Section 1983 – Ethical Considerations

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Section 1983 – Ethical Considerations

- Lawsuits brought pursuant to 42 U.S.C. § 1983 often involve claims against both the government and the employee.
- Many state and local laws require municipalities and local governments to defend and/or indemnify employees sued for acts or omissions arising in the scope of employment.
- This raises issues regarding who is your client and whether you have a conflict of interest. The starting point for answering those questions is the Model Rules of Professional Conduct, specifically Rules 1.13 and 1.7.

Model Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

...

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Model Rule 1.13 Organization As Client

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, ***subject to the provisions of Rule 1.7***. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Model Rule 1.7 Conflict Of Interest: Current Clients

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

(1) the representation of one client will be directly adverse to another client; or

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

Model Rule 1.7 Conflict Of Interest: Current Clients

Even where a "conflict" exists, a lawyer may represent each client if:

- Lawyer reasonably believes lawyer can competently and diligently represent each client;
- Representation is not illegal;
- **Neither client is asserting a claim against the other client represented by the lawyer in the same litigation**; and
- each client gives informed consent, confirmed in writing.

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The determination of whether an attorney representing both a municipality and its employee has a conflict of interest is analyzed on a case by case basis.

See Patterson v. Balsamico, 440 F.3d 104 (2d Cir. 2006).

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Courts do not find conflict where there is no actual conflict:

- *Rodick v. City of Schenectady*, 1 F.3d 1341 (2d Cir. 1993)(attorney argued officers were in scope of employment and raised all defenses)
- *Gordon v. Norman*, 788 F.2d 1194 (6th Cir. 1986)(attorneys stipulated officers were acting under color of law, defended the claim vigorously, and took no position inconsistent with their client's interest)

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Courts have found conflicts of interest where counsel acts contrary to the interest of the employee client:

- *Dunton v. County of Suffolk*, 729 F.2d 903 (2d Cir. 1984) (attorney argued client acted as irate husband rather than police officer when he found plaintiff with his wife)
- *Johnson v. Board of County Comm'rs*, 85 F.3d 489 (10th Cir. 1996) (actual conflict found where attorney representing client in his official capacity failed to inform him about his exposure to individual liability)

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- *Baker v. Gerould*, 2005 U.S. Dist. LEXIS 26498 (W.D.N.Y. 2005) (actual conflict found to exist between individual defendants where one co-defendant prepared report recommending administrative action against two co-defendants)
- *Marderosian v. Shamshak*, 170 F.R.D. 335 (D. Mass. 1997) (finding actual conflict where defendant was represented by attorney who advised defendant to take action that was the subject of lawsuit and judgment and who failed to raise advice as a defense.)

CITY OF ATLANTA

In the event of a conflict of interest between the City of Atlanta and an officer or between officers, the City Attorney may elect to hire outside counsel to represent the officer(s) not represented by the City Attorney.

CITY OF ATLANTA GROUNDS FOR REFUSAL OF REPRESENTATION

a. The act or omission did not arise out of and in the course of employment.
b. The officer acted or failed to act because of actual or intentional misconduct, fraud, or corruption or malice.
c. The defense of the civil action creates a conflict of interest between the City and the officer.
d. The litigation is for the purposes of criminal prosecution.
e. Defending the civil action is not in the best interest of the City.
f. The officer failed to act as a result of impaired judgment caused by the voluntary consumption of alcohol or illegal drugs.
g. Except in an emergency situation or upon extenuating circumstances, officer acted or failed to act directly contrary to the advice of the city attorney.
h. The officer acted or failed to act in such a manner as to constitute a criminal offense involving theft, embezzlement or other similar crime with respect to property or money of or in which the city has an interest.

CITY OF ATLANTA

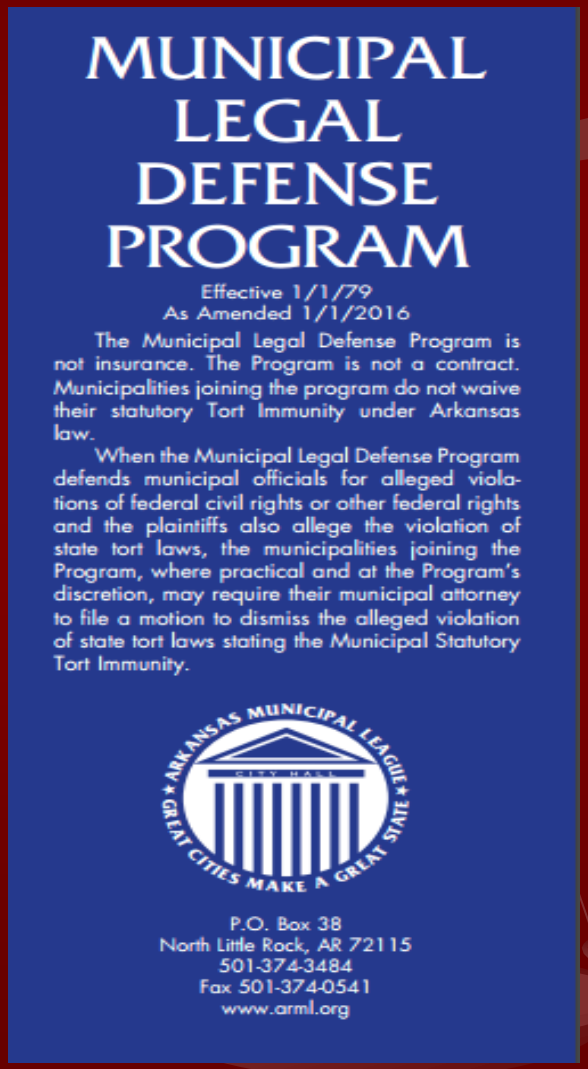
- The City of Atlanta is **NOT** required to indemnify officers in Section 1983 claims.

- The Atlanta City Code Section 2-783 (h) states "[w]here the City has undertaken to defend civil actions brought against officers or employees as provided by this section, the city may, in its sole discretion, by resolution duly adopted and approved, pay all or any part of final judgments awarded against officers or employees by courts of competent jurisdiction or any amount payable as monetary settlement of such civil actions."+

CITY OF ATLANTA

- However, "[n]o sum shall be paid pursuant to this section where punitive or exemplary damages have been assessed against any officer or employee by any court of competent jurisdiction." Atlanta City Code Section 2-783(h)(2).
- As such, the City is prohibited from paying <u>any</u> amount where punitive or exemplary damages are assessed.

Arkansas Municipal Legal Defense Program



Arkansas Municipal Legal Defense Program

- The Arkansas Municipal League offers legal defense and expense coverage up to 90% for suits against municipal officials and employers and civil rights suits against municipalities.
- This coverage, however, does not extend to punitive damages.
- The relevant legal defense provided by the AML includes all relevant appearances, research, briefings and pleadings and any and all necessary trial preparation and representation.

Arkansas Municipal Legal Defense Program

- Under the terms of the AML Defense Program contract, a municipality is primarily liable for judgments rendered against an employee of that municipality if damages occur as a portion of the employee's duties.
- The AML's director has the ultimate discretion to settle any claim prior to the entry of a judgment.

The Ethics of Settlement

- Under the provisions of the Defense Program Contract, the AML's decision to settle a claim is superior to the rights of a municipality or its officers.
- This comports with the nationwide standard regarding the rights of insurers:

The Ethics of Settlement

- Absent bad faith, and where the policy so states, an insurer has the right to control the defense of, and ultimately settle, the case. *See, e.g., Emcasco Ins. Co. v. American Intern. Specialty Lines Ins. Co.,* 438 F.3d 519, 521 (5th Cir. 2006).
- This holds true even where an insurer wants to settle over a policyholder's objections. *Vintilla v. Safeco Ins. Co.,* 417 F. Supp. 2d 922, 925 (N.D. Ohio 2006); *Harris v. Standard Acc. & Ins. Co.,* 191 F. Supp. 538, 540 (S.D.N.Y.),*rev'd on other grounds*, 297 F.2d 627 (1961), *cert denied,* 369 U.S. 843, 82 S.Ct. 875, 7 L.Ed.2d 847 (1962)

The Ethics of Settlement

- Put plainly, "It is generally agreed that under policy provisions giving the insurer the right to defend and settle claims against the insured, the insurer may be held liable to the insured for any damage to the insured ensuing where the insurer acts with bad faith toward the insured and improperly refuses or fails to compromise the claim involved." *Home Indem. Co. v. Snowden*, 264 S.W.2d 642, 645 (Ark. 1954).