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Ethical Obligations of Municipal Attorneys when a Councilmember is sued Personally.

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The American Bar Association ("ABA") has promulgated the Model Rules of Professional Conduct ("MRPC") which provides guidance to states in adopting rules setting the standards of ethical behavior and practices of attorneys. As attorneys, we must endeavor to govern our conduct in line with the code of professional conduct applicable within our respective jurisdictions. When working for a corporation, especially a governmental entity, issues can arise that create situations in which an attorney find him/herself walking a tightrope of potential ethical conflicts.

When a lawsuit is filed against an elected public official, one of the first questions that must be ascertained is: "what is the claim?" However, this seemingly simple question is multi-faceted. Is the claim filed in the official's individual or official capacity? Is the entity also named? Is the alleged action covered by insurance, if any? Is the entity immune from liability for the alleged action? In what capacity was the official engaged? An attorney must determine who is the client and if conflicts exist prior to responding to the complaint. This paper will attempt to work through these considerations, in relation to the ethical obligations set forth in ABA MRPC 1.7, 1.8(b), and 1.13. Care should be taken to consider the applicable amendments to the MRPC in your jurisdiction, as well as any applicable state laws or charter provisions that may shift or waive ethical issues and obligations.

If the claim involves defamation, the public official may be entitled to a First Amendment defense. As of 2021, legislation has been adopted in at least thirty states and Washington D.C. to counter "strategic lawsuits against public participation" ("SLAPP"); such regulations are generally referred to as "anti-SLAPP" laws.[1] In some states, anti-SLAPP laws apply to public servants, while other states specifically exclude government entities and officials from this First Amendment protection.[2] Texas' anti-SLAPP statute was amended in 2019[3] to exclude "a government entity, agency, or an official or employee acting in an official capacity."[4] This amendment was a result of the dismissal, pursuant to the Texas Citizens Participation Act, of claims, of *ultra vires* acts by officials of the Fort Bend Independent School District arising out of enforcement of truancy violations.[5] In light of the differing protection of anti-SLAPP statutes, if your jurisdiction provides anti-SLAPP protection to your public officials, this paper may only be relevant as to more limited types of claims, especially as to claims of defamation from the dais.

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[1] Cheryl Mullin and Erica Mahoney, *Strategic Lawsuits Against Public Participation: Avoiding the Sting of an Anti-SLAPP Challenge*, 40 FRANCHISE L.J. 647, *647, Spring, 2021.
[2] *Id*. at *653 (internal citations omitted).
[3] Acts 2019, 86th Leg., ch. 378 (HB 2730).
[4] TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (West 2020).
[5] Roach v. Ingram, 557 S.W.3d 203, 209 (Tex. App. – Hous. [14th Dist.] 2018), *pet. for rev. denied*.

Coverage.

If your entity has insurance coverage, it is important to submit the suit promptly, irrespective of whether the entity has immunity from the claim or if the interests of the public officials and the entity are adverse. If your entity is self-insured, you may want to confer with the governing body, absent the member who has been sued, to determine how the entity will proceed, unless state law requires such coverage.[6] A coverage determination presents a unique dilemma for a municipal attorney: (1) as the attorney for the entity, you have a duty to protect the entity from actions of its officials and employees; (2) should a neutral third-party or the governing body determine coverage, you as legal counsel could avoid political issues relating to the coverage decision. An attorney in this scenario must walk a fine line, since the entity may act only through its officials, but the entity's interests are not always aligned with the interests of individual officials.

If a lawsuit involves claims in which a governmental entity has immunity from liability, the insurer may not limit representation to only claims it would pay. Instead, at least in some jurisdictions, the insurer is required "to defend a claim against an insured when any theory of the complaint gives rise to the possibility that the insurer would be liable for its costs."[7] The theory behind this requirement is that the "duty to defend is broader than the duty to pay, [thus] the insurer may have to defend against claims which are not covered by the policy."[8] This broader duty does not eliminate the possibility of a conflict arising in the representation of the insured and the insurer. Rather, it imposes an obligation for the insurer to provide outside representation, or to reimburse the insured for such representation, when such a conflict does arise.[9] Many jurisdictions have held that when a claim for punitive damages, from which cities are immune from liability, is asserted, this claim raises an inherent conflict that requires the insurer to retain outside counsel for the insured.[10]

Of course, the duty to provide an attorney is not synonymous with indemnity, unless required by law.[11] If coverage or indemnification is limited in any manner, the insurer must provide a reservation of rights to the official who has been sued, so that the official is aware that he/she may still be personally liable, depending on state laws and determination of liability, if any. The official should also be made aware that the official's failure to cooperate with the attorney

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[6] This presumes that the entity may not have been sued and the member sued solely in their individual capacity for a claim that the entity has not waived governmental immunity.
[7] Illinois Municipal League Risk Management Ass'n v. Seibert, 585 N.E.2d 1130, 1134 (Ill. App. – 4th Dist. 1992) (citing Maryland Cas. Co. v. Peppers, 355 N.E.2d 24, 28 (Ill. 1976).
[8] *Seibert*, 585 N.E.2d at 1134 (internal citations omitted).
[9] *Id*. at 1136 (citing Thornton v. Paul, 384 N.E.2d 335, 343 (Ill. 1978)).
[10] *Seibert*, 585 N.E.2d at 1137 (internal citations omitted).
[11] *See generally*, Mangella v. Keyes, 613 F. Supp. 795, 798 (D. Conn. 1985) (quoting CONN. GEN. STAT. § 7-101a); Miller v. City of New York, 865 N.Y.S.2d 523, 527 (Sup. Ct. 2008) (citing GEN. MUN. LAW § 50-k); Eaves v. City of Worcester, 2012 U.S. Dist. LEXIS 175113, *20 (D. Mass. Dec. 11, 2012) (citing MASS. GEN. L. CH. 258, § 9).

appointed by the entity may result in loss of coverage or a judgment of joint liability, as well.[12] As a point of caution, at least one court has held that an entity cannot merely provide representation in the member's official capacity if the member is being sued in both their official capacity and personal capacity.[13]

Capacity.

While it is important to determine in what capacity the individual is being sued, claims against officials in their official capacities claim typically do not give rise to these types of ethical challenges. "An official capacity claim is the same as a claim brought directly against the governmental entity."[14] Further, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office."[15]

An official may be found liable in his/her individual capacity for wrongful acts committed during his/her tenure with the governmental entity. "It is firmly established that a defendant in a 1983 suit acts under color of state law when he abuses the position given to him by the State."[16] In *Tyson v. Cnty of Sabine*, an officer, Boyd, was found to have acted under color of law, but in his individual capacity.[17] Boyd had responded to a welfare check of the plaintiff at her home while on duty; however, the next day he returned, off-duty but in a police department shirt, and proceeded to threaten the plaintiff with arrest and then sexually assaulted the plaintiff.[18]

In determining the potential liability of an entity for wrongful acts committed by a member, one must look to whether the act was committed in the performance of the actor's official duty, even if the act was a violation of law, and whether the allegedly wrongful acts served a legitimate government objective.[19] Analyzing the plaintiff's claims of Boyd's acts under the *Due Process Clause* of the *Fourteenth Amendment*, the court found that the "state has no interest in sexually abusing its citizens[; therefore], sexual abuse by a state official cannot be justified by any legitimate government objective."[20] Similarly, a municipality has no interest in committing torts against members of the public, which means that the interests and defense theories of the member and the entity inherently conflict. In that case, it is imperative that outside representation be sought to avoid a conflict.

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[12] *Eaves*, at *23.
[13] Johnson v. Board of County Comm'rs, 85 F.3d 489, 493 – 494 (10th Cir. 1996) (no writ).
[14] Smith v. Glasscock, 2020 U.S. Dist. LEXIS 81424, *9 (citing Ky. v. Graham, 473 U.S. 159, 166 (1985)).
[15] *Smith*, 2020 U.S. Dist. LEXIS at *9 (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989)).
[16] Tyson v. Cnty. of Sabine, 42 F.4th 508, 518 (5th Cir. 2022) (quoting West v. Atkins 487 U.S. 42, 49-50 (1988)).
[17] *Tyson*, 42 F.4th at 523.
[18] *Id*. at 513 – 514 (there were three other complaints of sexual misconduct against Boyd prior to this occurrence).
[19] *Id*. at 518.
[20] *Id*.

In *Johnson v. Board of County Comm'rs*, the sheriff and board were sued by four female employees alleging sexual harassment and/or gender discrimination.[21] Greer filed an appearance with the court for the entity and the sheriff solely in his official capacity, leaving the sheriff to represent himself in his individual capacity, *pro se*.[22] Greer filed a motion for summary judgment for the board and the sheriff in his official capacity, arguing that the employees were all the personal staff of the sheriff, in his individual capacity, and the board was not the employer for purposes of Title VII liability.[23] The lower court denied the motion and the parties ended up settling the suit, without any payment from the sheriff.[24]

Prior to the settlement of the underlying case, the judge ordered Greer, and her firm, "to show cause why all pleadings filed on behalf of [defendant sheriff] should not be stricken and under what legal authority Greer presumed to enter a limited appearance on behalf of [the sheriff]."[25] Greer argued that her representation of the sheriff in his official capacity aligned with her representation of the board pursuant to the distinctions set forth in *Hafer v. Melo*.[26] In *Hafer*, the U.S. Supreme Court held that a suit against an official of an entity is really a suit against the entity.[27] The court struck the appearance of Greer in the sheriff's official capacity and ordered an appearance by the sheriff in both capacities. The court noted:

> [t]he distinction between an appearance on behalf of an individual named in a lawsuit and the capacities in which that individual is sued apparently escapes Greer. A persons may be sued in more than one capacity in a single lawsuit. This does not mean an attorney may limit his or her appearance on behalf of that person to one of the capacities in which the individual is sued.[28]

Further, such a limitation of representation raised a serious ethical issue for the court since it was unclear who the client was.[29] Finally, the court determined that Greer violated the Colorado Rules of Professional Conduct by leaving the sheriff exposed to liability in his individual capacity and disqualified her.[30]

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[21] *Johnson*, 85 F.3d at 491.
[22] *Id*.
[23] Johnson v. Board of County Comm'rs, 859 F. Supp. 438, 440 (D. Colo. 1994) (memo. op.).
[24] Tracy Harmon, *Cheek sex-harassment tab comes to $450,000*, THE PUEBLO CHIEFTAN (JAN. 13, 1995, 9:00 PM), https://www.chieftain.com/story/special/1995/01/14/cheek-sex-harassment-tab-comes/9030874007/.
[25] Johnson v. Board of County Comm'rs, 868 F. Supp. 1226, 1227 (D. Colo. 1994).
[26] *Board of County Comm'rs*, 868 F. Supp. at 1229 (citing Hafer v. Melo, 502 U.S. 21 (1991).
[27] *Board of County Comm'rs*, at 1230 (citing *Hafer*, 502 U.S. at 25).
[28] *Board of County Comm'rs*, at 1230.
[29] *Id*. at 1230.
[30] *Johnson*, at 491- 492.

A court order regarding a violation of an ethical rule is appealable even if the lawsuit is moot due to settlement. Greer appealed, challenging the district court's decision. The appellate court determined that even though the underlying claims in the lawsuit were moot, Greer had standing to appeal the order disqualifying her.[31] The plaintiffs' claims against sheriff in his individual capacity "seek to impose personal liability upon a government official for actions he takes under color of state law," as opposed to official capacity claims that are "only another way of pleading an action against an entity of which the officer is an agent."[32] Such individual v. official capacity claims can lead to defenses that differ or are in conflict, especially where the entity may allege that the individual employee is solely at fault.[33] Accordingly, the appellate court found that Greer was in violation of MRPC 1.7, not Rules 1.1 and 1.2 as found by the lower court, because she undertook to represent two parties with adverse interests, without getting informed consent.[34]

Adverse Interests

ABA MRPC 1.7 – Conflict of Interest: Current Clients.

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> > (1) the lawyer reasonable believes the representation will not adversely affect the relationship with the other client; and
> >
> > (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> > (1) the lawyer reasonably believes the representation will not be adversely affected; and
> >
> > (2) the client consents after consultation.

Although a public official may have been behaving in their official capacity, or under color of law, the interests of the entity and the official may not be aligned. An attorney bears a continuing duty to evaluate the potential for diverging or conflicting interests between the entity and the public official. Disqualification of

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[31] *Id*. at 492.
[32] *Id*. at 493 (quoting Kentucky v. Graham, 473 U.S. 159, 195 (1985)).
[33] *Johnson*, at 493.
[34] *Id*.

counsel occurs when an attorney "suffers from an actual conflict based on the" facts of the case, which renders "the attorney's duty of loyalty and zealous representation to the client . . . thereby impaired."[35] This potential for conflict is especially magnified in an organizational setting.

Under MRPC 1.7, it is paramount that an in-house attorney refers to the state law, municipal charter, entity by-laws, and/or relevant ordinances to determine the attorney's duties to the client prior to initiating a defense or selecting outside counsel. The in-house attorney must endeavor to determine not only potential liability and coverage but also who may ethically select the attorney to represent each party named in the suit. In applying the tenets of MRPC 1.7 to a municipal attorney's duty, the Michigan courts have consistently held that, where the in-house attorney has an actual conflict, the attorney must appoint an outside attorney.[36] However, if the claim involves official actions, or good-faith performance of official duties, indemnified under the charter, the city's attorney does not have a conflict requiring the appointment of outside counsel at the City's expense.[37]

As a general rule, "even where the interests and arguments of co-defendants are perfectly aligned, a municipal attorney is still required to consult with co-defendants and obtain their informed consent to simultaneous representation".[38] This duty to consult does not automatically compel disqualification. When the entity has undertaken and agreed to indemnify the co-defendant or state law compels representation, absent an actual conflict, a municipal attorney will not be disqualified or required to incur the expense of outside representation for a co-defendant.[39]

Even after obtaining informed consent, "an attorney who represent both municipal and individual defendants may find that" the defendants interests diverge so greatly from the other defendants interests "that the attorney cannot act as [a] zealous advocate for all."[40] At that point, the attorney must withdraw from representation. The existence of diverging interests is not always clear at the on-set of litigation. As a New York federal court observed, a conflict is not always inherent in joint representation of an employee witness and the organizational client, but "disqualification under Rule 1.7(a) occurs where at the time the issue is presented the attorney engaged in simultaneous representation suffers from an actual conflict based on the witness's expected testimony".[41]

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[35] George v. City of Buffalo, 789 F. Supp. 2d 417, 434 (W.D.N.Y 2011).
[36] *See generally*, Barkley v. City of Detroit, 514 N.W.2d 242, 243 (Mich. App. 1994); Young v. Flint City Council, 2006 Mich. App. LEXIS 3820, *4 (Mich. App. 2006).
[37] *Barkley*, at 243.
[38] *Eaves*, at *20.
[39] *Eaves*, at *19 (Massachusetts state law compels representation unless a conflict exists under MASS. GEN. L. ch. 258 § 6).
[40] *Eaves*, at *19 (quoting Dunton v. Cnty. of Suffolk, 729 F.2d 903, 907 (2d Cir. 1984).
[41] *George*, at 434.

This point in time analysis is a continuing obligation and is fact specific. In *George v. City of Buffalo*, the plaintiff sought to take the deposition of an employee of the City in an age discrimination and political retaliation case. The employee, represented by defense counsel, repeatedly refused to answer questions based upon his Fifth Amendment rights and fears of retaliation, and then retired from the City during the pendency of the litigation.[42] Defense counsel continued to assert representation of both the retired employee and City; however, plaintiff argued that the employee and City had differing interests, based on employee's refusal to testify, and thus, defense counsel had a conflict under Rules 1.7 and 1.13.[43] The court found that because the employee had retired, the issues relating to retaliation were no longer present and therefore, the interests of the retired employee and the City were not adverse.[44]

Interests of the parties will be adverse when either seeks to relieve liability by blaming the other party. The attorney representing the entity and employee, Pfeiffer, in *Dunton v. Cnty of Suffolk* introduced evidence at trial that Pfeiffer was acting outside of the scope of his employment and was solely liable for the plaintiff's claims.[45] The attorney had argued in his original answer that Pfeiffer "was acting in good faith pursuant to his official duties and responsibilities", but never made this argument at trial.[46] Pfeiffer appealed and sought reversal of the judgment against him, which the court granted.[47]

An attorney shall not engage in multiple representations, even when mandated by statute, if such representation violates the attorney's ethical duties. In *Dunton*, the attorney argued that Pfeiffer "acted as a husband, not even as an officer," as he pulled the co-worker of Pfeiffer's wife out of the wife's car when it appeared the co-worker was sexually assaulting Pfeiffer's wife.[48] The attorney went on the categorize Pfeiffer's behavior in a similar manner on several other occasions throughout the trial and never argued that the employee acted in good faith in stopping an alleged sexual assault.[49] The court found that the opinion of the U.S. Supreme Court in the *Monell* decision, which recognized an inherent conflict between the interests of the city and the employee, was directly relevant to the facts of this case.[50] Indeed, the court found that the attorney "not only fail[ed] to act as a conscientious advocate for Pfeiffer, but was acting against Pfeiffer's interest."[51] Such an egregious conflict of differing loyalties made disqualification

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[42] *Id*. at 422.
[43] *Id*. at 425.
[44] *Id*. at 435.
[45] *Dunton*. at 906.
[46] *Id*.
[47] *Id*. at 910.
[48] *Id.* at 906.
[49] *Id*.
[50] *Id.* at 907 (citing Van Ootegehem v. Gray, 628 F.2d 488, 495 n.7 (5th Cir. 1980)).
[51] *Id*. at 908.

appropriate.[52] Thus, unless the parties' interests are exactly aligned, representation by separate counsel is always advisable.

Provisions of a local charter will prevail over MRPC. In *Flint v. Young*, the city attorney sued the mayor and city council over the mayor's attempt to lay off employees in the city clerk and council offices.[53] At a conflict hearing in the circuit court, the judge admonished Ms. Young after she attempted to appoint attorneys for the council and herself.[54] The Court of Appeals reversed and remanded, holding that the Flint City charter gave the chief legal officer the sole authority to manage the litigation affairs of the city.[55] The court reasoned that the charter controlled over the ethical rules, such as MRPC 1.7, where Ms. Young had not attempted to represent either party, but had appointed outside counsel to represent each party independently. By doing so, she remained in compliance with MRPC 1.7. The council, as a body, had no authority to hire its own attorney.[56] The outcome would be different for an appointed official, such as city manager, who has the right to decline the entity's attorney and to retain separate representation at his/her own expense, thereby removing any potential conflict.[57] Therefore, an attorney is bound to comply with MRPC 1.7 except where the MPRC conflicts with a provision in the city charter, in which case, the charter controls.

Where a charter provides for coverage only if the city would be liable, the risk of conflict exists, and the MRPC controls. Likewise, in *Barkley v. City of Detroit*, a police officer moved to disqualify the city's attorneys under MRPC 1.7(b), because he did not consent to the dual representation.[58] The city's charter provided for coverage for employees and officers acting within their official duties; however, if any of the conduct was willful or not in good faith, the acts were not covered.[59] It was the duty of the in-house attorney to investigate whether the actions were in good faith and covered, or not, and to make a recommendation to the city council, who would determine coverage.[60] This process, as set forth in the city's charter, created an almost automatic conflict. The attorney had to gather information, including facts that the entity could possibly use against the employees, in making the recommendation to council.[61] The court upheld the

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[52] *Id*. (citing Shadid v. Jackson, 521 F. Supp. 87, 88 – 90 (E.D. Tex. 1981)).
[53] *Flint City Council wants City Attorney Trachelle Young booted from office*. https://www.mlive.com/flintjournal/newsnow/2008/03/flint_city_council_wants_city.html (accessed 02/12/2023)
[54] *Id*.
[55] *Young*, at *4 – 5.
[56] *Id*. at *7 – 8.
[57] Leleux-Thubron v. Iberia Parish Gov't, 2015 U.S. Dist LEXIS 8020, *12 – 13 (W.D. La. Jan. 23, 2015).
[58] *Barkley*, at 243.
[59] *Id*.
[60] *Id*.
[61] *Id.* at 244

lower court's determination that a conflict was inherent in this process and that the city's attorney could not represent the employees.[62]

When the defendants argue that the employees acted in their official capacity, and do not claim individual capacity liability, there is no conflict of interest requiring separate representation. In *Rodick v. City of Schenectady*, the employees sought to have an adverse judgment against them overturned due to dual representation of the parties.[63] The *Rodick* court found that, unlike the parties in the *Dunton* case "both the City and the [employees] argued that the [employees] were acting in their official capacity. Furthermore, the [employees] concede that their trial counsel advanced and argued all possible defenses available to them, including the qualified immunity defense".[64] Thus, the employees were not entitled to separate counsel and there was no prejudice to the employees that would warrant overturning the jury's verdict.[65]

Informed Consent

In order to overcome possible issues arising from joint representation, an attorney must obtain informed consent under MRPC 1.7. In addition, "if an actual conflict of interest materializes, even if it arises later in the same case", informed consent must again be obtained.[66] Determining whether an attorney obtained "adequate informed, written waiver is [ ] obviously a fact specific inquiry."[67] A California court has set forth a list of seven factors a court should consider:

> (1) the waiver's breadth; (2) its temporal scope, i.e., whether it waived only current conflicts or applied to all conflicts in the future; (3) the quality of the discussion between attorney and client; (4) the specificity of the waiver; (5) the nature of the actual conflict; (6) the sophistication of the client; and (7) the interest of justice.[68]

These factors are important to ensure that informed consent was obtained in compliance with MRPC 1.7. Failure to address any of these factors could result in prejudice of the client's rights and a possible bar grievance. It can also result in a new trial, based on an attorney's failure to provide zealous representation for each of the represented parties.[69]

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[62] *Id.* (an additional issue arose regarding the denial of coverage, which the employees appealed and the city was represented by the in-house attorneys against the employees).
[63] Rodick v. City of Schnectady, 1 F.3d 1341, 1343 (2d Cir. 1993).
[64] *Id.* at 1350.
[65] *Id*.
[66] Ballew v. City of Pasadena, 2020 U.S. Dist. LEXIS 267789, *19 (C.D. Cal. Nov. 12, 2020) (citing CAL. R. PROF. CONDUCT 1.7 cmt. 2).
[67] *Ballew*, at *18 (citing State Comp. Ins. Fund v. Drobot, 192 F. Supp.3d 1080, 1099 (C.D. Cal. 2016)).
[68] *Ballew*, at *18 (citing Exp. Dev. Can. v. Ese Elecs. Inc., 2017 WL 3122157, *3 (C.D. Cal. 2017) (internal citations omitted)).
[69] Marderosian v. Shamshak, 1997 U.S. Dist. LEXIS 7560, *23 – 24 (D. Mass. Jan 16, 1997)

The requirement for informed consent cannot be used to force an entity to bear the cost of separate counsel absent a legitimate conflict of interest. In *Eaves v. City of Worcester*, an officer, Duffy, hired separate counsel and sought to disqualify the city's attorneys based on their previous representation of him in litigation matters and representation of the city in investigating his employment actions.[70] Duffy argued that he would not consent to the joint representation based the conflict created by this history.[71] The city countered that the interests of the defendants in this matter were aligned and that it would be indemnifying Duffy for any damages awarded to the plaintiff.[72] In addition, there were no pending disciplinary issues pending against Duffy, although the court noted that the employment attorneys were not the same attorneys representing Duffy in this matter.[73] The court found that at this point in time, no conflict existed to justify Duffy's objection to the dual representation; therefore, Duffy was not entitled to separate representation at city expense.[74]

Informed consent is necessary to comply with MRPC 1.7, but it is not the only ethical obligation an attorney must consider. The Model Code of Professional Responsibility, DR 5-105 imposes on the attorney the separate obligation to determine if they can ethically continue representing two parties in the same matter, even after obtaining informed consent.[75] Thus, under MRPC 1.7, an attorney's "loyalty to a client is [ ] impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."[76] The test under DR 5-105(B) is that "an attorney should not continue employment if the employment is likely (1) to adversely affect his judgment on behalf of one or both of the clients, or (2) to involve the attorney in representing differing interests."[77] The burden rests on the attorney to determine if the joint representation is ethical, whether the client is an organization or an individual.

Governmental Clients.

ABA MRPC 1.13 – Organization as Client.

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
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> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related

[70] *Eaves*, at *13 – 14.
[71] *Id.* at *14.
[72] *Id.* at *18.
[73] *Id.* at *14 and 18.
[74] *Id.* at *23.
[75] Guillen v. City of Chicago, 956 F. Supp. 1416, 1422 (N.D. Ill. 1997).
[76] *Id*. at 1426 (internal citations omitted).
[77] *Id*. at 1422.

> to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
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> * * *
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> (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.
>
> (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.

"A lawyer shall proceed as is reasonably necessary in the best interest of the organization."[78] The comments to MRPC 1.13 provide that this rule applies to governmental entities.[79] Comment 10 of the MRPC 1.13 further states that "discussions between the lawyer for the organization and the individual may not be privileged" and the in-house attorney should advise the employee or officer of the potential for conflict.[80] As the in-house attorney, and the attorney for the entity, you are likely already conflicted in a suit against the governing body and its individual members.[81] Part of the determination of whether a conflict exists entails reviewing the facts and ascertaining if the entity and the council member are aligned in the defense of the suit. If not, the model rules require that you advise the member that they will have outside representation and that the entity's position may be averse to that of the member, pursuant to ABA MRPC 1.13(f).

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[78] 9 ABA MODEL RULES OF PROFESSIONS CONDUCT AND CODE OF JUDICIAL CONDUCT 1.13 (2019 ed.).
[79] In re Schuessler, 578 S.W.3d 762, 771 (Mo. S. Ct. 2019); 9 ABA MRPC 1.13 at Comment 9.
[80] 9 ABA MRPC 1.13 at Comment 10.
[81] Eugster v. City of Spokane, 39 P3d 380, 387 (Wash. 2002).

MRPC 1.13 does not prohibit dual representation but focuses on the duty to the entity. Of course, if the interests of the parties could be in conflict, the parties must knowingly waive the conflict and give informed consent in writing, as provide under MRPC 1.7.[82] However, in the municipal context, considering the decision in *Monell v. Dep't of Soc. Servs*.,[83] "the interests of a municipality and its employees inherently conflict."[84]

Duty to the Organization.

Government attorneys, for the reasons cited below, are appropriately held to a higher standard of conduct. Filing false charges to cover an in-custody assault, making a racist-homophobic slur, failing to report misconduct, and lying to the FBI are not actions that are in the best interest of the organization. Three assistant circuit court attorneys in St. Louis were disciplined after one attorney, Worrell, who was later disbarred and imprisoned, filed false charges against a suspect to cover up the beating of the suspect by a St. Louis detective.[85] The other two attorneys, Schuessler and Dierdorf, who were subsequently indefinitely suspended, knew about the false charges, but instead of reporting Worrell's misconduct, made derogatory jokes about the suspect, and lied to their supervisors, IAD, and the FBI.[86] Both Schuessler and Dierdorf were found to have violated Missouri Rule 4-1.13(b), which is mirrored after MRPC 1.13(b), because they knew Worrell "had violated the law by filing false charges against a suspect to cover up a detective's brutal assault of the suspect."[87]

The *In re Schuessler* court noted that as provided in ABA Standard 5.22, "when a lawyer in an official or governmental position knowingly fails to follow proper procedure or rules, and causes injury or potential injury to a party or to the integrity of the legal process" suspension is appropriate.[88] The continuing nature of Schuessler's and Dierdorf's dishonesty is misconduct that "undermine[s] public confidence in not only the individual but in the bar."[89] While this case doesn't involve claims against a member of the governing body, it does reinforce that government attorneys are held to a higher standard of conduct. As government attorneys, our behavior must be above reproach, although these lawyer's actions fell far below any standard of conduct considered professional.

While MRPC 1.13(b) provides for referring perceived misconduct to a higher authority, the public disclosure of alleged misdeeds is a violation of an attorney's duty to act in the best interest of the entity. A city attorney, Harding,

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[82] *Guillen*, at 1422.
[83] 436 U.S.658 (1978).
[84] Tapia v. City of Albuquerque, 10 F. Supp. 3d 1171, 1190 (D.N.M. 2014) (internal citations omitted).
[85] *Schuessler*, at 769.
[86] *Id.* at 771 – 776.
[87] *Id*. at 771.
[88] *Id.* at 772.
[89] *Id.* (quoting In re Disney, 922 S.W.2d 12, 15 (Mo. banc 1996).

was suspended from practice for ninety days for sending the local newspaper an open letter in which he described possible misuse of city equipment by the mayor, a city councilwoman, and the chief of police, and a copy of a written opinion by the same city councilwoman denying the city attorney pension benefits for certain years.[90] Harding consulted with the county attorney and the disciplinary administrator's office regarding the allegations.[91] In line with MRPC 1.13(b), the deputy disciplinary administrator advised Harding to discuss the matter with the mayor and city administrator, which he did, but instead of accepting proffered reimbursement for the misuse of equipment by the mayor, Harding informed him that criminal charges would be forthcoming.[92] The letter to the paper revealed information that Harding had learned from his confidential communications with the officers of his client, the city. This disclosure resulted in injury to the client and to the reputations of the officers of the entity.[93]

Under MRPC 1.13(a), an attorney represents the entity, which acts through its officers. Thus, in continuing to advise the officers of the city, Harding's actions were a violation of MRPC 1.13(f) by failing to advise the officials that the entity's interests may be averse to their interests and that his client was the entity.[94] The facts here are a good reminder that when a public official is sued, it is important to remind the official that, as the attorney for the entity, your role may not be in conflict with the interests of the official; it is our duty to inform. Once an attorney explains the identity of the client, no further action is required of the attorney under MRPC 1.13.[95]

Communications.

ABA MRPC 1.8(b) – Current Clients: Specific Rules

> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

As the city attorney, it is likely that confidential communications have occurred that could create a conflict between the entity and an employee. It is imperative that any communication received from the client, acting through its officers, not be used "to the disadvantage of the client, unless the client gives informed consent".[96] Thus,

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[90] In re Harding, 223 P. 3d 303, 310 - 11 (Kan. 2010).
[91] *Id.* at 304.
[92] *Id*.
[93] *Id.* at 309.
[94] *Id.* at 309 (the attorney's violation was of KRPC 1.13(d)).
[95] Casey v. Univ. of Med. & Dentistry of N.J., 2010 N.J. Super Unpub. LEXIS 1866, *14 (N.J – App. Div. 2010).
[96] *Leleux-Thubron*, at *18.

> an attorney from the city's law department may not first interview an employee concerning an underlying suit, thus obtaining confidential information, and then use that information to argue to the city council that no representation should be provided in the underlying case because the particular employee was not acting in good faith within the scope of employment.[97]

Instead, the best policy for the in-house attorney is to decline representation of all parties, if such facts are learned.[98] Even if parties are willing to consent to dual representation, the attorney must still consider whether communications learned from an employee during the litigation will lead to the attorney's representation of the employee being "materially limited by the lawyer's responsibilities" to the entity.[99] Even if specific facts are learned prior to representing dual parties, "there is a danger that the evidence will show [no liability of the city] and liability will rest solely on the individual plaintiff."[100] Therefore, at the out-set of litigation, and before engaging in any communications regarding the underlying facts, an in-house attorney should obtain outside counsel for named employees, unless an internal investigation has already revealed that the interests of the parties are aligned or the entity will be indemnifying the employees regardless of the facts.

Prior to disclosing confidential communications from a client, an attorney must receive consent from the client. "The attorney is in effect a special agent limited in duty to the vigilant prosecution and defense of the rights of the client and not to bargain or contract them away."[101] The South Dakota Supreme Court publicly censured a municipal attorney, Tornow, after he destroyed a recording, that he said didn't exist, and used confidential information to help defend his daughter from a traffic violation.[102] The court noted that:

> [a]s a public sector lawyer and prosecutor, Tornow was vested with powers that a lawyer in private practice does not have. Tornow was a minister of justice obligated to guard the rights of the accused, enforce the rights of the public, and see that justice was done without employing improper methods.[103]

Not only had Tornow misled his client, but he actively worked against the public entity in representing his daughter.[104] While Tornow argued that censure was inappropriate and unnecessary, since he had been fired from the city, the court

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[97] Barkley, at 247.
[98] *Id*.
[99] *Id.* (quoting MRPC 1.7(b)).
[100] *Id.* at 247.
[101] In re Tornow, 835 N.W.2d 912, 925 (S.D. 2013).
[102] *Id.* at 927.
[103] *Id*. (citing In re Discipline of Russell, 797 N.W.2d 77, 87 (S.D. 2017)).
[104] *Tornow*, at 927 (Tornow represented his daughter on appeal and disparaged the municipal court judge and prosecutor, his co-worker.).

determined that attorney discipline "is for the future protection of the public from all members of the bar who are tempted to engage in such conduct."[105]

Conclusion.

Attorneys have a broad ethical duty to their clients. Government attorneys representing an entity acting through elected and appointed officials must proceed with caution, in order to protect each persons interests and their ethical obligations. This maze begins with the simple question posed in the second paragraph of this paper: "what is the claim?" leading through complex issues such as: capacity; adverse interests informed consent; and communications, among others. It was my goal to provide a road map of considerations to assist the reader in complying with both the duty to the client and to the ethical requirements of the bar in the state where you practice.

[105] *Id*. at 927.