the attorney-client privilege and thus, as client's of the city attorney, a city council could invoke the attorney-client privilege. *See In re Grand Jury Subpoena (United States v. Doe),* 886 F.2d 135 (6th Cir.1989). Yet, the majority found that in this case, a meeting between two city council members, the city manager, city attorney and city fire chief concerning confidential legal advice and action, did not fall within the ambit of the attorney-client privilege. I disagree.

The majority's primary justification for holding that the privilege does not apply in this case is their belief that there is disparity of interest between the city councilmen and those whose activities directly affected the promotion at issue. The majority cites *In re Grand Jury Subpoena Duces Tecum (Office of President v. Office of Indep. Counsel),* 112 F.3d 910 (8th Cir.), *cert denied sub. nom,* 521 U.S. 1105, 117 S.Ct. 2482, 138 L.Ed.2d 991 (1997) as support for that proposition. In that case, however, the President's wife, *in her personal capacity,* was attempting to assert the attorney-client privilege with regard to a meeting she had with the White House lawyer. *Id.* at 922. Mrs. Clinton did not allege that she was either an agent of the White House or acting in her official capacity as First Lady. Thus, she was not considered a client of the White House attorney. Mrs. Clinton, to the contrary, merely asserted that although a third party, the common interest doctrine covered her meeting with the White House attorney. *Id.* at 922. Here, the city councilmen do not have to rely on the common interest doctrine because they attended the meeting in their official capacity as city councilmen. The city council is clearly an agent of the City and as such, is a direct client of the city attorney. *Doe,* 886 F.2d at 138. Moreover, *In re Grand Jury Subpoena Duces Tecum (Office of President v. Office of Indep. Counsel),* involved application of the attorney-client privilege in the criminal context. As justification for a narrower reading of the attorney-client privilege, the court noted that it was significant that executive branch employees, including attorneys, were under a statutory duty to report criminal wrongdoing by other employees. 112 F.3d at 920. The court also specifically found that application of the attorney-client privilege in civil litigation would present a different issue. *Id.* at 917–918.

Furthermore, the fact that Councilmen Ross and Bratcher did not play a direct role in the promotion and therefore did not directly expose the City to liability does not remove them from the reach of the attorney-client privilege. In *Upjohn Co. v. United States,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), the Supreme Court rejected such a narrow application of the attorney-client privilege in the corporate context. In *Upjohn,* this court had determined that the "control group" rather than the broader "subject matter" test was applicable for measuring the scope of the attorney client privilege in the corporate context. *See United States v. Upjohn Co.,* 600 F.2d 1223, 1225 (1979), *rev'd* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Under the subject matter test all employees of the corporation were considered agents of the corporation, and if in possession of information acquired in the ordinary course of business relating to the subject matter of her employment and the information was communicated confidentially, were covered under the attorney-client privilege. *Id.* at 1226. Only if the communications did not cover communication of pre-existing documents prepared for independent business reasons, or communications unrelated to the subject matter of the agent's employment, were communications between the corporate attorney and the employee excluded from the reach of the privilege. *Id.* Under the narrower control group test, however, only those communications made by the "control group" of the corporation, "those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given," were covered by the privilege. *Id.* at 1226. The Supreme Court granted certiorari and rejected this Circuit's application of the ***360** narrow control group approach with regard to the attorney-client privilege in the corporate context. *See Upjohn Co.* 449 U.S. at 392–93, 101 S.Ct. at 684–85. The Court noted that the control group test "frustrate[d] the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392, 101 S.Ct. at 684. The Court criticized the narrow scope given the attorney-client privilege in the court below because it "not only [made] it difficult for corporate attorneys to formulate sound advice when their client [was] faced with a specific legal problem, but [it] also threaten[ed] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id.* Thus, the Court found that the control group test was inapplicable and that because the communications in

the case concerned matters within the scope of the employee's corporate duties, their communications with the corporate attorney were covered by the privilege. *Id.* at 394–95, 101 S.Ct. at 685–86.

Upjohn provides clear reasoning for rejecting the majority's construction of the privilege in this case. Although not directly in charge of promotions in the City, City Councilmen Ross and Bratcher are intricately involved in the process. All hires and fires of all city employees are subject to an appeal directly to the city council. The termination of Henry Knox was appealed to the city council and caused the opening for the promotion at issue in this case. Clearly, because the city council must vote on the propriety of promotions if contested, its members have not only an interest, but a duty to discuss the legal ramifications that may be relevant in making their determinations. As the city attorney in this case noted, "it is important that all members of the city council be furnished, by the attorney, all relevant facts upon which to make their decision." (J.A. at 35) (Reed Aff.). Simply because the full city council was not present and Ross and Bratcher were not directly responsible for making the initial promotion decision, does not remove them from the reach of the attorney-client privilege. Indeed, under the majority's reasoning it would be nearly impossible for a city council ever to invoke the attorney client privilege. In most instances, a full city council meeting must be open to the public, which is not conducive to confidential discussions. A city council member then, would only be able to seek confidential legal advice in a private meeting with the city attorney, such as the meeting between the councilmen and city attorney in this case. The majority, however, would prevent such a meeting from being covered by the attorney-client privilege.

Finally, the underlying facts of this case do not merit the majority's narrow construction of the attorney-client privilege in order to preserve justice. The facts clearly illustrate that the promotion policy was changed due to problems with the Fire Department's test, and not simply as an effort to obtain a Black candidate. Indeed, as the majority points out, Chief Baxter had two opportunities to choose a Black candidate, which he did not utilize, before finally choosing Emmet Young. That race may have even played a small role in his final decision in an effort to ensure that the Fire Department maintain diversity in the face of an opposite history, and is perceived by its citizens as welcome to all, is not illegal and is in fact one of the remedial purposes behind the Civil Rights Act of 1964. The majority, in its rush to judgment, may well frustrate those very important ideals. Accordingly, I dissent.

All Citations

134 F.3d 351, 75 Fair Empl.Prac.Cas. (BNA) 1409, 72 Empl. Prac. Dec. P 45,161, 48 Fed. R. Evid. Serv. 750, 1998 Fed.App. 0011P

Footnotes

* Judge Jones would grant rehearing for the reasons stated in his dissent.

End of Document © 2015 Thomson Reuters. No claim to original U.S. Government Works.

180 Cal.App.4th 1130
Court of Appeal, Fourth District, California.

PRICELINE.COM INCORPORATED
et al., Plaintiffs and Appellants,
v.
CITY OF ANAHEIM et al.,
Defendants and Respondents.

No. G041338. | Jan. 5, 2010.

Synopsis

Background: Taxpayers petitioned for writ of mandate challenging city's use of outside counsel in tax assessment proceeding. The Superior Court, Orange County, No. 30–2008–00180048, Ronald L. Bauer, J., denied petition. Taxpayers appealed.

Holdings: The Court of Appeal, Ikola, J., held that:

[1] city's use of outside counsel on a contingency-fee basis in the tax assessment proceeding did not violate government lawyer's duty of neutrality, and

[2] city's use of outside counsel on a contingency-fee basis did not violate taxpayers' right to due process.

Affirmed.

West Headnotes (15)

[1] Mandamus
Laches

There was no prejudicial delay under the doctrine of laches, in taxpayers' petition for writ of mandate challenging city's use of outside counsel in tax assessment proceeding, where taxpayers filed the petition only six months after they obtained the outside counsel's retention agreements and one month after the administrative hearing officer declined to address the contingency fee arrangement in the tax assessment proceeding.

Cases that cite this headnote

[2] Attorney and Client
Disqualification in general

The courts have authority to disqualify counsel when necessary in the furtherance of justice.

Cases that cite this headnote

[3] Mandamus
Modification or vacation of judgment or order

A petition for writ of mandate was an appropriate method for taxpayers to seek disqualification of city's outside counsel in administrative tax assessment proceeding based on alleged violation of duty of neutrality, since appeal from hearing officer's decision would be inadequate remedy for violation of duty of neutrality.

Cases that cite this headnote

[4] Mandamus
Jurisdiction and authority

Taxpayers' petition for writ of mandate seeking the disqualification of city's outside counsel in administrative tax assessment proceeding was not subject to the "pay first, litigate later" doctrine, because taxpayers limited their writ petition to challenging the use of outside counsel in the tax assessment proceeding, not the propriety of the tax itself. West's Ann.Cal.Const. Art. 13, § 32.

Cases that cite this headnote

[5] Courts
Operation and effect in general

The language of an opinion must be construed with reference to the facts presented by the case; the positive authority of a decision is coextensive only with such facts.

Cases that cite this headnote

[6] Attorney and Client

Requisites and validity of contract

Only public nuisance actions, and perhaps other actions requiring delicate balancing and weighing of interests and values, fall within the class of civil actions wherein the duty of absolute neutrality bars governments from using contingency fees to compensate lawyers with sole litigation discretion.

Cases that cite this headnote

[7] Attorney and Client

Government, employment by or representation of

City's use of outside counsel on a contingency-fee basis in administrative tax assessment proceeding did not violate government lawyer's duty of neutrality, where the proceeding was civil and administrative rather than criminal, the retention agreements required law firm to obtain prior approval from city attorney for "all substantive matters related to the Litigation," an assistant city attorney was designated to oversee the assessment process and litigation, and the proceeding required no notable balancing or weighing of interests or values, absent evidence that the assistant city attorney did not actively and constantly supervise the litigation.

See 1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, § 146; Cal. Jur. 3d, District and Municipal Attorneys, § 13; Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2009) ¶ 5:151 (CAPROFR Ch. 5-B); Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 1:208 (CACIVP Ch. 1-A).

Cases that cite this headnote

[8] Criminal Law

Disqualification of chief prosecutor or of office itself

While a "conflict" of interest exists whenever there is a reasonable possibility that the district attorney's office may not exercise its discretionary function in an evenhanded manner in a criminal matter, the conflict is disabling only if it is so grave as to render it unlikely that the defendant will receive fair treatment. West's Ann.Cal.Penal Code § 1424.

Cases that cite this headnote

[9] Criminal Law

Disqualification of assigned prosecutor

For a criminal prosecutor's conflict of interest to be disabling, the potential for prejudice to the defendant—the likelihood that the defendant will not receive a fair trial—must be real, not merely apparent, and must rise to the level of a likelihood of unfairness. West's Ann.Cal.Penal Code § 1424.

Cases that cite this headnote

[10] Criminal Law

Counsel for prosecution

A trial court's decision not to disqualify outside counsel acting as a criminal prosecutor would be reviewed for an abuse of discretion. West's Ann.Cal.Penal Code § 1424.

Cases that cite this headnote

[11] Courts

Decisions of United States Courts as Authority in State Courts

Federal rules based on the supervisory power of the United States Supreme Court over the administration of justice in the federal courts are not binding on the states.

Cases that cite this headnote

[12] Attorney and Client

Government, employment by or representation of

Constitutional Law

Hotel and motel taxes

City's use of outside counsel on a contingency-fee basis in administrative tax assessment proceeding regarding transient occupancy taxes did not violate taxpayer's right to due process, as would require counsel's disqualification, where the proceeding was civil and administrative

rather than criminal, the retention agreements required law firm to obtain prior approval from city attorney for "all substantive matters related to the Litigation," and an assistant city attorney was designated to oversee the assessment process and litigation. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[13] Criminal Law

Disqualification of assigned prosecutor

Prosecutors need not be entirely neutral and detached.

Cases that cite this headnote

[14] Criminal Law

Duties and Obligations of Prosecuting Attorneys

In an adversary system, prosecutors are necessarily permitted to be zealous in their enforcement of the law.

Cases that cite this headnote

[15] District and Prosecuting Attorneys

Compensation and Fees

A state legislature may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people.

Cases that cite this headnote

Attorneys and Law Firms

****523** Skadden, Arps, Slate, Meagher & Flom, Darrel J. Heiber, Stacy R. Horth–Neubert, Daniel M. Rygorsky and Raoul D. Kennedy, San Francisco, for Plaintiffs and Appellants Priceline.com Incorporated, Lowestfare.com LLC, and Travelweb LLC.

Kelly Hart & Hallman and Brian S. Stagner, Fort Worth, TX, for Plaintiffs and Appellants Travelocity.com Inc., Travelocity.com LP, and Site59.com LLC.

Jones Day, Thomas R. Malcolm, James Karen, and Travis Biffar, Irvine, for Plaintiffs and Appellants Hotels.com LP, Hotels.com GP LLC, Expedia, Inc., and Travelnow.com, Inc.

McDermott Will & Emery, Jeffrey A. Rossman and Elizabeth B. Herrington, Chicago, IL, for Plaintiffs and Appellants Orbitz, Inc., Orbitz, LLC, Trip Network, Inc., and Internetwork Publishing Corporation.

Cristina L. Talley, City Attorney, Moses W. Johnson, Assistant City Attorney; Kiesel, Boucher & Larson, Paul R. Kiesel, William L. Larson, Beverly Hills; Baron & Budd, Patrick J. O'Connell, Kevin D. McHargue, Laura J. Baughman, Dallas, TX; McKool Smith, Steven D. Wolens and Gary Cruciani, Dallas, TX, for Defendants and Respondents City of Anaheim, Curt Pringle, and Jack White.

Elizabeth Milito; Carlton DiSante & Freudenberger and Alison L. Tsao, San Francisco, for National Federation of Independent Business Small Business Legal Center as Amicus Curiae on behalf of Plaintiffs and Appellants.

Edward M. Teyssier, for The Tax Foundation as Amicus Curiae on behalf of Plaintiffs and Appellants.

Jana S. Leslie, for Council on State Taxation as Amicus Curiae on behalf of Plaintiffs and Appellants.

Jennifer B. Henning, for California State Association of Counties and League of California Cities as Amici Curiae on behalf of Defendants and Respondents.

***1133 OPINION**

IKOLA, J.

Plaintiffs [1] appeal from a judgment denying their petition for a writ of mandate ****524** directed to defendants the City of Anaheim, Mayor Curt Pringle, and City Attorney Jack White (collectively, Anaheim). Plaintiffs sought to compel Anaheim to litigate tax assessment proceedings without the assistance of outside counsel retained pursuant to a contingency fee agreement. They contend outside counsel's contingency fee arrangement violates a government lawyer's duty of neutrality. (See *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746–751, 218 Cal.Rptr. 24, 705 P.2d 347 (*Clancy*).)

Clancy grants that "there are cases in which a government may hire an attorney on a contingent fee to try a civil case." (*Clancy, supra,* 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) But *Clancy* bars contingency fee lawyers from being the government's representative in a vaguely defined "class of civil actions" (*Clancy, supra,* 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347) that require "a balancing of interests" and "a delicate weighing of values" (*id.* at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347). The only California appellate case applying this restriction is *Clancy* itself, which barred a contingency fee lawyer from trying public nuisance actions as the city attorney. *Clancy* does *not* bar contingency fee lawyers from assisting government lawyers as co-counsel in ordinary civil litigation. This is such a case. The tax assessment proceeding is a civil administrative action that does not require "the delicate weighing of values" described in *Clancy.* We affirm the judgment denying plaintiffs' writ petition.

FACTS

The Taxes and the Contingency Fee Agreements

Plaintiffs are "online travel companies that provide the service of facilitating the reservation of hotel rooms at hotels in the City, or are corporate ***1134** affiliates of such companies...." Anaheim—through the law firm Kiesel, Boucher and Larson—informed plaintiffs in October 2007 they were liable for failing to remit transient occupancy taxes.

The transient occupancy tax is a local hotel tax. (Anaheim Mun.Code, § 2.12.000 et seq.) Every city hotel guest or other " 'transient' " (*id.,* § 2.12.005.100) must "pay a tax in the amount of fifteen percent of the rent" "[f]or the privilege of occupancy of space in any hotel" (*id.,* § 2.12.010.010). Every hotel " '[o]perator' " (*id.,* § 2.12.005.050) shall "collect the tax ... at the same time as the rent is collected from every transient" (*id.,* § 2.12.020.010) and remit the collected taxes to Anaheim each month (*id.,* § 2.12.030.010). [2]

Plaintiffs responded to the tax notice by asking Anaheim whether its outside counsel was serving on a contingency fee basis. ****525** Plaintiffs later asked for a copy of the retention agreement and followed with a formal request under the California Public Records Act. (Gov.Code, § 6250 et seq.)

Anaheim produced three retention agreements in March 2008. In the first agreement, dated April 2007, Anaheim retained Kiesel, Boucher and Larson, LLP, and Baron and Budd, P.C., as "Special Counsel to represent it in litigation seeking ... relief for the non-payment or underpayment to the City of transient occupancy taxes by online booking companies ... (collectively, the 'Litigation')." The law firms agreed to "obtain prior approval from the City concerning all substantive matters related to the Litigation including dispositive motions, selection of consultants and experts, and resolution of the Litigation. The City agrees to consult in good faith with Special Counsel prior to making a recommendation regarding any such substantive matter." Anaheim designated its city attorney "to direct Special Counsel.... This designation is intended to establish a clear line of authority and to minimize potential uncertainty...."

The retention agreement provided for compensation "on a contingency fee basis." Outside counsel would receive 30 percent of any "Gross Recovery" and "[t]he sole contingency upon which the City [would] pay compensation to Special Counsel is a recovery and collection on behalf of the City, whether by settlement, arbitration award, Court judgment, or otherwise."

***1135** The retention agreement contemplated legal challenges to the contingency fee agreement. It provided, "in the event that this contingency fee Agreement is found to be invalid, Special Counsel agrees to continue to represent the City in the Litigation with the understanding that, if there is no recovery, the City will owe nothing for attorneys' fees or Costs. [¶] If there is a recovery (including collection of the recovery), and this contingency fee Agreement is found to be invalid, the City shall pay a reasonable fee for the services rendered, plus Costs."

In the second agreement, dated October 2007, Anaheim retained Diamond McCarthy LLP as additional " 'Associate Counsel' " in the tax litigation. The agreement had similar terms regarding the scope of the representation and the relationship between Anaheim and outside counsel, though it now also specified that "[t]he City Attorney, as the chief legal officer for the City, is charged with representing the City in legal proceedings with respect to which it has an interest." Its contingency fee provisions mirrored those in the first agreement. The third retention agreement provided for fee sharing among the three law firms acting as outside counsel.

Anaheim issued estimated tax assessments to plaintiffs in May 2008, which plaintiffs appealed by requesting an administrative hearing. [3] Plaintiffs challenged the propriety

of the contingency fee agreements in their hearing request and subsequent filings with the hearing officer. The administrative hearing officer ruled he lacked jurisdiction to consider Anaheim's contingency fee arrangement with outside counsel.

The Writ Proceedings

[1] Plaintiffs petitioned for a writ of mandate directing Anaheim "to immediately ****526** cease and desist using Contingency Fee Counsel in the administration and enforcement of the City's transient occupancy tax."[4] They asserted ***1136** Anaheim violated its " 'duty of neutrality' by involving persons in the tax enforcement and collection process that have a financial interest in the outcome."

Plaintiffs offered a declaration from their counsel. Plaintiffs' counsel stated, "Contingency Fee Counsel has represented and acted for the City in every aspect of the Anaheim administrative appeal hearing process. Contingency Fee Counsel have handled all communications and negotiations with [plaintiff online travel companies] regarding those proceedings, prepared and submitted all briefing to the Hearing Officer, made legal argument for the City at the hearings, made all evidentiary objections for the City, cross-examined all witnesses for the City, and has been the City's exclusive mouthpiece at the hearings for its legal positions and issues. During four days of testimony, resulting in a 1,200 page transcript, the record reflects that the City's in-house counsel spoke no more than eleven times, and each time for the sole purpose of scheduling access of the City's hearing room."

Plaintiffs' counsel further stated Anaheim's auditor manager, Susan Grabemeyer–Grande, "admits under oath ... Contingency Fee Counsel's retained outside expert, Econ One, calculated the estimated assessment for each [plaintiff online travel company], and her role as to the estimated assessments was essentially limited to checking Econ One's math."

Plaintiffs also offered the auditor manager's declaration from a separate hotel tax class action. (*Transient Occupancy Tax Cases* (Super. Ct. L.A. County, JCCP No. 4472).) She stated "that [her] office would estimate the tax due by the [online travel companies] by using the best information available to [her]." Based on the plaintiffs' tax payments and data obtained by an Anaheim consultant, EconOne, she "determined that a valid estimate of the amounts due by each [online travel company] could be calculated by using a nine-step process using [this] information...." She allowed EconOne to perform these calculations, but "instructed [her] Senior Management Auditors to review the calculations of EconOne to insure that such calculations were accurate and done pursuant to the typical and normal methodology used by [her] office."

Anaheim opposed the petition, offering a new declaration from the auditor manager. She stated, "I and my staff directed the methodology and calculations of the assessments on the [online travel companies] to ensure compliance with Chapter 2.12 of the Anaheim Municipal Code and consistency with Anaheim's past audit practices. EconOne provided assistance and their expertise with the [online travel companies'] data file and prepared the initial assessment schedule. I and my staff then recalculated and verified the ***1137** calculations, ensured compliance with the Ordinance and performed sample testing of the data submitted by the [online travel companies] to hotel records."

Anaheim also offered a declaration from Assistant City Attorney, Moses W. ****527** Johnson IV. He explained that "[i]n November 2003, employees of the City ... advised the City to ... collect the full amount of [the transient occupancy tax] on rooms rented online. The City made a decision to collect these taxes from the [online travel companies] well before retaining outside counsel in April 2007."

The assistant city attorney described his role in overseeing the tax assessment proceedings. He stated the city attorney "assigned me to be the attorney from the City of Anaheim's City Attorney's Department to oversee, supervise and control the assessment process, administrative proceedings and any subsequent litigation that the City of Anaheim was preparing to commence against the [online travel companies]." In "carrying out the charge to oversee, supervise, and control the assessment, administrative and litigation processes and procedures relative to the City of Anaheim's claims against the [online travel companies] for outstanding [transient occupancy tax] interest and penalties, I have performed the following functions: [¶] a. participated in and overseen virtually all substantive discussions by and among city personnel and Outside Counsel; [¶] b. participated in, overseen and approved all substantive decisions concerning the City of Anaheim's claims against the [online travel companies] and have overseen and approved the subsequent implementation of those substantive decisions by Outside Counsel; [¶] c. reviewed and approved virtually all written communications and documents submitted to the [online

travel companies], the [online travel companies'] counsel, the administrative Hearing Officer and the courts by Outside Counsel." He continued, "To perform these functions, constant communication between me and Outside Counsel has occurred, usually on a daily basis. There have been dozens of conference calls, which usually occur several times per week.... Outside Counsel may not, and have not, engaged in any substantive actions or decisions without my direction, oversight and approval. My direction, oversight, and approval has been present from the beginning and continues on a daily basis."

After a hearing, the court denied the petition. It found, "the facts of the instant action are distinctly different from *Clancy*," which "must be strictly construed." It entered judgment accordingly.

DISCUSSION

[2] **[3]** **[4]** "[T]he courts have authority to disqualify counsel when necessary in the furtherance of justice." (*Clancy, supra,* 39 Cal.3d at p. 745, 218 Cal.Rptr. 24, 705 P.2d 347.) Contrary to ***1138** Anaheim's claim on appeal, the writ petition was an appropriate method to seek the disqualification of outside counsel. An appeal from the hearing officer's decision would be an inadequate remedy for violation of the duty of neutrality. [5] (See *Clancy,* at pp. 744, 750, 218 Cal.Rptr. 24, 705 P.2d 347 [issuing writ of mandate disqualifying counsel].) We turn now to that duty.

The Clancy Case

Plaintiffs contend *Clancy* imposes a duty on Anaheim to be "absolutely neutral" in the tax assessment proceedings (*Clancy,* ****528** *supra,* 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347), and that this duty bars Anaheim from retaining outside counsel in those proceedings on a contingency fee basis. But *Clancy* grants that "there are cases in which a government may hire an attorney on a contingent fee to try a civil case." (*Ibid.*) Thus, there is considerable tension in *Clancy's* holding.

[5] This tension requires careful analysis of *Clancy,* not casual citation to its most sweeping rhetoric. The "language of an opinion must be construed with reference to the facts presented by the case; the positive authority of a decision is coextensive only with such facts." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1097, 95 Cal.Rptr.2d 198, 997 P.2d 511 [limiting factually inapt California Supreme Court precedent].)

In *Clancy,* the City of Corona retained a private lawyer, James Clancy, to prosecute public nuisance abatement actions against businesses selling obscene publications. (*Clancy, supra,* 39 Cal.3d at p. 743, 218 Cal.Rptr. 24, 705 P.2d 347.) The retention agreement provided Clancy was an independent contractor to be paid $60 per hour if the city won and recovered attorney fees, or $30 per hour otherwise. (*Id.* at pp. 745, 747, 218 Cal.Rptr. 24, 705 P.2d 347.) Acting as the city's " 'special attorney,' " Clancy filed a complaint against a bookstore and its operator. (*Id.* at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.) The trial court denied the defendants' request to disqualify Clancy. (*Ibid.*)

On review, the *Clancy* court issued a writ of mandate "dismissing Clancy as the City's attorney in the pending action." (*Clancy, supra,* 39 Cal.3d at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.) Its analysis began by "review[ing] the responsibilities associated with the prosecution of a criminal case" and the prosecutor's " 'considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted.' " (*Id.* at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347.) From its review, *Clancy* concluded a ***1139** criminal prosecutor has a "duty of neutrality." (*Ibid.*) It later noted, "[c]ontingent fee contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional, but there is virtually no law on the subject." (*Id.* at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) Lacking other authority, the court relied on a textbook citing an unnamed 1920 New Mexico case and an American Bar Association standard. (*Ibid.*)

Clancy used the criminal prosecutor's duty of neutrality as a starting point. Relying on an American Bar Association code, it stated, "These duties are not limited to criminal prosecutors: 'A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.' " (*Clancy, supra,* 39 Cal.3d at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347.) It further stated, "When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function." (*Ibid.*) Each of the four cases cited in support of

this proposition involved judges or criminal prosecutors—not "other government attorneys."[6] ****529** (*Clancy*, at p. 746–747, 218 Cal.Rptr. 24, 705 P.2d 347.)

Clancy did cite an eminent domain case for the proposition that government lawyers must be "unaffected by personal interests." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347, citing *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871, 135 Cal.Rptr. 647, 558 P.2d 545 (*Decker*).) It noted, " 'The duty of a government attorney in an eminent domain action, which has been characterized as "a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner" [citation], is of high order.' " (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.) But *Decker* did not involve contingency fee lawyers. In that case, the city attorney committed misconduct by denying that the highest and best use of the condemned parcel would be offsite airport parking—even though he knew the city intended to use the parcel to fill just that need. (*Decker*, at pp. 865–866, 870–871, 135 Cal.Rptr. 647, 558 P.2d 545.) *Decker* criticized the city's failure to " 'develop a full and fair record' " and its breach of "responsibility to arrive at just compensation." (*Id.* at 871, 135 Cal.Rptr. 647, 558 P.2d 545.)

***1140** *Clancy* likened public nuisance cases to eminent domain cases on the ground that "[s]imilarly, the abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is added to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase. Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.)

Clancy also likened public nuisance cases to criminal prosecutions. "Public nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions. These actions are brought in the name of the People by the district attorney or city attorney. [Citation.] A person who maintains or commits a public nuisance is guilty of a misdemeanor. [Citation.] 'A public or common nuisance ... is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large.... As in the case of other crimes, the normal remedy is in the hands of the state.' [Citations.] A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney." (*Clancy*, *supra*, 39 Cal.3d at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347, fn. omitted.)

In a footnote, *Clancy* took pains to distinguish a case that "approved the assistance ****530** of a private attorney only because he appeared 'not in place of the State's duly authorized counsel.' " (*Clancy*, *supra*, 39 Cal.3d at p. 749, fn. 3, 218 Cal.Rptr. 24, 705 P.2d 347, citing *Sedelbauer v. State* (Ind.App.1983) 455 N.E.2d 1159, 1164 (*Sedelbauer*).) In the following footnote, it noted that even if "Clancy may have had little discretion in the decision whether to bring an action," " 'the prosecutor's discretionary functions' " continue through trial. (*Clancy*, at p. 749, fn. 4, 218 Cal.Rptr. 24, 705 P.2d 347.)

Finally, *Clancy* reached its holding. "Thus we hold that the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Clancy*, *supra*, 39 Cal.3d at p. 750, 218 Cal.Rptr. 24, 705 P.2d 347.)

1141** ***The Reach of Clancy's Holding is Limited

Clancy does not bar governmental entities from retaining outside counsel on a contingency fee basis in all actions. *Clancy* conceded the government may retain private lawyers to litigate certain civil actions, even on a contingency fee basis. "Nothing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case." (*Clancy*, *supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) It cited a case involving a "contingent fee arrangement whereby the city hired a law firm to represent it in all matters relating to the protection of its oil rights." (*Ibid.*, citing *Denio v. City of Huntington Beach* (1943) 22 Cal.2d 580, 140 P.2d 392 (*Denio*), overruled on a different ground in *Fracasse v. Brent* (1972) 6 Cal.3d 784, 792, 100 Cal.Rptr. 385, 494 P.2d 9.)

More recent cases have endorsed government retention of outside counsel on a contingency fee basis. One California court affirmed a writ of mandate directing a city to pay its outside counsel's contingency fee, holding the arrangement comported with municipal debt limitations. (*Law Offices of Cary S. Lapidus v. City of Wasco* (2004) 114 Cal.App.4th 1361, 1370, 8 Cal.Rptr.3d 680 (*Lapidus*).) Another California court affirmed a judgment awarding contingency fees to a city attorney, holding the arrangement complied with statutes barring public officials from having personal financial interests in official decisions or contracts. (*Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 540, 49 Cal.Rptr.2d 676 (*Campagna*).) The duty of neutrality was not addressed in either case. Still, it would appear California governments have routinely retained contingency fee counsel for decades, before and after *Clancy.*

We decline to extend *Clancy's* reach beyond the two limitations of its holding implied by its facts. "[T]he positive authority of a decision is coextensive only with" "the facts presented by the case." (*PLCM, supra,* 22 Cal.4th at p. 1097, 95 Cal.Rptr.2d 198, 997 P.2d 511.)

First, *Clancy* does not bar the use of contingency fee lawyers in all civil litigation. This limitation is shown by *Clancy's*: (1) concession that "[c]ertainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case" (*Clancy, supra,* 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347); (2) its statement that the duty of absolute neutrality applies only to "a class of civil actions," not to all civil actions (*ibid.*); and (3) its comparison of public nuisance actions with eminent domain actions, which involve " ' "a sober inquiry into values," ' " ****531** "a balancing of interests" and "a delicate weighing of values" (*id.* at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347).

***1142** Second, even in that class of actions where *Clancy* otherwise applies, it does not bar contingency fee lawyers from assisting government lawyers as co-counsel. This limitation is shown by: (1) the starting point of *Clancy's* analysis—the focus on a criminal prosecutor's "considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted" (*Clancy, supra,* 39 Cal.3d at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347); (2) the reminder that the prosecutor's discretionary functions continue past the filing decision and into the trial tactics (*id.* at p. 749, fn. 4, 218 Cal.Rptr. 24, 705 P.2d 347); and (3) the footnote distinguishing the *Sedelbauer* case on the ground the "private attorney ... appeared 'not in place of the State's duly authorized counsel.' "[7] (*Clancy,* at p. 749, fn. 3, 218 Cal.Rptr. 24, 705 P.2d 347.) When contingency fee lawyers assist government lawyers as co-counsel, the "considerable discretionary power" that *Clancy* seeks to protect remains vested in the government lawyers. The government lawyers check the contingency fee lawyer's financial interests.

Other courts have recognized the same two limitations.

One federal district court in California denied a motion to disqualify contingency fee lawyers from a tort action, finding the "case is sufficiently distinguishable from *Clancy* to allow for the government's retention of private counsel." (*City and County of San Francisco v. Philip Morris, Inc.* (N.D.Cal.1997) 957 F.Supp. 1130, 1135.) It noted outside counsel "is acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation. Because plaintiffs' public counsel are actually directing this litigation, the Court finds that the concerns expressed in *Clancy* regarding overzealousness on the part of private counsel have been adequately addressed...." (*Ibid.*) It further noted, "This lawsuit ... does not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy* " and "the case as it stands now will not require the private attorneys to argue about ... policy choices or value judgments...." (*Ibid.*)

Another federal district court in California found *Clancy* did not require disqualification of contingency fee lawyers because "Defendants have not countered Plaintiff's showing that the City Attorney for the City of Grass Valley is acting as co-counsel in this action and the City retains 'ultimate ***1143** decision-making authority in the case.' " (*City of Grass Valley v. Newmont Mining Corp.* (E.D.Cal. Nov. 20, 2003, No. 2:04–cv–00149–GEB–DAD, 2007 WL 4166238).)

The Supreme Court of Rhode Island distinguished *Clancy* and allowed contingency fee lawyers to act as co-counsel in a public nuisance action. (*State v. Lead Industries Assn., Inc.* (R.I.2008) 951 A.2d 428.) It held, "there is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent ****532** fee basis to assist in the litigation of certain *non-criminal* matters. Indeed, it is our view that the ability of the Attorney General to enter into such contractual relationships may well, in some circumstances, lead to results that will be beneficial to society—results which otherwise might not have been attainable. However, due to the special duty of attorneys general to 'seek justice' and

their wide discretion with respect to same, such contractual relationships must be accompanied by exacting limitations. In short, it is our view that the Attorney General is not precluded from engaging private counsel pursuant to a contingent fee agreement in order to assist in certain civil litigation, so long as the Office of Attorney General retains *absolute and total control over all critical decision-making* in any case in which such agreements have been entered into." (*Id.* at p. 475, fns. omitted.)

The Maryland high court similarly allowed contingency fee lawyers to assist government lawyers in a tort action. (*Philip Morris v. Glendening* (1998) 349 Md. 660, 709 A.2d 1230.) It distinguished *Clancy* because "there are no constitutional or criminal violations directly implicated here, and, hence, there is no potential conflict of interest." (*Phillip Morris,* at p. 1242–1243.) It noted the *Clancy* arrangement did not provide for "the oversight of an elected State official." (*Philip Morris,* at p. 1243.) In contrast, the retention agreement there entrusted to the Attorney General " 'the authority to control all aspects of [outside counsel's] handling of the litigation,' ... whose 'authority shall be final, sole and unreviewable.' " (*Ibid.*)

[6] These cases bolster our confidence we have read *Clancy* carefully and faithfully, as we must.[8] (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.) *Clancy* bars governments from granting sole litigation discretion to contingency fee lawyers in public nuisance actions—and perhaps to other actions requiring delicate ***1144** balancing and weighing of interests and values. Only those cases fall within the class of civil actions wherein the duty of absolute neutrality bars contingency fees.

Clancy Allows the City Attorney to Receive Assistance from Contingency Fee Co-counsel in the Tax Assessment Proceedings

[7] *Clancy's* twin limitations render it inapplicable here.

First, outside counsel do not act as Anaheim's sole representatives in the tax assessment proceedings. Both contingency fee retention agreements designate the city attorney "to direct Special Counsel and ... establish a clear line of authority and to minimize potential uncertainty...." The second agreement clarifies, "[t]he City Attorney, as the chief legal officer for the City, is charged with representing the City in legal proceedings with respect to which it has an interest." Under both agreements, the city attorney must give "prior approval" to the law firms, after "consult[ing] in good faith," for "all substantive matters related to the Litigation...."

In practice, the city attorney actively exercises his supervisory authority over the tax assessment proceedings. The city attorney designated an assistant city attorney "to oversee, supervise and control the ****533** assessment process, administrative proceedings and any subsequent litigation that the City of Anaheim was preparing to commence against the [online travel companies]." The assistant city attorney stated he had "participated in and overseen virtually all substantive discussions by and among city personnel and Outside Counsel"; "participated in, overseen and approved all substantive decisions concerning the City of Anaheim's claims against the [online travel companies] and have overseen and approved the subsequent implementation of those substantive decisions by Outside Counsel"; and "reviewed and approved virtually all written communications and documents submitted to the [online travel companies], the [online travel companies'] counsel, the administrative Hearing Officer and the courts by Outside Counsel." He has "constant communication" with the law firms, "usually on a daily basis," and has engaged in "dozens of conference calls [with them], which usually occur several times per week." He stated the law firms "may not, and have not, engaged in any substantive actions or decisions without my direction, oversight and approval." This constant, direct oversight by the city attorney's office distinguishes this case from *Clancy,* in which a single contingency fee lawyer served as the sole "special attorney" for the city in the public nuisance action. (*Clancy, supra,* 39 Cal.3d at p. 744, 218 Cal.Rptr. 24, 705 P.2d 347.)

Plaintiffs do not offer evidence contradicting the assistant city attorney's attestation to his active, constant supervision of this litigation. The declaration ***1145** from their counsel addresses outside counsel's litigation conduct, before and during the hearing, but it does not speak to the city attorney's oversight and approval of those actions. The declarations from the auditor manager do not support plaintiffs' characterization that the City's role in issuing the "estimated assessments was essentially limited to checking Econ One's math." Read fairly, the declarations show the auditor manager "determined that a valid estimate of the amounts due by each [online travel company] could be calculated by using a nine-step process" and "directed the methodology and calculations of the assessments" before turning to EconOne to perform the initial calculations using

its data and expertise. In any event, EconOne is not a contingency fee law firm. *Clancy* is silent on the retention of experts.

Second, this is a civil, administrative proceeding. It is not a criminal prosecution, for which "[c]ontingent fee contracts ... have been recognized to be unethical and potentially unconstitutional." (*Clancy, supra,* 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) Nor does a tax assessment proceeding fall within the "class of civil actions that demands the representative of the government to be absolutely neutral." (*Ibid.*) That class included public nuisance actions because they require "a balancing of interests," and "a delicate weighing of values." (*Id.* at p. 749, 218 Cal.Rptr. 24, 705 P.2d 347.)

This civil tax assessment proceeding requires no notable balancing or weighing of interests or values. Unlike a public nuisance case, it does not require Anaheim to balance a party's use of its property against Anaheim's competing interests in abating dangerous or obnoxious conditions. Unlike an eminent domain case, it does not require Anaheim to balance a party's ownership of property against Anaheim's interest in taking the property for public use.

All that this action requires is a determination that the transient occupancy tax is due. To be sure, Anaheim must construe its municipal code to determine whether the tax is due, and decide whether to ****534** pursue its collection. But these are the unremarkable precursors to any civil litigation brought by a government entity—not the balancing of interests and weighing of values contemplated by *Clancy.* For Anaheim to sue for breach of contract, for example, it would go through substantially the same process: construe the contract to determine whether it has a claim, and decide whether to pursue that claim.[9] In every civil action, the government makes a discretionary determination that it should assert a valid claim. (Cf. *Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1558, 92 Cal.Rptr.3d 219 [governmental entities' discretion whether to pursue claims cannot be ***1146** enjoined by mandate].) Extending *Clancy* to this tax assessment proceeding simply because it requires some exercise of legal analysis (is the tax owed?)[10] and discretion (should suit be filed?) would logically entail *Clancy's* expansion into breach of contract actions and any civil action requiring these same decisions —actions in which government entities appear to employ contingency fee counsel routinely. (See *Denio, supra,* 22 Cal.2d 580, 140 P.2d 392; *Lapidus, supra,* 114 Cal.App.4th at p. 1370, 8 Cal.Rptr.3d 680; *Campagna, supra,* 42 Cal.App.4th at p. 540, 49 Cal.Rptr.2d 676.)

In 24 years, no California appellate court has extended *Clancy's* reach to civil actions generally—or to any action other than one for public nuisance.[11] No sound reason exists why *Clancy* would bar government lawyers from receiving assistance from contingency fee lawyers as co-counsel in this case.

Cases Involving Prosecutors and Judges Do Not Warrant Disqualification Here

Plaintiffs contend *Clancy* should be extended to this case, even if not to all civil actions, because a tax assessment proceeding is "analogous" to a criminal prosecution. Plaintiffs rely heavily on language from California cases addressing the potential conflicts of interests of criminal prosecutors.[12] (See *People v. Eubanks* (1997) 14 Cal.4th 580, 59 Cal.Rptr.2d 200, 927 P.2d 310 *(Eubanks); Conner, supra,* 34 Cal.3d 141, 193 Cal.Rptr. 148, 666 P.2d 5; *Greer, supra,* 19 Cal.3d 255, 137 Cal.Rptr. 476, 561 P.2d 1164; *People v. Rhodes* (1974) 12 Cal.3d 180, 115 Cal.Rptr. 235, 524 P.2d 363.) *Clancy,* too, drew some of its broadest language from cases involving criminal prosecutors. (*Clancy, supra,* 39 Cal.3d at pp. 746–747, 218 Cal.Rptr. 24, 705 P.2d 347, citing *Conner, supra,* 34 Cal.3d 141, 193 Cal.Rptr. 148, 666 P.2d 5, *Greer, supra,* 19 Cal.3d 255, 137 Cal.Rptr. 476, 561 P.2d 1164.)

[8] **[9]** If anything, California law governing prosecutor recusal suggests outside ****535** counsel should not be disqualified here. Penal Code section 1424 supersedes cases like *Greer, supra,* 19 Cal.3d at page 269, 137 Cal.Rptr. 476, 561 P.2d 1164, which required recusal for the mere appearance of impropriety. (See *Conner, supra,* 34 Cal.3d at p. 147, 193 Cal.Rptr. 148, 666 P.2d 5.) The statute sets forth "a two-part test: (i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting? Thus, while a 'conflict' exists whenever there is a 'reasonable possibility that ***1147** the DA's office may not exercise its discretionary function in an evenhanded manner,' the conflict is disabling only if it is 'so grave as to render it unlikely that defendant will receive fair treatment.' " (*Eubanks, supra,* 14 Cal.4th at p. 594, 59 Cal.Rptr.2d 200, 927 P.2d 310.) "[T]he potential for prejudice to the defendant —the likelihood that the defendant will not receive a fair trial —must be real, not merely apparent, and must rise to the level

of a *likelihood* of unfairness." (*Id.* at p. 592, 59 Cal.Rptr.2d 200, 927 P.2d 310.)

[10] Thus, plaintiffs' concern that the contingency fee arrangement creates the appearance of impropriety would be unavailing to recuse a criminal prosecutor. Plaintiffs would have to show both a conflict and a likelihood of unfair treatment at the hands of outside counsel—which they have not done. And the trial court's decision not to disqualify outside counsel would be reviewed for an abuse of discretion. (*Eubanks, supra,* 14 Cal.4th at p. 592, 59 Cal.Rptr.2d 200, 927 P.2d 310.) On this record we would find none. It would be anomalous for us to disqualify outside counsel from a civil tax assessment proceeding when, on the same record, we would not recuse them from a criminal prosecution.

[11] Plaintiffs also rely upon a non-California case that disqualified an attorney from a criminal prosecution. (*Young v. U.S. ex rel. Vuitton et Fils S.A.* (1987) 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (*Young*)). Using its supervisory power,[13] the Court disqualified lawyers—whose client had obtained an injunction barring certain defendants from engaging in trademark infringement—from accepting a court appointment to prosecute criminal contempt charges against those defendants for violating the injunction. (*Id.* at pp. 790–792, 809, 107 S.Ct. 2124.) It held, "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." (*Id.* at p. 809, 107 S.Ct. 2124.) It noted the appointment "at a minimum created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety." (*Id.* at p. 806, 107 S.Ct. 2124.) And it placed counsel in the untenable position of owing conflicting duties to both the government and their client. (*Id.* at p. 807, 107 S.Ct. 2124.)

Young does not support disqualification here. It did not address civil litigation. Moreover, *Young* endorsed having private lawyers assist criminal prosecutors. It acknowledged "the fact that counsel for the beneficiary of the court order may often be most familiar with the allegedly contumacious conduct," and suggested "[t]hat familiarity may be put to use in *assisting* a disinterested prosecutor in pursuing the contempt action." (*Young, supra,* 481 U.S. at p. 806, fn. 17, 107 S.Ct. 2124.)

****536** **[12]** Plaintiffs further contend Anaheim's use of contingency fee counsel violates their right to due process. The due process cases they rely upon involve ***1148** judges or other adjudicators, not civil litigators. (See *Ward, supra,* 409 U.S. 57, 93 S.Ct. 80 [mayor received compensation from fines levied in cases he adjudicated]; *Tumey, supra,* 273 U.S. 510, 47 S.Ct. 437 [town collected fines from cases adjudicated by mayor]; *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 [judge should have recused himself from hearing case involving $3 million campaign contributor]; *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 [state justice cannot hear insurance case that would set legal standard governing his pending bad faith case against insurer]; *Gibson v. Berryhill* (1973) 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 [optometry board disqualified from license revocation hearing involving competing optometrists sued by the board]; *In re Murchison* (1955) 349 U.S. 133–134, 75 S.Ct. 623, 99 L.Ed. 942 [same judge who hears secret testimony as " 'one-man judge-grand jury' " cannot adjudicate ensuing contempt charge].)

[13] **[14]** **[15]** Cases regarding judges are wholly inapt from cases involving criminal prosecutors—and all the more from cases involving civil litigation. "The rigid requirements of *Tumey* and *Ward,* designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity." (*Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 248, 100 S.Ct. 1610, 64 L.Ed.2d 182 [reversing decision to disqualify administrative prosecutor because his department received share of fines].) To the contrary, "[p]rosecutors need not be entirely 'neutral and detached.' [Citation.] In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." (*Ibid.*) Indeed, "a state legislature 'may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people.' "[14] (*Id.* at p. 249, 100 S.Ct. 1610.) If so, outside counsel may be similarly "reward[ed] for thus acting in the interest of [Anaheim] and the people." (*Ibid.*)

A Final Thought

Although we have shaped our analysis to conform to *Clancy* and the parties' arguments, we are troubled by the notion that lawyers are more apt to treat defendants unfairly if they are paid pursuant to a contingency fee ***1149** agreement, rather than an hourly fee agreement. *Clancy* identifies the contingency fee lawyers' financial interest in the outcome of a case as a factor that may interfere with the duty of neutrality. But it is just as easily argued that a contingency fee

lawyer is *less* likely to pursue meritless litigation, whereas an hourly fee lawyer may have a financial ****537** motivation to continue prosecuting litigation discovered to lack merit. In short, we question the unstated assumption upon which *Clancy* is based. But we are constrained to analyze this case under the rationale stated therein. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.)

DISPOSITION

The judgment is affirmed. Anaheim shall recover its costs on appeal.

WE CONCUR: RYLAARSDAM, Acting P.J., and FYBEL, J.

All Citations

180 Cal.App.4th 1130, 103 Cal.Rptr.3d 521, 10 Cal. Daily Op. Serv. 243, 2010 Daily Journal D.A.R. 258

Footnotes

1 Priceline.com Incorporated, Lowestfare.com LLC, Travelweb LLC, Travelocity.com Inc., Travelocity.com LP, Site59.com LLC, Hotels.com LP, Hotels.com GP LLC, Expedia, Inc., Travelnow.com, Inc., Orbitz, Inc., Orbitz, LLC, Trip Network, Inc., and Internetwork Publishing Corporation.

2 An administrative hearing officer found plaintiffs liable for up to $9.8 million each in unremitted taxes, issuing a 55–page decision in February 2009. He found plaintiffs are “operators” of hotels and wrongly remitted taxes on the lower, wholesale rates they pay to reserve hotel rooms—not the higher, retail rates they charge customers. He rejected plaintiffs' assertion that Anaheim sought to impose the tax on their reservation fees. We express no opinion on the merits of this decision or Anaheim's tax assessments, over which litigation continues. We address only Anaheim's use of outside counsel.

3 The Anaheim Municipal Code set forth a comprehensive administrative procedure to be followed if an operator fails to remit the proper tax, which provides for assessments, appeals, and civil actions. (Anaheim Mun.Code, §§ 2.12.060.010, 2.12.060.020, 2.12.090.) The code generally provides that any code violation may be prosecuted as a misdemeanor unless otherwise expressly provided. (*Id.,* § 1.01.370.) Nothing in the record suggests the City has or will institute criminal prosecutions against plaintiffs.

4 Anaheim unpersuasively contends on appeal the writ petition was untimely. We see no prejudicial delay. (See *San Bernardino Valley Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 605, 51 Cal.Rptr.2d 897 [“Laches bars a mandamus action if the petitioner delays in initiating or prosecuting an action, and prejudice to the respondent results”].) Plaintiffs filed their petition in September 2008, only six months after they obtained the retention agreements and one month after the hearing officer declined to address the contingency fee arrangement.

5 Because plaintiffs limited their writ petition to challenging the use of outside counsel in the tax assessment proceeding, not the propriety of the tax itself, they are excused from the “ ‘pay first, litigate later’ ” doctrine in this case. (*Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1135, 113 Cal.Rptr.2d 690 [requiring taxpayers “to pay an assessed tax before filing a refund action”].) We express no opinion on the applicability of this doctrine in an appeal from the hearing officer's decision or any other related litigation.

6 Two of the cases disqualified criminal prosecutors because witnesses worked in their offices (*People v. Conner* (1983) 34 Cal.3d 141, 193 Cal.Rptr. 148, 666 P.2d 5 (*Conner*); *People v. Superior Court (Greer*) (1977) 19 Cal.3d 255, 137 Cal.Rptr. 476, 561 P.2d 1164 (*Greer*), superseded by statute as stated in *Conner,* at p. 147, 193 Cal.Rptr. 148, 666 P.2d 5) and two disqualified mayors from presiding over cases in which they or their city would recover any fines (*Ward v. Village of Monroeville* (1972) 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (*Ward*); *Tumey v. Ohio* (1927) 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (*Tumey*)). (See *Clancy, supra,* 39 Cal.3d at pp. 746–747, 218 Cal.Rptr. 24, 705 P.2d 347.)

7 The private attorney in *Sedelbauer* was not retained on a contingency fee basis, as far as the opinion discloses. (*Sedelbauer, supra,* 455 N.E.2d at p. 1164 [allowing “Citizens for Decency” member to assist in obscenity prosecution].) Plaintiffs claim this fact weighs against allowing contingency fee counsel to act as co-counsel. Actually, it cuts the other way. *Clancy* could have distinguished *Sedelbauer* on the ground no contingency fee was involved. Instead, *Clancy* took the trouble to distinguish *Sedelbauer* on the ground the private lawyer acted as co-counsel. This extra step in the analysis suggests *Clancy* was embracing the arrangement in *Sedelbauer* as a counterpoint to the arrangement in *Clancy.*

8 The two-page opinion in *Sears, Roebuck and Co. v. Parsons* (1991) 260 Ga. 824, 401 S.E.2d 4–5, is unpersuasive. There, the court found Georgia public policy forbade a county from paying contingency fees to an outside auditor that

reviewed property tax returns for potential under valuations. (*Ibid.*) California public policy on the use of contingency fee counsel is set forth in *Clancy.*

9 Plaintiffs claim the power to tax is the power to destroy. In the context of *Clancy,* little distinction exists between the civil tax assessment proceeding and any civil action in which a government entity is a plaintiff asserting a legal claim for money due.

10 We need not determine whether our analysis would apply to a hypothetical tax statute that explicitly requires a balancing of interests or weighing of values—not just legal analysis—in order to determine whether the tax is owed in the first place.

11 The California Supreme Court has granted review of a case in which the court declined to disqualify contingency fee co-counsel in a public nuisance case. (*County of Santa Clara v. Superior Court* (2008) 161 Cal.App.4th 1140, 74 Cal.Rptr.3d 842, review granted July 23, 2008, S163681.) We deny as irrelevant plaintiffs' request for judicial notice of an amicus brief filed in that case by the California District Attorneys Association.

12 Petitioners inaptly cite *Berger v. United States* (1935) 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314, a prosecutorial misconduct case involving no alleged conflict of interest.

13 "Federal rules based on the supervisory power of the United States Supreme Court over the administration of justice in the federal courts ... are not binding on the states." (*People v. Thayer* (1965) 63 Cal.2d 635, 639, 47 Cal.Rptr. 780, 408 P.2d 108.)

14 Marshall held using civil penalties collected for violations of federal child labor laws to reimburse the prosecuting agency did not violate due process. (*Marshall v. Jerrico, supra,* 446 U.S. at pp. 241, 252, 100 S.Ct. 1610.) It declined to "say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function" (*id.* at p. 250, 100 S.Ct. 1610), though it cautioned, "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." (*Id.* at pp. 249–251, 100 S.Ct. 1610.) Nothing in Marshall suggests it was contemplating the use of contingency fee lawyers as co-counsel in civil litigation.

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

69 Tex. B.J. 679

Texas Bar Journal
July, 2006

Feature
Ethics Opinion
Issued by the Professional Ethics Committee for the State Bar of Texas

OPINION NO. 567, FEBRUARY 2006

Copyright © 2006 by State Bar of Texas

QUESTION PRESENTED: *May a lawyer who represents a city render legal advice to an ethics board appointed by the city council regarding the investigation and determination of a complaint against a majority of the members of the city council?*

Statement of Facts

A lawyer in private practice represents a city as its city attorney. The city charter provides that the city attorney serves at the discretion of the city council, receiving such compensation as may be fixed by the council, represents the city in all litigation and legal proceedings, and performs other duties prescribed at the direction of the city council. The city council subsequently enacts an ethics ordinance that establishes an ethics board with powers to review and investigate complaints alleging ethics code violations made against employees or officials of the city. The ordinance specifically provides that the city attorney shall have the responsibility to render legal advice to the ethics board. A citizen then files a complaint against a majority of the members of the city council asserting claims of ethics code violations. The city attorney is called upon to provide legal advice to the ethics board concerning the complaint.

Discussion

The city attorney does not represent the individual city council members. Therefore, in representing the ethics board concerning charges against city council members, the city attorney will not violate Rule 1.06(b)(1) of the Texas Disciplinary Rules of Professional Conduct, which provides that, unless the requirements of Rule 1.06(c) (discussed below) can be met, a lawyer shall not represent a person if the representation "involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer. ..." Although representation of the ethics board may be materially and directly adverse to the interests of the members of the city council against whom the complaint has been filed, those city council members are not clients of the city attorney.

However, Rule 1.06(b)(2) is applicable to the proposed representation of the ethics board with respect to this complaint. Rule 1.06(b)(2) provides in pertinent part that, unless the requirements of Rule 1.06(c) (discussed below) can be met, a lawyer shall not represent a person if the representation "reasonably appears to be or become adversely limited ... by the lawyer's own interests." The city charter provides that the city attorney serves at the discretion of the city council and receives such compensation as may be fixed by the city council; therefore, representation of the ethics board against a majority of the members of the city council at least "reasonably appears" to be adversely limited within the meaning of Rule 1.06(b)(2) by the city attorney's own interests in his position as city attorney.

Rule 1.06(c) provides that a lawyer may represent a client in the circumstances described in Rule 1.06(b)(2) if under Rule 1.06(c)(1) the lawyer "reasonably believes" that the representation of the client will not be materially affected and under Rule 1.06(c)(2) each "affected or potentially affected client consents to such representation after full disclosure of the existence,

nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any." In this case the "affected or potentially affected" clients would be the ethics board and the city. Comment 7 to Rule 1.06, in discussing Rule 1.06(c)(1), states that when a "disinterested lawyer would conclude that the client should not agree to the representation under the circumstances," the lawyer should not ask for, or provide representation on the basis of, client consent. Under Rule 1.06(c)(1), given the inherent conflict between the ethics board's responsibility to investigate and determine the complaint against a majority of the members of the city council and the personal employment interests of the city attorney, the city attorney should not ask for consent to the proposed representation of the ethics board with respect to this complaint.

Conclusion

In the circumstances presented, a lawyer who represents a city may not render legal advice to a city ethics board concerning the investigation and determination of a complaint against a majority of the members of the city council.

69 TXBJ 679

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

681 F.Supp.2d 418
United States District Court,
W.D. New York.

Josh LIEBERMAN, et al., Plaintiffs,
v.
CITY OF ROCHESTER, et al., Defendants.

No. 07–CV–6316L. | Feb. 4, 2010.

Synopsis

Background: In § 1983 action by arrestees against City and police officers, officer defendants moved to disqualify City's Corporation Counsel from representing them.

Holdings: The District Court, Marian W. Payson, United States Magistrate Judge, held that:

[1] officers failed to show actual conflict between their interests and City's interests as result of corporate counsel's joint representation;

[2] there was no potential conflict of interest arising out of disciplinary proceeding against the officers; and

[3] there was no potential conflict of interest arising out of officers' § 1983 action against City.

Motion denied.

West Headnotes (4)

[1] Attorney and Client
Disqualification in general

Disqualification of counsel is a matter committed to the sound discretion of the district court.

Cases that cite this headnote

[2] Attorney and Client
Government, employment by or representation of

In § 1983 action by arrestees against City and police officers, officers, in support of their motion to disqualify City's corporation counsel from representing them and to compel City to hire independent counsel to represent them, failed to show actual conflict between their interests and City's interests as result of corporate counsel's joint representation of City and officers, and thus, district court would decline to exercise its discretion to disqualify counsel; corporation counsel's answer on behalf of all defendants asserted that City was the real party in interest because officers were being sued for actions taken within scope of their employment, and counsel affirmed that officers were entitled to defense and indemnification, so that City would be liable for any damages. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[3] Attorney and Client
Government, employment by or representation of

In § 1983 action by arrestees against City and police officers, for purposes of police officers' motion to disqualify City's corporation counsel from representing them and to compel City to hire independent counsel to represent them, the City's decision to hire outside counsel to represent the City in prosecuting a disciplinary proceeding against the officers arising out of the same incident underlying the § 1983 action, and to prohibit communications by or on behalf of corporation counsel and the outside counsel concerning the matters of their representation, prevented any potential conflict of interest that might be grounds for disqualification from arising. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[4] Attorney and Client
Government, employment by or representation of

Although police officers had brought § 1983 action against City, challenging City's disciplinary proceedings against them, and City

and officers were codefendants in separate § 1983 action brought against them by arrestees whose arrests had led to the disciplinary proceedings, those circumstances did not create a potential conflict of interest, for purposes of officers' motion to disqualify City's corporation counsel from representing them in arrestees' action; City had retained outside counsel to defend it in officers' action against it, and corporation counsel affirmed that it would not share with City's independent counsel any information that corporation counsel learned as result of representing officers in arrestees' action. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

Attorneys and Law Firms

***419** Christina A. Agola, Rochester, NY, for Plaintiffs.

Matthew D. Brown, City of Rochester Law Department, Jeffrey Wicks, Jeffrey Wicks, PLLC, Rochester, NY, for Defendants.

DECISION & ORDER

MARIAN W. PAYSON, United States Magistrate Judge.

PRELIMINARY STATEMENT

By order dated August 20, 2007, the above-captioned matter has been referred to the undersigned for the supervision of pretrial discovery and the hearing and disposition of all non-dispositive motions, pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B). (Docket # 7).

This case arises out of an alleged "gay-bashing" incident and the response thereto by various officers of the Rochester Police Department ("the Incident") that took place on June 1, 2007 in the area of South Goodman and Harvard Streets in the City of Rochester. On June 26, 2007, plaintiffs filed this action against the City of Rochester (the "City") and the following members of the Rochester Police Department ("RPD"): Chief David Moore, Sergeant Shaw, Lieutenant Ward, and Officers Tortora, MacFall and Yodice. (Docket # 1). Their complaint asserts constitutional claims under 42 U.S.C. § 1983, as well as common law claims for assault and battery, intentional infliction of emotional distress and negligent infliction of emotional harm. (Docket # 21 (the "Complaint")). Plaintiffs also seek punitive damages. (*Id.*). All defendants are currently represented by the City's Corporation Counsel ("Corporation Counsel").

Following the Incident, RPD's Professional Standards Sections commenced an internal investigation of the conduct of defendants Lieutenant Ward and Officers Tortora, MacFall and Yodice (collectively, "the Officers") during the Incident. (Docket # 26–2 at ¶ 4). Based on that investigation, each of the Officers was charged with violations of several RPD rules and regulations. (*Id.*). Each was also suspended from work for a period of time. (Docket # 26–3 at ¶¶ 15–21, 26). At the time this motion was argued, the charges were still pending.

On March 9, 2009, the Officers, represented by private counsel, filed a civil complaint in federal court against the City and several individual RPD officers, including Chief Moore. [1] (Docket # 26–4). The ***420** complaint asserts due process and First Amendment violations under 42 U.S.C. § 1983, as well as claims for defamation and intentional and negligent infliction of emotional distress, in connection with RPD's internal investigation of the Incident. (*Id.*).

Currently pending before this Court is a motion brought by the Officers to disqualify Corporation Counsel from representing them in this action. (Docket # 26). Specifically, the Officers contend that Corporation Counsel suffers from a conflict of interest arising from the City's roles in the three separate proceedings—this civil action, the Officers' civil action and the disciplinary proceedings. (Docket # 26–2 at ¶¶ 5–7). The Officers are represented on this motion by the same attorney who represents them in their Section 1983 action against the City.

Although the circumstances presented through this motion appear unusual and raise issues that require careful attention and consideration, I conclude that disqualification of Corporation Counsel is not warranted at this time.

FACTUAL BACKGROUND

I. *Plaintiffs' Lawsuit Against the Officers*

According to the Complaint, plaintiffs were walking home in the early hours of June 1, 2007, near South Goodman and Harvard Streets in the City of Rochester, when a group of four

individuals exited a cab and began shouting anti-gay epithets at them. (Docket # 21 at ¶¶ 21–23). Plaintiffs allege that the group then attacked them by kicking, punching and beating them with a metal pipe. (*Id.* at ¶ 24). Plaintiffs Herrick, Barrett and Terrance allege that they were injured by the beatings. (*Id.* at ¶¶ 24, 28). After a flurry of telephone calls, including to 911, plaintiffs left the scene of the confrontation and returned a short time later to find that their attackers were still present and that RPD officers had arrived. (*Id.* at ¶¶ 28–31).

According to plaintiffs, Officers Tortora and MacFall took no action against the perpetrators and refused to address their complaints that they had been attacked because of their perceived sexual orientation. (*Id.* at ¶ 33). According to plaintiffs, the officers instead directed them to go home or face arrest. (*Id.* at ¶¶ 33–37). Plaintiff Terrance further alleges that when he persisted in asking the police to file a complaint against the attackers, Officer MacFall made derogatory comments about his perceived sexual orientation and then assaulted him. (*Id.* at ¶¶ 38–43). Plaintiff Lieberman also alleges that a police officer assaulted him and used similar derogatory epithets. (*Id.* at ¶¶ 50–52). Lieberman was charged with three counts of disorderly conduct, taken to jail and released on bail a short time later. (*Id.* at ¶ 59). Terrance was also taken into custody and subsequently released on charges of failure to disperse. (*Id.* at ¶ 60).

Each of the plaintiffs in this action has asserted claims against the Officers and Sergeant Shaw for violations of the Equal Protection Clause under 42 U.S.C. § 1983, for common law torts of intentional and negligent infliction of emotional harm, and for punitive damages. (*Id.* at ¶¶ 61–237). In addition to those claims, plaintiffs Terrance and Lieberman have asserted claims against the Officers and Shaw for excessive use of force under 42 U.S.C. § 1983 and for common law torts of assault and battery. (*Id.*). Chief Moore is a named defendant only in the Section 1983 equal protection claims. (*Id.*). The City is a named defendant in Section 1983 claims brought under *Monell v. Dep't of Soc.* ***421** *Servs. of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), as well as in the equal protection claims. (*Id.*).

II. ***The Officers' Lawsuit Against the City***

Following the Incident, RPD's Professional Standards Section ("PSS") commenced an investigation of the Officers' conduct during the Incident. (Docket # 26–4 at ¶ 39). Days later, the RPD also initiated an internal criminal investigation of the Officers' actions. (*Id.* at ¶ 41). The criminal investigation apparently concluded on October 18, 2007, with a determination by a Monroe County grand jury that no criminal charges against the Officers were warranted. (*Id.* at ¶ 88).

At the conclusion of the PSS investigation on September 14, 2007, each of the Officers was charged with disciplinary violations and suspended from work with pay. (*Id.* at ¶¶ 80–83). Specifically, Officers MacFall, Tortora and Yodice were charged with use of profane and/or discourteous remarks, failure to prepare reports [2] and violation of truthfulness. (*Id.* at ¶¶ 80, 81, 83). Lieutenant Ward was charged with use of profane and/or discourteous remarks, failure to prepare reports and failure to supervise. [3] (*Id.* at ¶ 82). Each of the Officers pleaded not guilty. (*Id.* at ¶¶ 89–92). In accordance with Section 75 of the New York Civil Service Law, a hearing is required to be held on the disciplinary charges (the "Article 75 proceeding"), after which the hearing officer must make a recommendation whether the charges should be sustained. [4] (Docket # 29 at ¶ 13). RPD, through the Chief of Police, will then determine whether to accept or reject the recommendation of the hearing officer.

In April 2008, the Officers' suspensions ended and they were permitted to return to work. (Docket # 26–4 at ¶ 95).

In September 2008, the Officers served the City with a notice of claim pursuant to N.Y. Gen. Mun. Law § 50–e. (Docket # 26–2 at ¶ 6). On March 9, 2009, the Officers filed their federal Section 1983 complaint against the City, Chief Moore and various other RPD officers and officials. (Docket # 26–4). In the complaint, the Officers allege that the City's investigation and the disciplinary charges instituted against them were politically motivated in order to get the "gay vote" following criticism in the media of the Officers' conduct during the Incident. (*Id.* at ¶¶ 40, 70–71). The Officers allege that the PSS was intent to charge them with misconduct and deliberately ignored exculpatory evidence in reaching its decision to lodge charges. (*Id.* at ¶¶ 64–66). The Officers' causes of action include Section 1983 claims based on violations of the Due Process Clause and the First ***422** Amendment, as well as common law claims of defamation and intentional and negligent infliction of emotional distress. (*Id.* at ¶¶ 113–152).

III. ***The Pending Motion***

A. ***Relevant Background***

The City's Charter requires it to defend and indemnify any City employee who is sued for compensatory damages based upon acts or omissions that occurred "while the employee was exercising or performing ... his or her powers and duties within the scope of his or her public employment." (Docket # 29–2 at §§ 2–23(C) and (E)). The City is further required to indemnify employees for punitive damages provided that the employee was "*properly* discharging his or her powers and duties within the scope of his or her employment, as determined by the Corporation Counsel." (*Id.* at § 2–23(E) (emphasis added)). In the event that Corporation Counsel determines that "an actual conflict of interest exists" in the representation of an employee, the Charter provides that the City employee may retain private counsel at the City's expense. (*Id.* at § 2–23(D)).

The Collective Bargaining Agreement ("CBA") between the City and the Rochester Police Locust Club, the police union, provides that the City shall indemnify a police officer for any judgment "provided that the act or omission occurred while the police officer was exercising or performing or in good faith purporting to exercise or perform his powers and duties." (Docket # 29–4, Art. 30 § 8D). The CBA does not require indemnification where the damage award "resulted from intentional wrongdoing on the part of the police officer." (*Id.*). The CBA contains a provision similar to the Charter for a police officer to retain private counsel at City expense where Corporation Counsel is conflicted from representing the officer. (*Id.* at Art. 30 § 8C).

After plaintiffs filed the instant suit, Corporation Counsel determined that the Officers were acting within the scope of their employment during the Incident and undertook to defend and indemnify them, including against the claim for punitive damages. (Docket # 29 at ¶ 11 ("Rochester's Corporation Counsel determined that the Officers were acting within the scope of their employment as Rochester Police Officers during the incident in question and therefore are entitled to defense and indemnification, including indemnification of any potential punitive damages (assuming full cooperation by the officers in the defense of this action)")). Under the Charter, defense and indemnification is conditioned upon the employee's full cooperation in the defense of the action. (Docket # 29–2 at § 2–23(G)). The Charter further provides that the City's Corporation Counsel shall have "complete charge of the defense" and "sole authority to defend or settle any action." (*Id.* at § 2–23(I)).

On July 23, 2008, after disciplinary charges were instituted against the Officers, but before they filed suit against the City, the City retained an outside law firm to represent it in the Article 75 proceeding against the Officers. (*Id.* at ¶ 16; Docket # 29–5). Thus, Corporation Counsel does not and will not represent the City in the Article 75 proceeding.

B. *The Instant Motion*

Following unsuccessful attempts to persuade the City to hire outside counsel to defend them in this action, the Officers filed the pending motion to disqualify Corporation Counsel from representing them in this lawsuit. (Docket # 26). Specifically, the Officers contend that a conflict of interest exists that entitles them to retain private counsel at the City's expense. (Docket # 32 at ¶¶ 16–17). The City opposes ***423** the motion, while plaintiffs do not. (Docket 29, 30).

Although the City declined to retain outside counsel for the Officers in this action, Corporation Counsel represented that the City plans to hire outside counsel to defend the City against the Officers' civil lawsuit. (Docket # 29 at ¶ 20). Indeed, a review of the docket in that action reveals that after this motion was argued, the same firm that represents the City in the Article 75 proceeding appeared as counsel of record for the City in that case. *See MacFall v. City of Rochester*, No. 09–CV–6113, 2009 WL 5058757 (W.D.N.Y.2009).

DISCUSSION

It is well-settled that a lawyer's duty to his client is that of a fiduciary or trustee. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir.1976) (citing *Hafter v. Farkas*, 498 F.2d 587, 589 (2d Cir.1974)). The client is entitled to trust that, at least until the pending litigation concludes, he has his counsel's undivided loyalty as an "advocate and champion" and may "rely upon his undivided allegiance and faithful, devoted service." *Id.* (citations and internal quotation omitted).

Similarly, Disciplinary Rule ("DR") 5–105(A) of the American Bar Association's Code of Professional Responsibility provides:

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected

> by the acceptance of the proffered employment, or if it would be likely to involve him in representing different interests, except to the extent permitted under DR 5–105(C).

DR 5–105(A). DR 5–105(C) permits multiple representation provided there is full disclosure and all interests can be adequately represented.[5] *See* DR 5–105(C) ("[a] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each"). On this issue, the Code's Ethical Considerations ("EC") caution that "[a] lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which the lawyer would be justified in representing in litigation multiple clients with potentially differing interests." EC 5–15.

The Second Circuit has declined to adopt any "single representation" rule requiring independent representation in all cases involving actual or potential conflicts between multiple clients. *In re Taylor*, 567 F.2d 1183, 1191 (2d Cir.1977). Rather, the court is charged with ensuring that each client is fully aware of any conflict and its potential impact upon his or her interests and nonetheless desires to proceed with joint representation. *Id.* Once that assurance is adequately provided, the court may not interfere with or obstruct a party's knowing choice of counsel. *Id.*

In the case at bar, the Officers seek to disqualify their own counsel. Thus, it presumably would be of little utility for this Court to inquire of the Officers their position on joint representation.[6] The Court ***424** further assumes that the Officers could hire private counsel at their own expense, if they so choose. With these assumptions in mind, the question presented by this motion is whether the City should be compelled to hire independent counsel at its expense to represent the Officers because Corporation Counsel is legally disqualified from doing so.

Here, the Officers allege that Corporation Counsel suffers from an actual conflict of interest because of the differing interests between the City and the Officers that have been created by the various legal proceedings described above. Specifically, the Officers argue that the conflict arises because of and is manifest in the City's simultaneous defense of them in the plaintiffs' lawsuit, prosecution of the Officers in the Article 75 disciplinary proceeding and defense of itself in the Officers' lawsuit.

A. *Has a Conflict Arisen as a Result of Corporation Counsel's Joint Representation of the City and the Officers in this Lawsuit?*

[1] **[2]** Disqualification of counsel "is a matter committed to the sound discretion of the district court." *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 72 (2d Cir.1990). Critical to the proper exercise of that discretion is the question whether the attorney suffers from an actual or potential conflict of interest. *See Coggins v. County of Nassau*, 615 F.Supp.2d 11, 34 (E.D.N.Y.2009) (denying without prejudice to renewal defendant's motion to disqualify the county attorney from representing him in light of the "possibility that a potential conflict of interest may arise"). "An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and [the client's] interests diverge with respect to a material factual or legal issue or to a course of action." *United States v. Schwarz*, 283 F.3d 76, 91 (2d Cir.2002) (quoting *Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir.1993)). In contrast, "[a] potential conflict of interest exists if the interests of the defendant may place the attorney under inconsistent duties at some time in the future." *United States v. Kliti*, 156 F.3d 150, 153 n. 3 (2d Cir.1998).

Following the Supreme Court's decision in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), holding that a municipality may be held liable under 42 U.S.C. § 1983 for injuries caused by its employees taken pursuant to municipal policy, the Second Circuit has recognized that "the interests of a municipality and its employee as defendants in a section 1983 action are in conflict." *Dunton v. County of Suffolk*, 729 F.2d 903, 907 (2d Cir.), *amended on other grounds*, 748 F.2d 69 (2d Cir.1984). As the court explained,

> 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 good faith immunity defense, the municipality may be wholly liable because it cannot assert the good faith immunity of its employees as a defense to a section 1983 action.

Id. (citation omitted).

In *Dunton,* the plaintiff filed a Section 1983 action against Suffolk County and a Suffolk County police officer who had physically assaulted a man whom the officer had found in a car with the officer's wife. *Id.* at 905. The Suffolk County Attorney represented both the county and the officer. *Id.* at 906. At trial, the county attorney argued that the officer's actions ***425** were those of a man acting as a husband, not as an officer, and that the officer thus had acted outside the scope of his employment. *Id.* The jury awarded compensatory and punitive damages against the officer. *Id.* On appeal, the Second Circuit held that the county attorney had created a serious and impermissible conflict of interest by making arguments that were directly contrary to the officer's interests, namely, that the officer "was not acting under color of state law but rather as an 'irate husband.' " *Id.* at 908. The Second Circuit declined to impose a *per se* rule mandating disqualification in cases of joint representation of a municipality and its employee in Section 1983 actions, *id.* at 908 n. 4, preferring instead to employ "a case-by-case determination," *see Patterson v. Balsamico,* 440 F.3d 104, 114 (2d Cir.2006). The court further counseled that "[w]here a conflict is serious and disqualification might be warranted, the district court is under a duty to ensure that the client fully appreciates his situation." *Dunton v. County of Suffolk,* 729 F.2d at 908.

District courts have interpreted *Dunton* to require disqualification of counsel representing both an individual officer and the municipal employer in Section 1983 cases only where counsel acts in a way that is *actually* against the officer's interests. *See, e.g., Coggins v. County of Nassau,* 615 F.Supp.2d at 33 (declining to disqualify county attorney because the county's and employee's interests were aligned as a result of county's determination that employee "acted within the proper discharge of [his] duties and within the scope of [his] employment" and thus "any judgment against [the employee] will effectively be one against the [c]ounty"); *Weintraub v. Bd. of Educ. of the City Sch. Dist. of City of New York,* 2001 WL 984933, *2–3 (E.D.N.Y.2001) (refusing to disqualify counsel, but choosing to advise employee of possible conflict in view of corporation counsel's inconsistent statements concerning whether it had conclusively determined that defendant had been acting within the scope of his employment). In other words, a potential conflict is insufficient to warrant disqualification; rather, the employee must show that an actual conflict exists.

Further, in the absence of a showing of actual prejudice to the employee, the Second Circuit has declined to disturb jury verdicts against municipal employees in Section 1983 actions where the employee was jointly represented with the municipality. *See, e.g., Patterson v. Balsamico,* 440 F.3d at 115–16 (employee did not "make the required showing of a sufficiently serious actual conflict of interest" because the county attorney "neither advanced an argument contrary to [the employee's] interest, such as that [the employee] was acting outside the scope of his employment, nor failed to present a valid defense for reasons of loyalty to [the county]"); *Leather v. Ten Eyck,* 2 Fed.Appx. 145, 148 (2d Cir.) (affirming verdict despite multiple representation; noting that "a necessary [but missing] element of the conflict of interest claim the individual defendants present is that 'counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance' ") (quoting *Gordon v. Norman,* 788 F.2d 1194, 1198 (6th Cir.1986)), *cert. denied,* 533 U.S. 941, 121 S.Ct. 2577, 150 L.Ed.2d 739 (2001); *Rodick v. City of Schenectady,* 1 F.3d 1341, 1350 (2d Cir.1993) (disqualification not necessary where city attorney had argued that "officers were acting in their official capacity" and had "advanced and argued all possible defenses available to the officers, including the qualified immunity defense"). These post-*Dunton* decisions refute any suggestion by the Officers that *Dunton* stands for the proposition that joint representation of a municipality and its employee is prohibited in all Section 1983 cases. *See* ***426** *Patterson,* 440 F.3d at 114 ("[i]n [*Dunton*], we noted that the *potential* for such a conflict is inherent in Section 1983 cases") (emphasis added).

In the case at bar, Corporation Counsel's answer filed on behalf of all of the defendants asserts eighteen affirmative defenses, some of which are asserted on behalf of all the defendants, some of which are asserted on behalf of the City alone and some of which are asserted on behalf of the individual defendants alone, such as, that they are entitled to qualified immunity and that they were acting "in an official capacity." (Docket # 22). The answer also asserts that the City is the "real party in interest" because

the Officers are being sued for actions taken within the scope of their employment. (*Id.* at ¶ 37). In its response to this motion, counsel affirmed that Corporation Counsel has "determined that the Officers were acting within the scope of their employment as Rochester Police Officers during the incident in question and therefore are entitled to defense and indemnification, including indemnification of any potential punitive damages." [7] (Docket # 29 at ¶ 11). In other words, Corporation Counsel perceives no conflict of interest, or even potential for one, because "the City will be liable for any and all damages that may be awarded, even if awarded against the individual officers." (*Id.* at ¶ 27). Corporation Counsel reaffirmed the City's position on the record at oral argument of this motion and indicated his willingness to stipulate to that position. Considering these unequivocal representations, the City's and the Officers' interests appear aligned at this stage of the litigation.

The Officers argue that Corporation Counsel's statement that the City is the real party in interest betrays counsel's view that "the Officer clients are not really entitled to meaningfully participate" in the defense of the case. (Docket # 32 at ¶ 7). I do not agree that this statement is properly read to imply an abandonment by Corporation Counsel of his ethical obligations to his other clients, the Officers, rather than to acknowledge that the City will shoulder any damage award because it has determined that the Officers acted within the scope of their official duties. The Officers do allege, however, that several actions taken by Corporation Counsel prove that counsel is not vigorously defending them. For example, the Officers allege that counsel neither discussed the answer with the Officers prior to filing it, nor asserted any counterclaims on their behalf. (Docket # 26–2 at ¶¶ 15–16). The Officers further contend that counsel did not consult with the Officers before communicating a settlement offer to plaintiffs. (Docket # 32 at ¶¶ 9–14).

In response, Corporation Counsel maintains that neither the Charter nor the CBA obligates the City to provide legal counsel for counterclaims, which the employee may assert as a separate cause of action on a separate lawsuit, [8] and that ***427** counsel chose not to assert any because "counterclaims can interfere with potential resolution of the lawsuit." (Docket # 29 at ¶ 24). Counsel also represents that he conducted a thorough review before filing the answer. (*Id.* at ¶ 22). At oral argument, Corporation Counsel further explained that the City's settlement offer did not envision any monetary contribution by the Officers or admission by them of wrongdoing (indeed, the offer contemplated releases in their favor) and, for those reasons, counsel did not advise the Officers of the offer. [9]

This decision does not address the question whether every action taken by Corporation Counsel in the defense of the Officers comports with counsel's ethical obligations, and it should not be read to suggest any opinion on that dispute. I am satisfied, however, based on Corporation Counsel's response to the Officers' allegations and on the record as a whole that the challenged actions do not reflect any abdication by Corporation Counsel of his ethical responsibilities to the Officers in favor of his responsibilities to the City. *Cf. Gordon v. Norman*, 788 F.2d at 1198 (defendants' complaints "regarding their attorney's conduct and effectiveness simply cannot be explained in terms of a conflict between their interests and the City's interests"). I am further satisfied that Corporation Counsel's representation of the Officers to date in this litigation does not give rise to any grounds for disqualification.

In sum, based on the record before me, I find that the Officers have failed to show that their interests actually conflict with those of the municipal co-defendant. Rather, at this stage in the litigation, the City has not distanced itself from the Officers in the defense of this action, but rather has affirmed that the Officers were acting within the scope of their employment. This fact, coupled with Corporation Counsel's representation that the City will indemnify the Officers for compensatory and punitive damages, distinguishes this case from *Dunton* and makes disqualification at this stage inappropriate. *See, e.g., Patterson*, 440 F.3d at 115 ("The particular conflict cited in *Dunton* as inherent in Section 1983 actions against municipalities ... is simply not present here. At no time did [counsel] assert that [the employee] was acting 'outside the scope of his employment' "); *Rodick v. City of Schenectady*, 1 F.3d at 1350 ("*Dunton* is distinguishable [because] both the City and the officers argued that the officers were acting in their official capacity"); *Coggins*, 615 F.Supp.2d at 33 ("In fact, the interests of the County [and the county employees] appear to be aligned following the Board's ... determination [that they acted] 'within the proper discharge of their duties and within the scope of their employment.' ... Thus, any judgment against [the employee] will effectively be one against the County"). Although the possibility exists that Corporation Counsel's joint representation may present a potential conflict in the future, [10] I conclude that it would be ***428** premature to disqualify counsel based simply upon a possibility that may

not transpire. Therefore, I decline to disqualify Corporation Counsel upon those grounds.

B. *Has a Conflict Arisen as a Result of the Prosecution of the Officers on Disciplinary Charges?*

[3] I turn to the Officers' argument that Corporation Counsel is conflicted from representing them as a result of RPD's pending disciplinary charges against the Officers. The Officers argue that because RPD is a municipal department, then the City "stands in the role of prosecutor in the disciplinary proceedings against the Officers." (Docket # 26–2 at ¶ 5). They further argue that the City's role as prosecutor directly conflicts with its role defending the Officers in this action. (*Id.* at ¶ 8).

The City maintains that its roles in the two separate actions do not create a conflict of interest. (Docket # 29 at ¶¶ 14–15). As a general matter, the City points out that RPD often investigates and disciplines police officers for violations of RPD rules and regulations relating to incidents that result in civil litigation against the City. (*Id.* at ¶ 14). The City notes that if Corporation Counsel's defense in civil lawsuits of officers whom RPD disciplines poses a *per se* conflict warranting disqualification, then the City would be required to hire outside counsel in every such case at substantial expense to the City. (*Id.* at ¶ 15).

Notwithstanding those concerns, in this matter the City has retained outside counsel to prosecute the Article 75 proceeding. (*Id.* at ¶ 16). Counsel in this case has represented that he has not communicated and will not communicate without outside counsel about this lawsuit or the Article 75 proceeding or disclose any privileged information learned from his clients. (*Id.* at ¶¶ 17–18). At oral argument, counsel for the Officers confirmed that the Officers are not concerned about, and this motion does not implicate, disclosure of privileged information or confidences.

I find that the City's decisions to hire outside counsel to prosecute the Article 75 proceeding and to prohibit communications by or on behalf of Corporation Counsel and outside counsel concerning the matters of their representation prevent any potential conflict from arising had Corporation ***429** Counsel represented the City in both actions. [11]

C. *Has a Conflict Arisen as a Result of the Officers' Section 1983 Action Against the City?*

[4] Finally, I address the question whether the unusual posture of the City as both a defendant in a Section 1983 action brought against it by the Officers and as a co-defendant with the Officers in this lawsuit creates a conflict justifying disqualification of Corporation Counsel as counsel for the Officers in this lawsuit. The Officers argue that it does; the City disagrees.

Resolution of this dispute again turns on the fact that the City has hired outside counsel to defend the City in the Officers' suit. [12] (Docket # 29 at ¶ 20). Further, counsel has affirmed that it "will not share or cause to be shared any information with the attorney hired to represent [the City] in the Officers' lawsuit that [Corporation Counsel] learn[s] as a result of [ ] represent[ing the Officers] in this lawsuit or allow such information to be utilized in the defense of the [O]fficers' lawsuit." (*Id.* at ¶ 21). As with the previous issue, I conclude that the City's retention of outside counsel to defend it in the Officers' civil suit permits Corporation Counsel to defend the Officers in this action without creating a potential conflict. [13]

The Officers contend that retention of outside counsel in one lawsuit only (the Officers' and not the plaintiffs') is insufficient to protect against "the distinct and significant possibility that issues litigated and testimony elicited at trial in this case will have *a preclusive effect or provide fodder for impeachment* in the Officers' subsequent litigation." (*See* Docket # 36) (emphasis in original). Of course, that possibility exists regardless of whether Corporation Counsel or another attorney represents the Officers in this action. Recognizing that, the Officers presumably are concerned that Corporation Counsel may purposefully elicit testimony during the trial of this matter for use by the City in its defense against the Officers' suit. In my judgment, such a scenario is too speculative to support disqualification of counsel at this time. Even if Corporation Counsel were to elicit testimony in this suit that could be used in the Officers' suit, the Officers have not shown that such theoretical testimony would likely be adverse to the Officers' interests in this lawsuit. *See Coggins,* 615 F.Supp.2d at 31 ("the evidence is far from clear that [the] likely testimony conflicts ... and that separate counsel ... is either prudent or necessary at this juncture"). In fact, given Corporation Counsel's determination that the Officers were acting within the scope of their employment and will be indemnified by the City, that possibility seems unlikely.

CONCLUSION

Although the City's and the Officers' involvement in three separate proceedings arising from the same incident appears unusual, any potential conflict arising from their roles in those proceedings has been adequately addressed by the City's retention of outside counsel to represent it in the Article 75 proceeding and the Officers' ***430** Section 1983 lawsuit. To require the City to retain outside counsel in a third action—this case—without a demonstrable showing that Corporation Counsel is laboring under an actual conflict would impose an even greater financial burden on the City that is not justified under controlling precedent.

My determination on the important and sensitive issues raised in this motion, however, does not exclude the possibility that circumstances may arise or change as this litigation proceeds that will necessitate revisiting those issues. For that reason, I deny the motion without prejudice to renewal. *See Coggins,* 615 F.Supp.2d at 34 (disqualification motion denied without prejudice "[i]n light of the possibility that a potential conflict of interest may arise"). I further direct Corporation Counsel to advise this Court in writing as to the outcome of the Article 75 proceedings upon their conclusion.

It hardly bears repeating that a client's trust that his attorney is acting in his interests is integral to a successful attorney-client relationship. Considering the issues raised in this motion, both sides will need to communicate openly and fully in order to establish a productive relationship. The importance of that communication is implicit in the contractual obligation imposed by the City Charter and the CBA on the Officers to cooperate with Corporation Counsel in their defense and in the professional obligation imposed by applicable ethical rules on Corporation Counsel to represent vigorously the interests of all of his clients. Corporation Counsel has assured this Court of his commitment to the vigorous defense of the Officers in this action. The Officers are entitled to rely on that assurance. If they believe that they cannot, they are of course free to retain counsel of their choosing at their own expense.

For the foregoing reasons, the Officers' motion to disqualify Corporation Counsel from representing them **(Docket # 26)** is **DENIED** at this time without prejudice to renewal.

IT IS SO ORDERED.

All Citations

681 F.Supp.2d 418

Footnotes

1 The case, captioned *MacFall v. City of Rochester,* is pending in this district court and bears docket number 09–CV–6113.

2 The complaint alleges that each of the Officers was charged with "failure to prepare a CR." (Docket # 26–4 at ¶¶ 80–83). Neither the complaint nor the parties in this action have defined the abbreviation "CR," although the Court assumes that it refers to a written report that each officer was required to prepare.

3 The Officers' complaint alleges that each of the Officers received four disciplinary charges, but the complaint identifies only three charges lodged against each. (Docket # 26–4 at ¶¶ 80–83). The Court has not been provided with the charging documents or any records relating to the PSS investigation, and the record is thus unclear whether the fourth charge was a second count of one of the above-mentioned charges or a new charge.

4 At the time of oral argument, the Article 75 hearing had not yet been held. This Court has not been notified whether a hearing has since taken place and, if so, the hearing officer's recommendation or RPD's determination whether to accept or reject that determination.

5 Rule 1.7 of the New York Rules of Professional Conduct contains provisions that do not differ in material respects from DR 5–105. Pursuant to Rule 83.3(f) of this Court's Local Rules, attorneys practicing in this Court are bound to adhere to the New York Rules of Professional Conduct.

6 At oral argument, the Officers' counsel on this motion represented that the Officers do not consent to joint representation.

7 Although counsel's affirmation did not directly state that Corporation Counsel had determined that the Officers had "properly" discharged their duties within the scope of their employment, which is a prerequisite to indemnification for punitive damages under the City's Charter, it is only reasonable to assume that such a determination has been made in view of counsel's unequivocal representation that the City will indemnify the Officers for any punitive damage award against them. Corporation Counsel is directed to notify this Court in writing no later than one week from the entry of this decision and order in the event that such a determination has not been made.

8 Counsel for Officer MacFall in this motion has represented that MacFall could have asserted a counterclaim for assault against plaintiff Terrance in this lawsuit. (Docket # 26–2 at ¶ 16). Under Federal Rule of Civil Procedure 13(a), such a

claim would likely constitute a compulsory counterclaim. Fed.R.Civ.P. 13(a). New York law, by contrast, does not have a compulsory counterclaim rule. *See* N.Y. C.P.L.R. § 3019; *Eubanks v. Liberty Mortgage Banking Ltd.,* 976 F.Supp. 171, 173 (E.D.N.Y.1997) ("New York ... does not have any compulsory counterclaim rule"). MacFall was free to sue Terrance in state court and indeed has done just that. (Docket # 26–2 at ¶ 16).

9 DR 5–106 provides:

> A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

10 At oral argument, this Court posited a scenario that in its view would pose a potential conflict. Three of the Officers have been charged with a "violation of truthfulness" in the PSS investigation. (Docket # 26–4 at ¶¶ 80, 81, 83). These pending charges raise the question whether, in the event that these charges of untruthfulness were sustained against them following the Article 75 hearing and accepted by RPD through the Chief of Police, Corporation Counsel would be ethically restrained from attempting to impugn those findings if plaintiffs' counsel sought to use them to impeach the officers' credibility.

Corporation Counsel has stated without equivocation that he would not be restrained from vigorously attacking any disciplinary finding that would negatively impact the City's interests in the litigation. (*See* Docket # 35). Because counsel views the City's interests as aligned with the officers' interests, the fact that the City will "bear the consequences" of any adverse judgment in this litigation provides it with the same incentive as the officers to attack the findings. (*Id.*). Corporation Counsel further contends that "the City often argues that results of disciplinary proceedings are inadmissible or irrelevant." (*Id.*).

The Court does not question the City's incentive to attack any such findings, if they were to be made. Rather, it questions Corporation Counsel's freedom, consistent with his ethical obligations and constraints, to attack the ultimate findings made by the RPD through the Chief of Police (another co-defendant in this case). That said, I am satisfied that on the facts presented on the record before me, such a hypothetical scenario should not be addressed in this motion and does not justify withdrawal at this stage of the litigation.

11 This opinion does not address whether disqualification would have been warranted had the City not retained outside counsel.

12 The docket in the Officers' lawsuit reveals that the same law firm that represents the City in the Article 75 proceeding has appeared as counsel for all defendants, including the City, in the Officers' lawsuit. *See MacFall v. City of Rochester,* No. 09–CV–6113, 2009 WL 5058757 (W.D.N.Y.2009).

13 Again, this opinion does not address whether disqualification would have been warranted had the City not retained outside counsel to defend against the Officers' Section 1983 lawsuit.

End of Document © 2015 Thomson Reuters. No claim to original U.S. Government Works.

132 S.Ct. 1657
Supreme Court of the United States

Steve A. FILARSKY, Petitioner
v.
Nicholas B. DELIA.

No. 10–1018. | Argued Jan. 17, 2012. | Decided April 17, 2012.

Synopsis

Background: Firefighter brought § 1983 action against city, fire department and officials, and a private attorney, alleging that internal affairs investigation violated his constitutional rights. The United States District Court for the Central District of California, Manuel L. Real, J., granted summary judgment in favor of all defendants. Firefighter appealed. The United States Court of Appeals for the Ninth Circuit, Bennett, District Judge for the Northern District of Iowa, sitting by designation, 621 F.3d 1069, affirmed in part, reversed in part, and remanded. Certiorari was granted.

[Holding:] The Supreme Court, Chief Justice Roberts, held that attorney who was retained by city to assist in investigation into firefighter's potential wrongdoing was entitled to seek the protection of qualified immunity.

Reversed.

Justice Ginsburg filed concurring opinion.

Justice Sotomayor filed concurring opinion.

West Headnotes (6)

[1] Civil Rights
Private Persons or Corporations, in General

Anyone whose conduct is fairly attributable to the state can be sued as a state actor under § 1983. 42 U.S.C.A. § 1983.

105 Cases that cite this headnote

[2] Civil Rights
Common law or state law torts

Civil Rights
Government Agencies and Officers

The court reads § 1983 in harmony with general principles of tort immunities and defenses and proceeds on the assumption that common-law principles of immunity were incorporated into the judicial system and that they should not be abrogated absent clear legislative intent to do so. 42 U.S.C.A. § 1983.

10 Cases that cite this headnote

[3] Civil Rights
Government Agencies and Officers

Immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis. 42 U.S.C.A. § 1983.

28 Cases that cite this headnote

[4] Civil Rights
Government Agencies and Officers

Immunity under § 1983 protects government's ability to perform its traditional functions; it does so by helping to avoid unwarranted timidity in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits. 42 U.S.C.A. § 1983.

18 Cases that cite this headnote

[5] Civil Rights
Privilege or Immunity; Good Faith and Probable Cause

Civil Rights
Government Agencies and Officers

Affording immunity under § 1983 not only to public employees but also to others acting on behalf of the government serves to ensure that talented candidates are not deterred by the threat of damages suits from entering public service. 42 U.S.C.A. § 1983.

22 Cases that cite this headnote

[6] Civil Rights

Employment practices

Attorney who was retained by city to assist in conducting official investigation into firefighter's potential wrongdoing was entitled to seek the protection of qualified immunity in firefighter's § 1983 claim alleging his Fourth Amendment rights were violated during the investigation, even though attorney was not a permanent, full-time employee of the city; government employees performing such work were entitled to seek protection of qualified immunity, and common law drew no distinction between government employees and others working on behalf of government. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

100 Cases that cite this headnote

1658 *Syllabus [*]

Respondent Delia, a firefighter employed by the City of Rialto, California, missed work after becoming ill on the job. Suspicious of Delia's extended absence, the City hired a private investigation firm to conduct surveillance on him. When Delia was seen buying fiberglass insulation and other building supplies, the City initiated an internal affairs investigation. It hired petitioner Filarsky, a private attorney, to interview Delia. At the interview, which Delia's attorney and two fire department officials also attended, Delia acknowledged buying the supplies, but denied having done any work on his home. To verify Delia's claim, Filarsky asked Delia to allow a fire department official to enter his home and view the unused materials. When Delia refused, Filarsky ordered him to bring the materials out of his home for the official to see. This prompted Delia's attorney to threaten a civil rights action against the City and Filarsky. Nonetheless, after the interview concluded, officials followed Delia to his home, where he produced the materials.

Delia brought an action under 42 U.S.C. § 1983 against the City, the Fire Department, Filarsky, and other individuals, alleging that the order to produce the building materials violated his Fourth and Fourteenth Amendment rights. The District Court granted summary judgment to the individual defendants on the basis of qualified immunity. The Court of Appeals for the Ninth Circuit affirmed with respect to all individual defendants except Filarsky, concluding that he was not entitled to seek qualified immunity because he was a private attorney, not a City employee.

Held: A private individual temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit under § 1983. Pp. 1661 – 1668.

(a) In determining whether the Court of Appeals made a valid distinction between City employees and Filarsky for qualified immunity purposes, this Court looks to the general principles of tort immunities and defenses applicable at common law, and the reasons the Court has afforded protection from suit under § 1983. See *Imbler v. Pachtman,* 424 U.S. 409, 418, 96 S.Ct. 984, 47 L.Ed.2d 128. The common law as it existed in 1871, when Congress enacted § 1983, did not draw a distinction between full-time public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities. Government at that time was smaller in both size and reach, had fewer responsibilities, and operated primarily at the local level. Government work was carried out to a significant extent by individuals who did not devote all their time to public duties, but instead pursued private callings as well. In according protection from suit to individuals doing the government's work, the common law did not draw distinctions based on the nature of a worker's engagement with the government. Indeed, examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself. Common law principles of immunity were incorporated into § 1983 and should not be abrogated absent clear legislative intent. See ***1659** *Pulliam v. Allen,* 466 U.S. 522, 529, 104 S.Ct. 1970, 80 L.Ed.2d 565. Immunity under § 1983 therefore should not vary depending on whether an individual working for the government does so as a permanent or full-time employee, or on some other basis. Pp. 1661 – 1665.

(b) Nothing about the reasons this Court has given for recognizing immunity under § 1983 counsels against carrying forward the common law rule. First, the government interest in avoiding "unwarranted timidity" on the part of those engaged in the public's business—which has been called "the most important special government immunity-

producing concern," *Richardson v. McKnight*, 521 U.S. 399, 409, 117 S.Ct. 2100, 138 L.Ed.2d 540—is equally implicated regardless of whether the individual sued as a state actor works for the government full-time or on some other basis. Second, affording immunity to those acting on the government's behalf serves to " 'ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.' " *Id.*, at 408, 117 S.Ct. 2100. The government, in need of specialized knowledge or expertise, may look outside its permanent workforce to secure the services of private individuals. But because those individuals are free to choose other work that would not expose them to liability for government actions, the most talented candidates might decline public engagements if they did not receive the same immunity enjoyed by their public employee counterparts. Third, the public interest in ensuring performance of government duties free from the distractions that can accompany lawsuits is implicated whether those duties are discharged by private individuals or permanent government employees. Finally, distinguishing among those who carry out the public's business based on their particular relationship with the government creates significant line-drawing problems and can deprive state actors of the ability to " 'reasonably anticipate when their conduct may give rise to liability for damages,' " *Anderson v. Creighton*, 483 U.S. 635, 646, 107 S.Ct. 3034, 97 L.Ed.2d 523. Pp. 1665 – 1666.

(c) This conclusion is not contrary to *Wyatt v. Cole*, 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504, or *Richardson v. McKnight*,521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540. *Wyatt* did not implicate the reasons underlying recognition of qualified immunity because the defendant in that case had no connection to government and pursued purely private ends. *Richardson* involved the unusual circumstances of prison guards employed by a private company who worked in a privately run prison facility. Nothing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work. Pp. 1666 – 1668.

621 F.3d 1069, reversed.

ROBERTS, C.J., delivered the opinion for a unanimous Court. GINSBURG, J., and SOTOMAYOR, J., filed concurring opinions.

Attorneys and Law Firms

Patricia A. Millett, Washington, DC, for Petitioner.

Nicole A. Saharsky, for the United States, as amicus curiae, by special leave of the Court, supporting the Petitioner.

Michael A. McGill, Upland, CA, for Respondent.

Jon H. Tisdale, Jennifer Calderon, Gilbert, Kelly, Crowley & Jenett LLP, Los Angeles, CA, Amit Kurlekar, Akin, Gump, Strauss, Hauer & Feld LLP, San Francisco, CA, Patricia A. Millett, Counsel of Record, James E. Sherry, James E. Tysse, Akin, Gump, Strauss, Hauer & Feld LLP, Washington, DC, Barry Chasnoff, Akin, ***1660** Gump, Strauss, Hauer & Feld LLP, San Antonio, TX, for Petitioner.

Dieter C. Dammeier, Michael A. McGill, Counsel of Record, Michael A. Morguess, Christopher L. Gaspard, Carolina Veronica Cutler, Lackie, Dammeier & McGill APC, Upland, CA, for Respondent.

Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

Section 1983 provides a cause of action against state actors who violate an individual's rights under federal law. 42 U.S.C. § 1983. At common law, those who carried out the work of government enjoyed various protections from liability when doing so, in order to allow them to serve the government without undue fear of personal exposure. Our decisions have looked to these common law protections in affording either absolute or qualified immunity to individuals sued under § 1983. The question in this case is whether an individual hired by the government to do its work is prohibited from seeking such immunity, solely because he works for the government on something other than a permanent or full-time basis.

I

A

Nicholas Delia, a firefighter employed by the City of Rialto, California, became ill while responding to a toxic spill in August 2006. Under a doctor's orders, Delia missed three weeks of work. The City became suspicious of Delia's extended absence, and hired a private investigation firm to conduct surveillance on him. The private investigators observed Delia purchasing building supplies—including several rolls of fiberglass insulation—from a home improvement store. The City surmised that Delia was missing work to do construction on his home rather than because of

illness, and it initiated a formal internal affairs investigation of him.

Delia was ordered to appear for an administrative investigation interview. The City hired Steve Filarsky to conduct the interview. Filarsky was an experienced employment lawyer who had previously represented the City in several investigations. Delia and his attorney attended the interview, along with Filarsky and two fire department officials, Mike Peel and Frank Bekker. During the interview, Filarsky questioned Delia about the building supplies. Delia acknowledged that he had purchased the supplies, but claimed that he had not yet done the work on his home.

During a break, Filarsky met with Peel, Bekker, and Fire Chief Stephen Wells. Filarsky proposed resolving the investigation by verifying Delia's claim that he had not done any work on his home. To do so, Filarsky recommended asking Delia to produce the building materials. Chief Wells approved the plan.

When the meeting resumed, Filarsky requested permission for Peel to enter Delia's home to view the materials. On the advice of counsel, Delia refused. Filarsky then asked Delia if he would be willing to bring the materials out onto his lawn, so that Peel could observe them without entering his home. Delia again refused to consent. Unable to obtain Delia's cooperation, Filarsky ordered him to produce the materials for inspection.

Delia's counsel objected to the order, asserting that it would violate the Fourth Amendment. When that objection proved unavailing, Delia's counsel threatened to sue the City. He went on to tell Filarsky that "[w]e might quite possibly find a way ***1661** to figure if we can name you Mr. Filarsky.... If you want to take that chance, you go right ahead." App. 131–132. The threat was repeated over and over: "[E]verybody is going to get named, and they are going to sweat it out as to whether or not they have individual liability...." "[Y]ou order him and you will be named and that is not an idle threat." "Whoever issues that order is going to be named in the lawsuit." "[W]e will seek any and all damages including individual liability.... [W]e are coming if you order this." "[M]ake sure the spelling is clear [in the order] so we know who to sue." *Id.*, at 134–136, 148–149. Despite these threats, Filarsky prepared an order directing Delia to produce the materials, which Chief Wells signed.

As soon as the interview concluded, Peel and Bekker followed Delia to his home. Once there, Delia, his attorney, and a union representative went into Delia's house, brought out the four rolls of insulation, and placed them on Delia's lawn. Peel and Bekker, who remained in their car during this process, thanked Delia for showing them the insulation and drove off.

B

Delia brought an action under 42 U.S.C. § 1983 against the City, its Fire Department, Chief Wells, Peel, Bekker, Filarsky, and ten unidentified individuals, alleging that the order to produce the building materials violated his rights under the Fourth and Fourteenth Amendments. The District Court granted summary judgment to all the individual defendants, concluding that they were protected by qualified immunity. The court held that Delia had "not demonstrated a violation of a clearly established constitutional right," because "Delia was not threatened with insubordination or termination if he did not comply with any order given and none of these defendants entered [his] house." *Delia v. Rialto*, No. CV 08–03359 (C.D.Cal., Mar. 9, 2009), App. to Pet. for Cert. 42, 48.

The Court of Appeals for the Ninth Circuit affirmed with respect to all defendants except Filarsky. The Court of Appeals concluded that the order violated the Fourth Amendment, but agreed with the District Court that Delia "ha[d] not demonstrated that a constitutional right was clearly established as of the date of Chief Wells's order, such that defendants would have known that their actions were unlawful." *Delia v. Rialto*, 621 F.3d 1069, 1079 (2010). As to Filarsky, however, the court concluded that because he was a private attorney and not a City employee, he was not entitled to seek the protection of qualified immunity. *Id.*, at 1080–1081. The court noted that its decision conflicted with a decision of the Court of Appeals for the Sixth Circuit, see *Cullinan v. Abramson*, 128 F.3d 301, 310 (1997), but considered itself bound by Circuit precedent and therefore "not free to follow the *Cullinan* decision." 621 F.3d, at 1080 (citing *Gonzalez v. Spencer*, 336 F.3d 832 (C.A.9 2003)).

Filarsky filed a petition for certiorari, which we granted. 564 U.S. ——, 132 S.Ct. 70, 180 L.Ed.2d 939 (2011).

II

[1] Section 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights "under color" of state law. 42 U.S.C. § 1983. Anyone whose conduct is "fairly attributable to the state" can be sued as a state actor under § 1983. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). At common law, government actors were afforded certain protections from liability, based on the reasoning that "the public good can best be secured by allowing officers ***1662** charged with the duty of deciding upon the rights of others, to act upon their own free, unbiased convictions, uninfluenced by any apprehensions." *Wasson v. Mitchell*, 18 Iowa 153, 155–156 (1864) (internal quotation marks omitted); see also W. Prosser, Law of Torts § 25, p. 150 (1941) (common law protections derived from the need to avoid the "impossible burden [that] would fall upon all our agencies of government" if those acting on behalf of the government were "unduly hampered and intimidated in the discharge of their duties" by a fear of personal liability). Our decisions have recognized similar immunities under § 1983, reasoning that common law protections " 'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983." *Imbler v. Pachtman*, 424 U.S. 409, 418, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)).

In this case, there is no dispute that qualified immunity is available for the sort of investigative activities at issue. See *Pearson v. Callahan*, 555 U.S. 223, 243–244, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The Court of Appeals granted this protection to Chief Wells, Peel, and Bekker, but denied it to Filarsky, because he was not a public employee but was instead a private individual "retained by the City to participate in internal affairs investigations." 621 F.3d, at 1079–1080. In determining whether this distinction is valid, we look to the "general principles of tort immunities and defenses" applicable at common law, and the reasons we have afforded protection from suit under § 1983. *Imbler, supra*, at 418, 96 S.Ct. 984.

A

Under our precedent, the inquiry begins with the common law as it existed when Congress passed § 1983 in 1871. *Tower v. Glover*, 467 U.S. 914, 920, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984). Understanding the protections the common law afforded to those exercising government power in 1871 requires an appreciation of the nature of government at that time. In the mid-nineteenth century, government was smaller in both size and reach. It had fewer responsibilities, and operated primarily at the local level. Local governments faced tight budget constraints, and generally had neither the need nor the ability to maintain an established bureaucracy staffed by professionals. See B. Campbell, The Growth of American Government: Governance From the Cleveland Era to the Present 14–16, 20–21 (1995); *id.*, at 20 (noting that in the 1880s "[t]he governor's office staff in Wisconsin ... totaled five workers if we count the lieutenant governor and the janitor").

As one commentator has observed, there was at that time "no very clear conception of a professional office, that is, an office the incumbent of which devotes his entire time to the discharge of public functions, who has no other occupation, and who receives a sufficiently large compensation to enable him to live without resorting to other means." F. Goodnow, Principles of the Administrative Law of the United States 227 (1905). Instead, to a significant extent, government was "administered by members of society who temporarily or occasionally discharge[d] public functions." *Id.*, at 228. Whether government relied primarily upon professionals or occasional workers obviously varied across the country and across different government functions. But even at the turn of the twentieth century, a public servant was often one who "does not devote his entire time to his public duties, but is, at the same time that he is holding public office, permitted to carry on some other regular business, and as a matter of fact finds his main means of ***1663** support in such business or in his private means since he receives from his office a compensation insufficient to support him." *Id.*, at 227.

Private citizens were actively involved in government work, especially where the work most directly touched the lives of the people. It was not unusual, for example, to see the owner of the local general store step behind a window in his shop to don his postman's hat. See, *e.g.*, Stole Stamps, Maysville, KY, The Evening Bulletin, p. 1, Sept. 25, 1895 (reporting that "[t]he post office and general store at Mount Hope was broken into," resulting in the loss of $400 worth of cutlery and stamps). Nor would it have been a surprise to find, on a trip to the docks, the local ferryman collecting harbor fees as public wharfmaster. See 3 E. Johnson, A History of Kentucky and Kentuckians 1346 (1912).

Even such a core government activity as criminal prosecution was often carried out by a mixture of public employees and

private individuals temporarily serving the public. At the time § 1983 was enacted, private lawyers were regularly engaged to conduct criminal prosecutions on behalf of the State. See, *e.g.*, *Commonwealth v. Gibbs*, 70 Mass. 146 (1855); *White v. Polk County*, 17 Iowa 413 (1864). Abraham Lincoln himself accepted several such appointments. See, *e.g.*, An Awful Crime and Speedy Punishment, Springfield Daily Register, May 14, 1853 (reporting that "A. Lincoln, esq. was appointed prosecutor" in a rape case). In addition, private lawyers often assisted public prosecutors in significant cases. See, *e.g.*, *Commonwealth v. Knapp*, 27 Mass. 477, 490–491 (1830); *Chambers v. State*, 22 Tenn. 237 (1842). And public prosecutors themselves continued to represent private clients while in office—sometimes creating odd conflicts of interest. See *People v. Bussey*, 82 Mich. 49, 46 N.W. 97, 98 (1890) (public prosecutor employed as private counsel by the defendant's wife in several civil suits against the defendant); *Phillip v. Waller*, 5 Haw. 609, 617 (1886) (public prosecutor represented plaintiff in a suit for malicious prosecution); *Oliver v. Pate*, 43 Ind. 132, 139 (1873) (public prosecutor who conducted a state prosecution against a defendant later served as counsel for the defendant in a malicious prosecution suit against the complaining witness).

This mixture of public responsibility and private pursuits extended even to the highest levels of government. Until the position became full-time in 1853, for example, the Attorney General of the United States was expected to and did maintain an active private law practice. To cite a notable illustration, in *Hayburn's Case*, 2 Dall. 409, 1 L.Ed. 436 (1792), the first Attorney General, Edmund Randolph, sought a writ of mandamus from this Court to compel a lower court to hear William Hayburn's petition to be put on the pension list. When this Court did not allow the Attorney General to seek the writ in his official capacity, Randolph readily solved the problem by arguing the case as Hayburn's private lawyer. *Ibid.*; see also Letter from Edmund Randolph to James Madison (Aug. 12, 1792), reprinted in 14 The Papers of James Madison 348, 349 (R. Rutland, T. Mason, R. Brugger, J. Sisson, & F. Teute eds.1983); Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism, 1989 Duke L.J. 561, 598–599, n. 121, 619.

Given all this, it should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities. Government actors involved in adjudicative activities, for example, were protected by an absolute immunity from suit. See ***1664** *Bradley v. Fisher*, 13 Wall. 335, 347–348, 20 L.Ed. 646 (1872); J. Bishop, Commentaries on the Non–Contract Law § 781 (1889). This immunity applied equally to "the highest judge in the State or nation" and "the lowest officer who sits as a court and tries petty causes," T. Cooley, Law of Torts 409 (1879), including those who served as judges on a part-time or episodic basis. Justices of the peace, for example, often maintained active private law practices (or even had nonlegal livelihoods), and generally served in a judicial capacity only part-time. See *Hubbell v. Harbeck*, 54 Hun. 147, 7 N.Y.S. 243 (1889); *Ingraham v. Leland*, 19 Vt. 304 (1847). In fact, justices of the peace were not even paid a salary by the government, but instead received compensation through fees payable by the parties that came before them. See W. Murfee, The Justice of the Peace § 1145 (1886). Yet the common law extended the same immunity "to a justice of the peace as to any other judicial officer." *Pratt v. Gardner*, 56 Mass. 63, 70 (1848); see also *Mangold v. Thorpe*, 33 N.J.L. 134, 137–138 (1868).

The common law also extended certain protections to individuals engaged in law enforcement activities, such as sheriffs and constables. At the time § 1983 was enacted, however, "[t]he line between public and private policing was frequently hazy. Private detectives and privately employed patrol personnel often were publicly appointed as special policemen, and the means and objects of detective work, in particular, made it difficult to distinguish between those on the public payroll and private detectives." Sklansky, The Private Police, 46 UCLA L.Rev. 1165, 1210 (1999) (footnotes and internal quotation marks omitted). The protections provided by the common law did not turn on whether someone we today would call a police officer worked for the government full-time or instead for both public and private employers. Rather, at common law, "[a] special constable, duly appointed according to law, ha[d] all the powers of a regular constable so far as may be necessary for the proper discharge of the special duties intrusted to him, and in the lawful discharge of those duties, [was] as fully protected as any other officer." W. Murfee, A Treatise on the Law of Sheriffs and Other Ministerial Officers § 1121, p. 609 (1884).

Sheriffs executing a warrant were empowered by the common law to enlist the aid of the able-bodied men of the community in doing so. See 1 W. Blackstone, Commentaries on the Laws of England 332 (1765); *In re Quarles*, 158 U.S. 532, 535, 15 S.Ct. 959, 39 L.Ed. 1080 (1895). While serving as part of this "posse comitatus," a private individual had the same authority

as the sheriff, and was protected to the same extent. See, *e.g.*, *Robinson v. State*, 93 Ga. 77, 18 S.E. 1018, 1019 (1893) ("A member of a posse comitatus summoned by the sheriff to aid in the execution of a warrant for a felony in the sheriff's hands is entitled to the same protection in the discharge of his duties as the sheriff himself"); *State v. Mooring*, 115 N.C. 709, 20 S.E. 182 (1894) (considering it "well settled by the courts" that a sheriff may break open the doors of a house to execute a search warrant and that "if he act in good faith in doing so, both he and his posse comitatus will be protected"); *North Carolina v. Gosnell*, 74 F. 734, 738–739 (C.C.W.D.N.C.1896) ("Both judicial and ministerial officers, in the execution of the duties of their office, are under the strong protection of the law; and their legally summoned assistants, for such time as in service, are officers of the law"); *Reed v. Rice*, 25 Ky. 44, 46–47 (App.1829) (private individuals summoned by a constable to execute a search warrant were protected from a suit based on the invalidity of the warrant).

***1665** Indeed, examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself. See, *e.g.*, *Gregory v. Brooks*, 37 Conn. 365, 372 (1870) (public wharfmaster not liable for ordering removal of a vessel unless the order was issued maliciously); *Henderson v. Smith*, 26 W.Va. 829, 836–838 (1885) (notaries public given immunity for discretionary acts taken in good faith); *Chamberlain v. Clayton*, 56 Iowa 331, 9 N.W. 237 (1881) (trustees of a public institution for the disabled not liable absent a showing of malice); *McCormick v. Burt*, 95 Ill. 263, 265–266 (1880) (school board members not liable for suspending a student in good faith); *Donahoe v. Richards*, 38 Me. 379, 392 (1854) (same); *Downer v. Lent*, 6 Cal. 94, 95 (1856) (members of a Board of Pilot Commissioners given immunity for official acts); *Rail v. Potts & Baker*, 27 Tenn. 225, 228–230 (1847) (private individuals appointed by the sheriff to serve as judges of an election were not liable for refusing a voter absent a showing of malice); *Jenkins v. Waldron*, 11 Johns. 114, 120–121 (N.Y.Sup.Ct.1814) (same).

[2] **[3]** We read § 1983 "in harmony with general principles of tort immunities and defenses." *Imbler*, 424 U.S., at 418, 96 S.Ct. 984. And we "proceed[ ] on the assumption that common-law principles of ... immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Pulliam v. Allen*, 466 U.S. 522, 529, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). Under this assumption, immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.

B

[4] Nothing about the reasons we have given for recognizing immunity under § 1983 counsels against carrying forward the common law rule. As we have explained, such immunity "protect[s] government's ability to perform its traditional functions." *Wyatt v. Cole*, 504 U.S. 158, 167, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992). It does so by helping to avoid "unwarranted timidity" in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits. *Richardson v. McKnight*, 521 U.S. 399, 409–411, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997).

We have called the government interest in avoiding "unwarranted timidity" on the part of those engaged in the public's business "the most important special government immunity-producing concern." *Id.*, at 409, 117 S.Ct. 2100. Ensuring that those who serve the government do so "with the decisiveness and the judgment required by the public good," *Scheuer v. Rhodes*, 416 U.S. 232, 240, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), is of vital importance regardless whether the individual sued as a state actor works full-time or on some other basis.

[5] Affording immunity not only to public employees but also to others acting on behalf of the government similarly serves to " 'ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.' " *Richardson, supra*, at 408, 117 S.Ct. 2100 (quoting *Wyatt, supra*, at 167, 112 S.Ct. 1827). The government's need to attract talented individuals is not limited to full-time public employees. Indeed, it is often when there is a particular need for specialized knowledge or expertise that the government ***1666** must look outside its permanent work force to secure the services of private individuals. This case is a good example: Filarsky had 29 years of specialized experience as an attorney in labor, employment, and personnel matters, with particular expertise in conducting internal affairs investigations. App. to Pet. for Cert. 59, 89; App. 156. The City of Rialto certainly had no permanent employee with anything approaching those qualifications. To the extent such private individuals do not depend on the

government for their livelihood, they have freedom to select other work—work that will not expose them to liability for government actions. This makes it more likely that the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts.

Sometimes, as in this case, private individuals will work in close coordination with public employees, and face threatened legal action for the same conduct. See App. 134 (Delia's lawyer: "everybody is going to get named" in threatened suit). Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity. Under such circumstances, any private individual with a choice might think twice before accepting a government assignment.

The public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits is also implicated when individuals other than permanent government employees discharge these duties. See *Richardson, supra,* at 411, 117 S.Ct. 2100. Not only will such individuals' performance of any ongoing government responsibilities suffer from the distraction of lawsuits, but such distractions will also often affect any public employees with whom they work by embroiling those employees in litigation. This case is again a good example: If the suit against Filarsky moves forward, it is highly likely that Chief Wells, Bekker, and Peel will all be required to testify, given their roles in the dispute. Allowing suit under § 1983 against private individuals assisting the government will substantially undermine an important reason immunity is accorded public employees in the first place.

Distinguishing among those who carry out the public's business based on the nature of their particular relationship with the government also creates significant line-drawing problems. It is unclear, for example, how Filarsky would be categorized if he regularly spent half his time working for the City, or worked exclusively on one City project for an entire year. See Tr. of Oral Arg. 34–36. Such questions deprive state actors of the ability to "reasonably anticipate when their conduct may give rise to liability for damages," *Anderson v. Creighton,* 483 U.S. 635, 646, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (alteration and internal quotation marks omitted), frustrating the purposes immunity is meant to serve. An uncertain immunity is little better than no immunity at all.

III

Our decisions in *Wyatt v. Cole,* 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992), and *Richardson v. McKnight,* 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997), are not to the contrary. In *Wyatt,* we held that individuals who used a state replevin law to compel the local sheriff to seize disputed property from a former business partner were not entitled to seek qualified immunity. Cf. *Lugar,* 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (holding ***1667** that an individual who uses a state replevin, garnishment, or attachment statute later declared to be unconstitutional acts under color of state law for purposes of § 1983). We explained that the reasons underlying recognition of qualified immunity did not support its extension to individuals who had no connection to government and pursued purely private ends. Because such individuals "hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good," we concluded that extending immunity to them would "have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service." 504 U.S., at 168, 112 S.Ct. 1827.

Wyatt is plainly not implicated by the circumstances of this case. Unlike the defendants in *Wyatt,* who were using the mechanisms of government to achieve their own ends, individuals working for the government in pursuit of government objectives are "principally concerned with enhancing the public good." *Ibid.* Whether such individuals have assurance that they will be able to seek protection if sued under § 1983 directly affects the government's ability to achieve its objectives through their public service. Put simply, *Wyatt* involved no government agents, no government interests, and no government need for immunity.

In *Richardson,* we considered whether guards employed by a privately run prison facility could seek the protection of qualified immunity. Although the Court had previously determined that public-employee prison guards were entitled to qualified immunity, see *Procunier v. Navarette,* 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978), it determined that prison guards employed by a private company and working in a privately run prison facility did not enjoy the same protection. We explained that the various incentives characteristic of the private market in that case ensured that the guards would not perform their public duties with

unwarranted timidity or be deterred from entering that line of work. 521 U.S., at 410–411, 117 S.Ct. 2100.

Richardson was a self-consciously "narrow[ ]" decision. *Id.*, at 413, 117 S.Ct. 2100 ("[W]e have answered the immunity question narrowly, in the context in which it arose"). The Court made clear that its holding was not meant to foreclose all claims of immunity by private individuals. *Ibid.* Instead, the Court emphasized that the particular circumstances of that case—"a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms"—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983. *Ibid.* Nothing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work.

* * *

[6] A straightforward application of the rule set out above is sufficient to resolve this case. Though not a public employee, Filarsky was retained by the City to assist in conducting an official investigation into potential wrongdoing. There is no dispute that government employees performing such work are entitled to seek the protection of qualified immunity. The Court of Appeals rejected Filarsky's claim to the protection accorded Wells, Bekker, and Peel solely because he was not a permanent, full-time employee of the City. The common law, however, did not draw ***1668** such distinctions, and we see no justification for doing so under § 1983.

New York City has a Department of Investigation staffed by full-time public employees who investigate city personnel, and the resources to pay for it. The City of Rialto has neither, and so must rely on the occasional services of private individuals such as Mr. Filarsky. There is no reason Rialto's internal affairs investigator should be denied the qualified immunity enjoyed by the ones who work for New York.

In light of the foregoing, the judgment of the Court of Appeals denying qualified immunity to Filarsky is reversed.

It is so ordered.

Justice GINSBURG, concurring.

The Court addresses a sole question in this case: Is a private attorney retained by a municipality to investigate a personnel matter eligible for qualified immunity in a suit under 42 U.S.C. § 1983 alleging a constitutional violation committed in the course of the investigation? I agree that the answer is yes and that the judgment of the Court of Appeals holding private attorney Filarsky categorically ineligible for qualified immunity must be reversed. Qualified immunity may be overcome, however, if the defendant knew or should have known that his conduct violated a right "clearly established" at the time of the episode in suit. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Because the Ninth Circuit did not consider the application of that standard to Filarsky, the matter, as I see it, may be pursued on remand.

Filarsky was retained by the City of Rialto to investigate whether city firefighter Delia was taking time off from work under the false pretense of a disabling physical condition. In pursuit of the investigation, Filarsky asked Delia to consent to a search of his home to determine what Delia had done with several rolls of insulation he had recently purchased at a home improvement store. When Delia, on counsel's advice, refused to consent to the search, Filarsky "hatch[ed] a plan" to overcome Delia's resistance. *Delia v. Rialto*, 621 F.3d 1069, 1077 (C.A.9 2010). "[W]e will do it a different way," Filarsky informed Delia. App. 129; see 621 F.3d, at 1077 ("Unable to obtain Delia's consent to a warrantless search of his house ..., Filarsky tried a different tactic.").

Following Filarsky's advice, Fire Chief Wells ordered Delia to bring the insulation out of his house and place the rolls on his lawn for inspection. App. 158. Filarsky recommended this course, the Ninth Circuit observed, mindful that "an individual does not have an expectation of privacy in items exposed to the public, thereby eliminating the need for a search warrant." 621 F.3d, at 1077. Delia complied with Chief Wells's order by producing the rolls, all of them unused, App. 78, 85, after which the investigation into the legitimacy of Delia's absence from work apparently ended.

In explaining why the individual defendants other than Filarsky were entitled to summary judgment on their qualified immunity pleas, the Ninth Circuit stated that "no ... threat to [Delia's] employment" attended Fire Chief Wells's order. 621 F.3d, at 1079. The District Court similarly stated that "Delia was not threatened with insubordination or termination if he did not comply with [the] order." App. to Pet. for Cert. 48.

These statements are at odds with the facts, as recounted by the Court of Appeals. "At the onset of the interview," the Ninth Circuit stressed, "Filarsky warned Delia that he was obligated to fully cooperate," and that "[i]f at any time it is deemed ***1669** you are not cooperating then you can be held to be insubordinate and subject to disciplinary action, up to and including termination." 621 F.3d, at 1072 (internal quotation marks omitted). Continuing in this vein, the Court of Appeals concluded that "Delia's actions were involuntary and coerced by the direct threat of sanctions including loss of his firefighter position." *Id.*, at 1077; see *id.*, at 1085 ("Delia's actions were involuntary and occurred as a result of the direct threat of sanctions[.]").

In further proceedings upon return of this case to the Court of Appeals, these questions bear attention. First, if it is "clearly established," as the Ninth Circuit thought it was, that "the warrantless search of a home is presumptively unreasonable," *id.*, at 1075, and that a well-trained investigating officer would so comprehend,[1] may an official circumvent the warrant requirement by ordering the person under investigation to cart his personal property out of the house for inspection?[2] And if it is "clearly established" that an employee may not be fired for exercising a constitutional right, see *id.*, at 1079,[3] is it not equally plain that discipline or discharge may not be threatened to induce surrender of such a right?

In short, the Court has responded appropriately to the question tendered for our review, but the Circuit's law will remain muddled absent the Court of Appeals' focused attention to the question whether Filarsky's conduct violated "clearly established" law.

Justice SOTOMAYOR, concurring.

The Court of Appeals denied qualified immunity to Filarsky solely because, as retained outside counsel, he was not a formal employee of the City of Rialto. I agree with and join today's opinion holding that this distinction is not a sound basis on which to deny immunity.

I add only that it does not follow that *every* private individual who works for the government in some capacity necessarily may claim qualified immunity when sued under 42 U.S.C. § 1983. Such individuals must satisfy our usual test for conferring immunity. As the Court explains, that test "look[s] to the 'general principles of tort immunities and defenses' applicable at common law, and the reasons we have afforded protection from suit under § 1983." *Ante*, at 1662 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)).

Thus in *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997), we denied qualified immunity to prison guards who were privately employed, despite their quintessentially public ***1670** function. We did so because we found "no special reasons significantly favoring an extension of governmental immunity" in that context. *Id.*, at 412, 117 S.Ct. 2100. We left open, however, the question whether immunity would be appropriate for "a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.*, at 413, 117 S.Ct. 2100.

Filarsky, supported by the United States as *amicus curiae*, contends that he fits into this coda because he worked in close coordination with and under the supervision of City employees. Whether Filarsky was supervised by those employees, and did not himself do the supervising, is unclear. But there is no doubt that Filarsky worked alongside the employees in investigating Delia. In such circumstances, I agree that Filarsky should be allowed to claim qualified immunity from a § 1983 suit. As the Court's opinion persuasively explains, there is a " 'firmly rooted' tradition of immunity" applicable to individuals who perform government work in capacities other than as formal employees. *Id.*, at 404, 117 S.Ct. 2100; see *ante*, at 1662 – 1665. And conferring qualified immunity on individuals like Filarsky helps "protec[t] government's ability to perform its traditional functions," and thereby helps "protect the public at large." *Wyatt v. Cole*, 504 U.S. 158, 167–168, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992). When a private individual works closely with immune government employees, there is a real risk that the individual will be intimidated from performing his duties fully if he, and he alone, may bear the price of liability for collective conduct. See *ante*, at 1665 – 1666; see also *ante*, at 1666 (noting distraction caused to immune public employees by § 1983 litigation brought against nonimmune associates).

This does not mean that a private individual may assert qualified immunity *only* when working in close coordination with government employees. For example, *Richardson* 's suggestion that immunity is also appropriate for individuals "serving as an adjunct to government in an essential governmental activity," 521 U.S., at 413, 117 S.Ct. 2100,

would seem to encompass modern-day special prosecutors and comparable individuals hired for their independence. There may yet be other circumstances in which immunity is warranted for private actors. The point is simply that such cases should be decided as they arise, as is our longstanding practice in the field of immunity law.

All Citations

132 S.Ct. 1657, 182 L.Ed.2d 662, 80 USLW 4318, 33 IER Cases 1518, 12 Cal. Daily Op. Serv. 4133, 2012 Daily Journal D.A.R. 4777, 23 Fla. L. Weekly Fed. S 266

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Delia also suggests that Filarsky's conduct should be measured against a "reasonable attorney" standard: whether an attorney providing advice in a public-employee investigation should have known that the search of Delia's personal property, stored in his home, would be lawless. See Brief for Respondent 45–46.

2 An additional inquiry may be appropriate: Although conceived as a substitute for a warrantless entry, should the inspection order Filarsky counseled pass muster as a permissible discovery device? Cf. *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 195, 208–211, 66 S.Ct. 494, 90 L.Ed. 614 (1946) (subpoena *duces tecum* for a corporation's business records, authorized by § 9 of the Fair Labor Standards Act, encountered no Fourth Amendment shoal).

3 The Ninth Circuit referred to cases holding that public employees' job retention cannot be conditioned on relinquishing the Fifth Amendment's safeguard against self-incrimination: *Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of City of New York,* 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968), and *Gardner v. Broderick,* 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968).

End of Document © 2015 Thomson Reuters. No claim to original U.S. Government Works.

2007 WL 4166238
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

CITY OF GRASS VALLEY, Plaintiff,
v.
NEWMONT MINING CORPORATION, a corporation; Newmont USA Limited, a corporation; Newmont North American Exploration Limited, a corporation; New Verde Mines LLC, a limited liability company; Newmont Realty Company, a corporation, Defendants.

No. 2:04-cv-00149-GEB-DAD. | Nov. 20, 2007.

Attorneys and Law Firms

Duane C. Miller, Michael Dana Axline, Miller, Axline and Sawyer, Sacramento, CA, Kenton L. Alm, Meyers Nave, Riback, Silver & Wilson, Oakland, CA, for Plaintiff.

Alison J. Thayer, Elizabeth H. Temkin, Mark Wielga, Scott W. Hardt, Temkin, Wielga, Hardt & Longenecker, LLP, Denver, CO, Craig C. Allison, Stevens and O'Connell, Sacramento, CA, for Defendants.

ORDER [*]

GARLAND E. BURRELL, JR., District Judge.

***1** Defendants move to disqualify Plaintiff's outside counsel, arguing that the outside counsel's contingency fee arrangement with the City violates a government attorney's duty of neutrality. (Def.s' Mot. at 3:6-14.) Plaintiff (hereinafter sometimes referenced as "the City") opposes the motion. For the following reasons, the motion is denied.

Defendants argue that the California Supreme Court's decision in *People ex rel. Clancy v. Superior Court (Clancy)*, 39 Cal.3d 740, 750, 218 Cal.Rptr. 24, 705 P.2d 347 (1985) compels disqualification of Plaintiff's outside counsel because *Clancy* held that a government entity could not hire outside counsel on a contingency fee basis to litigate claims for abatement of a public nuisance. (Def.s' Mot. at 3:19-24.) The City includes in its Complaint, *inter alia*, a claim for abatement of public nuisance. (Pl.'s Compl. at 10:16-12:6.) Defendants assert that the City's lead trial counsel is being compensated on a contingency fee basis. (Def.s' Mot. at 2:7-16.) The City counters that it is authorized by California Government Code section 37101 to hire outside counsel and that *Clancy* approves of hiring outside counsel where the government retains control of the litigation. (Pl.'s Opp. at 2:6-12, n. 1.)

Courts have the inherent power to disqualify counsel. *Cargill Inc. v. Budine*, 2007 WL 1813762, *7 (E.D.Cal. June 22, 2007). Motions to disqualify counsel are decided based on state law. *In re County of Los Angeles*, 223 F.3d 990, 995 (9th Cir.2000). The party seeking disqualification bears the burden of proving the conflict alleged. *United States v. Schafer*, 2006 WL 3271290, *7 (E.D.Cal. Nov.12, 2006).

Even assuming arguendo that the City's outside counsel is hired on a contingency fee basis, Defendants have not countered Plaintiff's showing that the City Attorney for the City of Grass Valley is acting as co-counsel in this action and the City retains "ultimate decision-making authority in the case." (Decl. of Jeffrey Folz in Opp. ¶ 4; Pl.'s Opp. at 6:12-20.) Accordingly, Defendants' motion is denied. *Clancy*, 39 Cal.3d at n. 3 (distinguishing *Sedelbauer v. State*, 455 N.E.2d 1159, 1164 (Ind.App.1983) because in that case "the court approved the assistance of a private attorney only because he appeared 'not in place of the state's duly authorized counsel.' "); *City and County of San Francisco v. Philip Morris, Inc.*, 957 F.Supp. 1130, 1135 (N.D.Cal.1997) ("the Court finds that this case is sufficiently distinguishable from *Clancy* [because outside counsel] is acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation.").

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 4166238

Footnotes

* This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.

99 Fed.Appx. 29
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

Elizabeth BANNER, Plaintiff,
Michael Freifeld and Law Office of Glen N. Lenhoff, Appellants,
Tom R. Pabst, Appellant.
v.
City of Flint and Carl Hamilton, Defendants–Appellees.

Nos. 01–1118, 01–1401 and 02–1297. | April 8, 2004.

Synopsis
Background: In reverse discrimination action against city, city and intervening employee moved for sanctions against attorney for plaintiff-employee for misconduct in divulging intervenor's confidences. The United States District Court for the Eastern District of Michigan, 136 F.Supp.2d 678, entered order imposing sanctions against attorneys, and attorneys appealed.

Holdings: The Court of Appeals held that:

[1] former client did not waive attorney-client privilege by failing to invoke privilege during deposition;

[2] award of attorney fees to opposing parties as sanctions was not abuse of discretion; and

[3] imposition of unconditionally payable fine for criminal contempt was abuse of discretion.

Affirmed in part, reversed in part, and remanded.

West Headnotes (10)

[1] United States Magistrate Judges
Hearing

District court was authorized to conduct evidentiary hearing on party's objections to magistrate judge's report and recommendation, despite opposing party's objections to hearing, even though Federal Magistrate's Act was designed to ensure that parties could have pretrial ruling reconsidered where ruling was based on error or mistake of law, where magistrate judge did not consider impact of professional rules of conduct on motion for sanctions against attorney. 28 U.S.C.A. § 636.

7 Cases that cite this headnote

[2] Privileged Communications and Confidentiality
Relation of Attorney and Client

Under Michigan law, potential client's statements to attorney during initial consultation were protected by attorney-client privilege, even if client eventually decided not to engage attorney. MRPC 1.6.

7 Cases that cite this headnote

[3] Attorney and Client
Client's confidences, in general

Privileged Communications and Confidentiality
Waiver of privilege

Under Michigan law, former client did not waive attorney-client privilege by failing to invoke privilege during deposition conducted by attorney on behalf of another client, and thus attorney violated rule of professional conduct by divulging former client's confidences during deposition, where attorney had not explained to former client availability of attorney-client privilege, when it could be asserted, or that only former client could waive it. MRPC 1.6.

5 Cases that cite this headnote

[4] **Federal Civil Procedure**
Authority to Impose

Federal Civil Procedure
Other particular conduct

Federal Civil Procedure
Notice and hearing

District court was authorized to consider attorney's ethical breaches occurring in context of litigation under its auspices and to award attorney fees to opposing parties as sanctions for such breaches, where court ordered attorney to appear at evidentiary hearing on opposing parties' objections to magistrate judge's order regarding motion to strike former client's deposition testimony on ground that its use violated former client's attorney-client privilege, and court provided attorney with notice that it would consider propriety of sanctions.

3 Cases that cite this headnote

[5] **Federal Civil Procedure**
Computation; items and services compensable

District court did not abuse its discretion by awarding $15,000 to city and $5,000 to city employee as sanctions for attorney's improper use of confidential information obtained from employee in another employee's employment discrimination action, where fees and costs incurred by virtue of ethical breaches upon which sanctions were based reasonably approximated sums imposed by district court.

Cases that cite this headnote

[6] **Federal Civil Procedure**
Computation; items and services compensable

District court abused its discretion by awarding $5,000, payable to court clerk, as sanction for attorney's improper use of confidential information obtained from employee in another employee's employment discrimination action, where court awarded opposing parties attorney fees as sanctions, but did not provide any rationale for fact or amount of additional sanction.

1 Cases that cite this headnote

[7] **Courts**
Restraining Particular Proceedings

Federal district court order prohibiting use of deposition transcript in employment discrimination action that court found was obtained unethically and in derogation of protections afforded witness under law in course of litigation pending before it did not implicate Anti–Injunction Act, where order did not purport to prohibit parallel state court proceedings, and did not prohibit counsel in state proceedings from eliciting factual testimony witness had provided in federal action. 28 U.S.C.A. § 2283.

1 Cases that cite this headnote

[8] **Injunction**
Commencement and Prosecution in General

Federal district court did not abuse its discretion in enjoining attorney conducting state court litigation from using deposition testimony obtained in federal court proceedings in derogation of attorney-client privilege, where attorney was both in active concert and participation with attorney that litigated matter in federal court, and had adequate notice of details of injunction to place him on notice of his obligations thereunder. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

Cases that cite this headnote

[9] **Contempt**
Disobedience to Mandate, Order, or Judgment

Federal district court did not abuse its discretion in finding that flagrant and purposeful defiance of its order by attorney conducting parallel litigation in state court warranted finding of civil contempt and imposition of sanctions, even if attorney's decision to do so was premised on good-faith disagreement over scope or validity

of that order, where attorney did not file for modification of order until after he was found in contempt, and did not await ruling from Court of Appeals vacating that order before he repeated his contemptuous conduct.

1 Cases that cite this headnote

[10] Contempt

Notice or other process; attachment

District court's failure to give attorney proper notice that failure to comply with its order could result in criminal sanction precluded imposition of unconditionally payable fine for criminal contempt, where original notice for hearing ordered attorney to appear, but did not charge him with criminal contempt, or suggest he could be subject to punitive criminal sanctions. Fed.Rules Cr.Proc.Rule 42, 18 U.S.C.A.

Cases that cite this headnote

***30** On Appeal from the United States District Court for the Eastern District of Michigan.

Attorneys and Law Firms

***31** E. Michael Morris, Morris & Doherty, Birmingham, MI, Michael A. Kowalko, Flint, MI, for Appellants.

Tom R. Pabst, Flint, MI, pro se.

Terrence J. Miglio, Brian A. Kreucher, Barbara Endoy, Keller, Thoma, Detroit, MI, H. William Reising, Plunkett & Cooney, Flint, MI, Ernest R. Bazzana, Plunkett & Cooney, Detroit, MI, for Defendants–Appellees.

Before: MARTIN and DAUGHTREY, Circuit Judges, and O'MALLEY, District Judge. *

Opinion

PER CURIAM.

****1** These consolidated appeals challenge three orders entered by the district court imposing sanctions against attorney Michael Freifeld, his law firm, and attorney Thomas Pabst. The underlying case was settled and dismissed by stipulation of the parties.

The factual circumstances in this case are complex and unlikely to be repeated. At the same time, Messrs. Freifeld and Pabst raise a great number of issues, stemming in part from the complicated nature of the relevant facts. A full discussion of the facts, and a complete analysis of the issues raised, would require a lengthy opinion. This case, however, has minimal precedential value. For these reasons, we have set forth below only an abbreviated discussion of the factual history and the many arguments raised. even though our analysis has been painstaking. Ultimately, we conclude as follows.

With regard to the district court's sanction order against attorney Freifeld and his law firm: (1) the district court was within its rights to conduct an evidentiary hearing regarding Freifeld's behavior; (2) the district court properly used a de novo review of the Magistrate Judge's ruling; (3) the district court concluded correctly that Freifeld did breach Michigan Rule of Professional Conduct 1.6; (4) the district court had the authority to impose sanctions for this breach; (5) Freifeld and his law firm received adequate notice before the district court imposed sanctions; (6) neither the sanction of $15,000 in attorney fees payable to defendant Flint, nor the sanction of $5,000 in attorney fees payable to defendant Rose, were unreasonable, and both sanctions were within the district court's power and discretion; (7) the district court had the power and authority to impose a $5,000 sanction in the form of a fine payable to the court: (8) the district court followed the proper procedure regarding imposition of the $5,000 sanction, given that the sanction was not in connection with a finding of contempt; (9) nonetheless, the sanction of $5,000 payable to the clerk of court was unreasonable and an abuse of discretion in the circumstances, because the $20,000 attorney fee sanctions alone adequately served the necessary punitive and deterrent purposes. Accordingly, we **AFFIRM** the sanction against Freifeld and his law firm of $15,000 in attorney fees payable to defendant Flint, and **AFFIRM** the sanction against Freifeld and his law firm of $5,000 in attorney fees payable to defendant Rose, but we **REVERSE** the sanction against Freifeld of $5,000 payable to the clerk of court.

With regard to the sanctions against attorney Pabst: (1) the Anti–Injunction Act is inapposite to the question of the court's authority to sanction Pabst's conduct; (2) the propriety of the district court's injunction is controlled by ***32** Fed.R.Civ.P. 65; (3) the district court's injunction was arguably overbroad, to the extent it forbade use of the Rose deposition in *any*

case by *any* attorney, but it was not overbroad as to attorney Pabst, who was acting "in active concert or participation" with Freifeld; (4) despite this possible overbreadth, Pabst's willful defiance of the district court's injunction order was completely inappropriate; (5) the district court was correct in its conclusion that Pabst disobeyed a district court order, he did so deliberately, and he did so beyond a reasonable doubt (*see In re Smothers,* 322 F.3d 438, 441–42 (6th Cir.2003)); (6) the $1,000 and $2,000 fines payable to the clerk of court, although reasonable in amount, were criminal in nature; (7) as such, the district court had to comply with the notice provisions of Fed.R.Crim.P. 42(b); (8) as to the first contempt fine of $1,000, the district court did not comply with Rule 42(b), because it did not give Pabst adequate notice that he might be subject to criminal sanctions; (9) as to the second contempt fine of $2,000, Pabst did receive adequate notice; and (10) the trial judge did not err when she declined to recuse herself. Accordingly, we **AFFIRM** the $2,000 sanction against Pabst, payable to the Clerk of Court, but we **REVERSE** the $1,000 sanction against Pabst, payable to the Clerk of Court, and REMAND this case with directions that the district court may address again the propriety of the first sanction against Pabst.

****2** Finally, we **DENY** the motion by Flint and Rose for sanctions against Pabst on appeal.

I. BACKGROUND

Michael Freifeld, an associate in the Law Office of Glen N. Lenhoff (the Law Firm). represented Elizabeth Banner in a race discrimination case against Flint. In early 2000, another Flint employee, Vickie Rose, met Freifeld separately to discuss a potential employment-related claim against Flint. During Rose's meeting with Freifeld, she shared confidential information about her job. During the consultation, Freifeld told Rose that he represented Banner and that he might wish to call Rose as a witness. He asked Rose to sign an affidavit in support of Banner's claims, but she refused. Ultimately, Rose decided not to retain Freifeld and not to sue Flint, opting instead to avoid disruption of her job.

Freifeld later noticed Rose's deposition in the Banner case as an employee-witness, and Flint. not being aware of Freifeld's earlier conversations with Rose, instructed Rose to appear. On March 7, 2000, Rose was deposed by Freifeld without the benefit of personal counsel. Freifeld proceeded to question Rose about the matters discussed during their initial attorney-client consultation. While Rose responded to the questions put to her, Rose later testified that she did not appear at the deposition voluntarily, but was required to do so by her job, and that she did not voluntarily provide information in order to assist Banner's case against Flint. Rose also said she did not think Freifeld would ask about the confidential matters they discussed, and that Freifeld never told her that she had the right to assert an attorney-client privilege or any other right to confidentiality with respect to her earlier discussions with him.

After Freifeld deposed Rose, he gave a copy of the transcript to Pabst, a lawyer who was not associated with the Law Firm, but was involved in other cases against Flint. Pabst deposed Rose in May in connection with a state-court employment action against Flint and asked about the confidential information she had provided to Freifeld.

***33** In June, facilitators in *Banner* recommended a settlement of $170,000. The parties did not initially agree to this settlement. On June 27, Flint and Rose moved for an order: 1) striking Rose's deposition testimony; 2) preventing her deposition testimony from being used in *any* legal or administrative proceeding; 3) barring Banner's attorneys from inquiring into areas in which Rose could assert her attorney-client privilege; and 4) imposing sanctions. In opposition. Banner argued that Rose waived her attorney-client privilege by voluntarily appearing at the deposition and answering questions without objection. Freifeld and the Law Firm argued that they committed no ethical violations. A magistrate judge held a hearing and issued an order denying the motion to strike on grounds that, even if she did not understand the concept of attorney-client privilege, Rose had, nonetheless, waived her privilege vis-a-vis Freifeld by answering questions at the deposition without a contemporaneous objection. Flint and Rose filed objections in district court, seeking an order granting their motions or a hearing.

****3** In October, the parties reached an agreement to settle the Banner case for $130,000. On October 10, Lenhoff, Freifeld, and attorneys for Flint were to meet with the district judge for a pretrial conference in another case. The parties told her the *Banner* case had settled. She asked about the objections to the magistrate judge's order and said she was concerned about the deposition. Though Freifeld and the Law Firm argued that those matters had been mooted by the settlement, the judge told Freifeld and Lenhoff that she was referring the matter to the Michigan Attorney Grievance Committee and ordered

them to appear, along with Rose, for *in camera* review of all records about Rose. [1]

The court held an evidentiary hearing on November 3, 2000. The court explained that the hearing was necessary because of her concern that certain ethical violations had occurred in a matter pending before her; the court found that the settlement did not moot those concerns. The parties not only addressed the issues presented to the magistrate judge, but, at the request of the district judge, also addressed Michigan Rule of Professional Conduct 1.6, covering confidentiality. The parties had earlier briefed Michigan Rule of Professional Conduct 1.9, regarding the attorney-client privilege and its application to former clients, but had not addressed a lawyer's general obligation to maintain client confidences.

The district court found that Freifeld and the Law Firm breached both the attorney-client privilege and the obligation of confidentiality imposed by Rule 1.6 in taking the Rose deposition. The court set aside as clearly erroneous the magistrate judge's order denying the motion to strike the deposition. The court stated that Freifeld showed "a disregard for the rules of professional conduct" and found he and his law firm misinterpreted another ethics rule not at issue here. [2]

The court remarked that Freifeld "display[ed] a reckless attitude toward the rules of professional conduct" in pressuring ***34** Rose to disclose confidential information and that he showed a lack of concern for whether her disclosures would be detrimental once revealed. This violated "the spirit, if not the letter," of the Michigan Rules, according to the district court. The court struck Rose's deposition; enjoined *Banner's attorneys* from distributing it or disclosing its contents; and prohibited them from deposing Rose about matters in it. The court also enjoined use of the deposition in *any other proceeding by any attorney*. Finally, the court imposed a $5,000 sanction payable to the court against Freifeld, and ordered Freifeld and the Firm to pay Flint's attorney $15,000 in fees (relating to the Rose deposition, the motion for a protective order and the hearing) and to pay Rose's attorney $5,000 for fees (in connection with her request for a protective order and attendance at the hearing). Lastly, the district court stated it would refer Freifeld and the Law Firm to the state Attorney Grievance Commission.

****4** After the district court prohibited the deposition's use, an attorney for Flint sent a letter to Pabst with a copy of the order, telling Pabst that the court had barred him from using the deposition in state court. Pabst disagreed, asserting that he did not believe the order could bind him in state court and stating that he would ask the state court to conduct its own hearing. Pabst made several filings in state cases, attaching complete transcripts of the deposition to two motions, stating he was challenging the injunction. Pabst did not seek relief from the federal court order before the district court, however, and he did not seek to appeal that order to this Court. Indeed, Pabst concedes that he knowingly violated the district court order based on his own determination that the order was invalid. Attorneys for Flint and Rose filed a motion in the district court to hold Pabst in contempt. In his answer, Pabst made many arguments, including his assertion that the district judge should disqualify herself because she had displayed hostility toward Banner's attorneys by sanctioning them, that the injunction did not comply with Federal Rule of Civil Procedure 65(d), that Pabst was not among the parties or agents involved in *Banner* or in active concert or participation with them, and that the order could not apply to his actions in state court.

The district judge denied the motion to disqualify herself. The court then found that Pabst was bound by her order and held Pabst in contempt, imposing a sanction of $1,000 payable to the court. Despite this order, Pabst continued to ignore the injunction. Again, Pabst did not seek and await an order setting aside the injunction; he, instead, continued to ignore the injunction order based on his own disagreement with the trial judge's authority to enter it. In September 2001, Pabst filed an answer to Flint's motions in state court and renewed a request for an evidentiary hearing, again attaching the deposition transcript. Flint again sought sanctions against Pabst. On January 23, 2002, the district court held yet another hearing and imposed an additional fine of $2,000 on Pabst, payable to the Clerk of Court, for contempt. Pabst finally filed a motion to modify the injunction with the district court on April 22, 2002. That motion was denied. While Pabst did not appeal the district court's Spring, 2002 order, he did timely appeal the two sanctions orders entered in February, 2001 and January, 2002, respectively. Both of Pabst's appeals have been consolidated with the appeals taken by Freifeld and the Law Firm.

II. ANALYSIS

A. Freifeld's Appeal

Freifeld's multiple assertions fall into three categories. First, the district court ***35** did not have authority to reverse the

magistrate judge and used the wrong standard of review in doing so. Second, the court's analysis of attorney-client privilege was wrong with respect to waiver, as was its analysis of the Michigan Rules of Professional Conduct. Third, the district court abused its discretion in imposing sanctions. We disagree with all of these assertions, save a portion of the third.

The Magistrate Judge's Decision

****5** Pursuant to the Federal Magistrate Judge's Act, 28 U.S.C. § 636, a district court may designate a magistrate judge to decide any nondispositive pretrial matter. *Id.* § 636(b)(1)(A). A district court may reconsider a magistrate judge's decision on matters so designated and overturn it only if it is "clearly erroneous or contrary to law." *Id.* Freifeld and the Law Firm rely on our decision in *United States v. Curtis*, 237 F.3d 598 (6th Cir.2001), to argue that the trial court applied the wrong standard and used a *de novo* review. We remanded in *Curtis*, though, not because the district court applied the wrong standard, but because we could not tell what standard it used. *Id.* at 603–04. Here, it is obvious from the district court's opinion that she felt that the magistrate judge's decision was clearly erroneous for a number of reasons, not the least of which was the magistrate judge's failure to consider certain ethical standards the district court found controlling. Specifically, the district court concluded that the magistrate judge's failure to consider Freifeld's duty of confidentiality rendered the underlying order "contrary to law."

[1] The district court was correct to conduct an evidentiary hearing, moreover, despite Freifeld's objections to one. In *Conetta v. National Hair Care Centers, Inc.*, 236 F.3d 67 (1st Cir.2001), the First Circuit wrote that, although the Federal Magistrate's Act does not expressly allow the district court to take new evidence in non-dispositive matters referred to a magistrate judge, "it is not clearly forbidden either if there is good cause for revisiting the matter." *Id.* at 74. The court iterated that the case belongs to the district judge and that the Federal Magistrate's Act is designed to ensure that parties may have a pretrial ruling reconsidered where the ruling is based on error or mistake of law, and *not* to limit the power of the district judge. *Id.* Here, the court considered evidence submitted to the magistrate judge, and determined that the ethical issues needed further inquiry.

We agree that the magistrate judge did not consider Rule 1.6, so the district court was entitled to take evidence and decide on the application of that rule. Inherent power stems from the concept that courts have powers necessary to exercise their other powers. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). "[C]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates...."*Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821). With regard to Rule 1.6, the district court invoked its powers to consider issues the magistrate judge had not. We find, moreover, that, once invoked, the district court correctly assessed that disciplinary rule and had the right to control attorney conduct before her by sanctioning violations of it. [3]

36** ***Ethical Considerations

****6** **[2]** When a potential client consults with an attorney, the consultation establishes a relationship akin to that of an attorney and existing client, and the elements of the attorney-client privilege we set forth in *Reed v. Baxter*, 134 F.3d 351, 355–56 (6th Cir.1998), are satisfied:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser, (8) unless the protection is waived.

To encourage candor in the attorney-client relationship, the lawyer must maintain confidentiality of information relating to the representation. *See* Michigan Rules of Professional Conduct 1.6, cmt. The ethical rule of confidentiality is closely related to the evidentiary rule of attorney-client privilege. Hazard, Geoffrey C., Jr., and Hodes, W. William, 1 The Law of Lawyering § 9.7 (3d. ed.2001). The difference is that confidentiality "applies to virtually all information coming into a lawyer's hands concerning a client, and forbids virtually all disclosures...." *Id.* The privilege is narrow in scope, invoked in response to an attempt to compel testimony, where the testimony sought is about information passed between lawyer and client. *Id.* The duty of confidentiality "directs lawyers not to disclose—voluntarily or otherwise, unless an exception applies, information that the lawyer has learned *about* a client, no matter where or how the information was learned." *Id.* Thus, if Rose's information was protected by attorney-client privilege, and Rose waived the privilege, its

disclosure by Freifeld would still be subject to his duty of confidentiality.

[3] Flint and Rose cite several cases to support the proposition that Freifeld breached ethical duties when deposing Rose. *See, e.g., United States v. Moscony,* 927 F.2d 742, 750 (3d Cir.1991) (holding a conflict of interest arose when attorney loyalties were divided, and loyalties were divided when an attorney cross-examined former clients). Michigan Rule 1.6 allows disclosure of confidences and secrets with consent of the client "but only after full disclosure." Full disclosure is advising the client about the advantages *and disadvantages* of revelation in language the client can understand. Hazard at § 9.16. We cannot find where Freifeld gave full disclosure before laying bare Rose's confidences. Thus, we find that substantial evidence supports the district court's finding that Freifeld violated Rule 1.6.

Sanctions Against Freifeld and the Law Firm

The district court did not state under what authority it was imposing sanctions, though the court did clearly differentiate between its award of attorneys fees against Freifeld and the Law Firm and the imposition of a fine on Freifeld individually. Courts need specific statutory authority, the presence of bad faith, or the willful disobedience of a court order before they award attorneys' fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 260, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). We stated in *Tiedel v. Northwestern Michigan College,* 865 F.2d 88, 93–94 (6th Cir.1988), that, absent Congressional authorization, federal courts may exercise inherent powers to award attorneys' fees in "narrowly defined circumstances." When an attorney or litigant has demonstrated ***37** bad faith in the conduct of litigation, the court has the inherent authority to assess an award of attorneys' fees. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 765–66, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). Imposition of sanctions comes from the court's power to police itself, so that a court can vindicate its authority without resorting to a finding of contempt of court. *Chambers,* 501 U.S. at 46. If the district court uses its inherent powers to sanction, it must find that the questioned conduct constitutes or is tantamount to bad faith. *Id.* at 767. As we noted in *Scharer v. Plabell Rubber Products, Inc.,* 858 F.2d 317, 320 (6th Cir.1988). attorneys' fees have been awarded under inherent authority "in the interest of justice" with no finding of bad faith. *Id.*

****7** **[4]** In *First Bank of Marietta v. Hartford Underwriters Insurance Company,* 307 F.3d 501, 513 (6th Cir.2002), we discussed *Mann v. University of Cincinnati,* Nos. 95–3195, 95–3292, 1997 WL 280188 (6th Cir. May 27, 1997), in which we held that the conduct the district court found "tantamount" to bad faith was indeed bad faith, despite no express language in the district court's opinion. *Id.* Clearly, a district court has within its power the authority to consider ethical breaches occurring in the context of litigation under its auspices and to impose sanctions for such breaches. No magic words are necessary to support the imposition of sanctions where the record is sufficiently detailed and the evidence in that record supports the conclusion that sanctionable conduct, in fact, occurred.

A court must give notice and afford an attorney opportunity to be heard before imposing sanctions. *Wilson–Simmons,* 207 F.3d at 822. The district court must give parties facing sanctions minimal procedural protections, but not formal notice detailing the penalties or a full evidentiary hearing. *Id.* A full evidentiary hearing is not needed when the court has sufficient relevant information, including pleadings or materials filed in the record, to decide. *Id.* at 823. Here, Freifeld and the Law Firm had ample notice that the district court was considering sanctions. On October 12, 2000, the district court ordered Rose and Freifeld to appear at a November 3, 2000 evidentiary hearing on Flint's and Rose's objections to the magistrate judge's order regarding the motion to strike, and also ordered Freifeld to produce for *in camera* review all notes and records regarding Rose. Even ignoring the notice Freifeld received by virtue of the motion to strike and evidentiary hearing in front of the magistrate judge, the district court certainly provided Freifeld with sufficient notice that it was going to hold its own hearing to consider the propriety of sanctions; the district court even telegraphed the depth of its concern with Freifeld's actions when it set the hearing date. Thereafter, the court held a fairly detailed hearing, making a full record of the proceeding and of its findings. Ultimately, we are satisfied that Freifeld and the Law Firm were afforded adequate notice and access to substantial judicial processes before sanctions were imposed upon them.

[5] The final question is the reasonableness of the sanctions imposed. As to the attorneys' fees awarded to Flint and Rose, we find that the record supports the conclusion that the fees and costs incurred by virtue of the ethical breaches upon which the sanctions were based reasonably approximate the sums imposed by the district court. Accordingly, we find that the district judge acted within her discretion, and acted

reasonably, in awarding $15,000 and $5,000 in attorney fees to Flint and ***38** Rose, respectively. [4]

[6] We find, however, that the additional $5,000 against Freifeld, payable to the Clerk of Court, was not reasonable in the face of the substantial fee awards otherwise imposed. In the past, this Court has expressed concern over payment of a fine into the court under Rule 11 where the procedural protections otherwise applicable to a criminal contempt finding are not strictly employed. *Scharer,* 858 F.2d at 321. We recently held, however, that a small fine payable to the court is acceptable in certain circumstances, even when summarily imposed. *In re Smothers,* 322 F.3d 438, 443 (6th Cir.2003). While we decline to draw a line demarcating where a fine ceases to be sufficiently small to fall within the bounds of *Smothers,* we are troubled by the size of the fine imposed upon Freifeld in this case. The district court did not provide any rationale for the fact or amount of the "additional sanction" she imposed upon Freifeld. We find that, in light of both the attorneys' fee awards imposed and the procedural status of the case (the sanctions were imposed post-settlement), the additional $5,000 was not reasonably related to the punitive and deterrent purposes of the sanctions.

****8** Ultimately, we **AFFIRM** the district court's award of a total of $20,000 in attorneys' fees to Flint and Rose, payable by Freifeld and the Law Firm, but **VACATE** the $5,000 fine payable to the court as unreasonable in the circumstances.

B. Pabst's Appeal

Reach of the Injunction

[7] Pabst argues that the injunction could not bind him and that, accordingly, he could not be sanctioned for failure to follow it, because the Anti–Injunction Act, 28 U.S.C. § 2283, generally bars federal courts from entering orders which bar pending state court proceedings. *See, e.g., In re Dublin Sec., Inc. v. Hurd,* 133 F.3d 377, 380–81 (6th Cir.1997). While Pabst spends much time analyzing the Anti–Injunction Act and the district court cited authority analyzing whether and to what extent that Act limits a federal court's authority to protect the rights and obligations of the litigants before it, we find the Anti–Injunction Act inapposite. The district court did not purport to prohibit state court proceedings involving Flint and its employees and did not even prohibit counsel in such proceedings from eliciting, from Rose or otherwise, the very factual testimony she provided in this action. All the district court did was to prohibit the use of a deposition transcript which the court found was obtained unethically and in derogation of the protections afforded Rose under the law in the course of a litigation pending before her.

We find that this case is more accurately analyzed under Federal Rule of Civil Procedure 65(d) and those cases interpreting it and does not require parsing of the Anti–Injunction Act or the scope of any exceptions thereto.

Rule 65(d) provides that:

> every order granting an injunction ... is binding only upon the parties to the action. their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them....

Our deepest concern with the relief fashioned by the district court is that it enjoins non-parties to the litigation in *Banner*. We have often reiterated the principle that injunctive relief should be no broader than necessary to remedy the harm at issue. *See, e.g., United States v. Miami Univ.,* 294 F.3d, 797, 816 (6th Cir.2002). In ***39** *Blackard v. Memphis Area Medical Center for Women, Inc.,* 262 F.3d 568 (6th Cir.2001), we explained that Federal Rule 65(d) is based on the doctrine that "a decree of injunction not only binds the parties defendant but also those represented by them or subject to their control." *Id.* at 574 (quoting *Regal Knitwear Co. v. NLRB,* 324 U.S. 9, 14, 65 S.Ct. 478, 89 L.Ed. 661 (1945)). To determine whether a person is "in active concert or participation with" an enjoined party, we look to the actual relationship between the two. *Id.* The third party is bound "if that party is identified with the named, enjoined party in interest, in 'privity' with it, represented by it or subject to its control." *Id.*

[8] We hold that forbidding the use of the Rose deposition in the *Banner* case and forbidding its use by Pabst in other cases were both appropriate exercises of the district court's authority. We reach this conclusion because we find that Pabst was both in active concert and participation with Freifeld and the Law Firm, and had adequate notice of the details of the injunction to place him on notice of his obligations thereunder.

****9** On this point, we note that Freifeld was the source of the copy of the deposition Pabst possessed and that Freifeld provided that transcript to Pabst for the precise purpose of enhancing Pabst's litigation posture against Flint, thereby

encouraging Pabst's use of the very information Rose had disclosed to Freifeld in confidence. Pabst knew that Freifeld provided the deposition to him for the purpose of using the information provided by Rose against her employer. We find that these facts put Pabst in "privity" with Freifeld, at least as it relates to the subject-matter of the district court's injunction. *See Blackard,* 262 F.3d at 574 ("[t]o determine whether a person is one who acts in concert ... with the enjoined party, the court must look to the actual relationship between the person enjoined and the person thought to be bound by the injunction"); *Black's Law Dictionary* 1079 (5th ed.1979) (the "concept of 'privity' pertains to the relationship between a party to a suit and a person who was not a party, but whose interest in the action was such that he will be bound by the final judgment as if he were a party"). Thus, while we agree that the district court's order may have been overbroad *as against the world in general,* we do not find it to have been overbroad as to Pabst.

Contempt Orders and Sanctions Against Pabst

[9] We stated in *Blackard* that parties bound on its face by an injunction must follow it when it is in effect, even if it is later found erroneous. It is completely unacceptable for an attorney to defy an order of a federal court flagrantly and purposefully, even if the decision to do so is premised on a good-faith disagreement over the scope or validity of that order. *See N. Am. Coal Corp. v. Local Union 2262, United Mine Workers of Am.,* 497 F.2d 459, 465 (6th Cir.1974) ("[o]f course, even if the district court's injunction was invalid for the reasons we have outlined, it is settled law that it still must be obeyed until and unless it is overturned on appeal."). Pabst openly and admittedly chose to challenge the district court's order by disobeying it. Pabst did *not* file for modification of the order until after he was found in contempt and he did not await ruling from this Court vacating that order before he repeated his contemptuous conduct. With more civilized means of challenging a court order available, Pabst simply chose a course of flagrant defiance. Such defiance runs counter to acceptable attorney conduct and the efficient administration of justice. The two findings that Pabst was in contempt were not an abuse ***40** of discretion, and we uphold them with an observation that such conduct is below that expected of an attorney admitted to practice in our courts.

The district court imposed sanctions, payable to the clerk of court, after finding contempt. In *Downey v. Clauder,* 30 F.3d 681, 685 (6th Cir.1994), we recognized the power of federal courts to impose civil or criminal sanctions on an attorney, but the court must look to both the proceeding and the relief granted to determine whether a contempt order is civil or criminal in nature. *Id.* Civil contempt sanctions are intended "to enforce compliance with court orders and to compensate injured parties for losses sustained." *Id.* Sanctions imposed "to vindicate the authority of the court by punishing past acts of disobedience" are criminal in nature. *Id.* Thus, an "unconditionally payable fine" for a contempt finding is criminal in nature. *Id.*

****10** Several requirements must be satisfied before such a criminal contempt sanction may be imposed. The law requires four things: a finding that the individual violated a district court order; a finding that he did so deliberately; a finding that he so acted beyond a reasonable doubt; and notice, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, that failure to comply with the court's orders could result in a criminal sanction and that the court was considering the imposition of such a sanction. *See Smothers,* 322 F.3d at 441–42 (listing the four conditions for imposition of a criminal contempt sanction.).

[10] In *Downey,* 30 F.3d at 686, we held that a conviction of criminal contempt without proper notice does not comport with the strictures of Rule 42(b). Here, the district court did not initially give Pabst notice that he would be subject to criminal sanctions. The original notice for a hearing ordered Pabst to appear, but did not charge him with criminal contempt, nor even suggest he may be subject to punitive criminal sanctions for prior use of the Rose deposition. We conclude, accordingly, that the district court did not follow Rule 42(b) with respect to the first $1,000 contempt sanction imposed upon him. We, therefore, **REVERSE** the February, 2001, order imposing the $1,000 sanction (Appeal No. 01–1401), and **REMAND** for the district court to reconsider that sanction in accordance with this opinion. [5]

We find, however, that Pabst was *fully* on notice as of the January, 2002, sanctions order that his conduct would subject him to a finding of contempt and that a call to appear before the court in connection with that conduct would, in fact, be for the *precise* purpose of determining the propriety of such an award. The first hearing and first sanction, accompanied by the district court's explanation of her rationale, therefore, unequivocally put Pabst on notice that continued violations of the injunction order would neither be tolerated nor forgiven. We therefore **AFFIRM** the sanctions order that is the subject of the appeal in Case 02–1297.

Recusal of Judge Roberts

On appeal, Pabst requests that we find that Judge Roberts should have recused herself and that we remand with direction to assign a different judge. We review such decisions for abuse of discretion. *Union Planters Bank v. L & J Dev. Co.*, 115 F.3d 378, 382 (6th Cir.1997). Under 28 U.S.C. § 455(a), recusal is warranted where "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably ***41** be questioned." *Union Planters Bank*, 115 F.3d. at 383 (quoting *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir.1993), *cert. denied*, 510 U.S. 1163, 114 S.Ct. 1188, 127 L.Ed.2d 538 (1994)). We have found no grounds for recusal.

Sanctions on Appeal

Flint and Rose move for sanctions in this appeal to punish Pabst for items in his brief they believe are frivolous. While the brief in question neither reflects exemplary legal writing nor, candidly, sufficient respect for the federal courts, it does not require further proceedings before us or additional sanctions. Thus, we **DENY** the motion.

III. CONCLUSION

****11** In Freifeld and the Law Firm's appeal (Case No. 01–1118), we **AFFIRM** the district court's finding that Freifeld breached ethical rules, and hold that it did not err in reviewing the magistrate judge's order. We also **AFFIRM** the imposition of the injunction as it applies to use of the deposition by Freifeld and the Law Firm. We **AFFIRM** the judgment imposing sanctions generally, and the sanctions order imposing a total of $20,000 in attorneys' fees specifically, but **REVERSE** the $5,000 fine payable to the court.

In Pabst's appeals, we **AFFIRM** the injunction to the extent it forbids Pabst from using the Rose deposition, and **AFFIRM IN–PART** the finding of contempt against Pabst (Case No. 01–1297), and **REVERSE IN–PART** the imposition of sanctions against Pabst (Case No. 01–1401). We **REMAND** for further proceedings, as appropriate. [6]

All Citations

99 Fed.Appx. 29, 2004 WL 771672

Footnotes

* Honorable Kathleen M. O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

1 It does not appear that either Flint or Rose sought to keep the matter alive post-settlement; all parties appear to have been surprised by the district court's unwillingness to ignore this seemingly collateral issue.

2 Both the magistrate judge and district court found that Freifeld and his firm had engaged in improper *ex parte* contact with Flint's former employees in violation of Michigan Rule of Professional Conduct 4.2 and barred further such contact, though no sanction was imposed in connection with that conduct. The parties have not appealed that aspect of the lower court's ruling.

3 While we tend to agree with the district court that the magistrate judge's interpretation of the attorney client privilege and attendant principles of waiver was also clearly erroneous in the circumstances presented here, we need not reach that issue because we find the district court's consideration of Rule 1.6 to have been both within the scope of her authority and, ultimately, correct.

4 Indeed, the court was quite temperate in her consideration of these serious matters.

5 On this point, we reiterate that the first three prerequisites to the imposition of a contempt sanction were clearly satisfied.

6 We do not *direct* the district court to conduct further proceedings; we merely find that further proceedings in Case No. 01–1401 may be appropriate. The district court is free to assess whether such proceedings are necessary in light of our other findings.

© 2015 Thomson Reuters. No claim to original U.S. Government Works.