Navigating the Conflicts of Interest facing the Municipal Attorney Responsible for Police Misconduct Litigation

42 U.S.C. § 1983 Litigation

Individual Defendants:

- Qualified Immunity Defense
- Municipal Employer obligated to obtain representation and indemnify
  - -- scope of employment required
  - -- punitive damages generally excluded

Municipal Defendants

- No respondeat superior
- Custom, policy and practice
- No Qualified Immunity
- No Punitive Damages

Duty of Zealous Advocacy

- ABA MODEL RULES (Preamble): As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.

- RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS. § 16 (AM. LAW INST. 2000) ("[A] lawyer must, in matters within the scope of the representation: (1) proceed in a matter reasonably calculated to advance the client's lawful objectives, as defined by the client after consultation.")

- MODEL RULES OF PRO. CONDUCT R. 1.13(a) (AM. BAR ASS'N 2003) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 96(1)(a) (AM. L. INST. 2000) ("When a lawyer is employed or retained to represent an organization . . . the lawyer represents the interests of the organization as defined by its responsible agents pursuant to the organization's decision-making procedures . . . .").

Conflicts of Interest

MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS'N 2012) ("[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.")

Third Party Payment

MODEL RULES OF PRO. CONDUCT r. 1.8(f) (AM. BAR ASS'N 2012) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.")

Duties of Confidentiality

- MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR ASS'N 2020) ("(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 . . . . (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.")
- MODEL RULES OF PRO. CONDUCT r. 1.6, cmt. 3 (AM. BAR ASS'N 2012) ("The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."); *id*. r. 1.8, cmt. 5 ("Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client . . . . Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules.")

Consider:

Consider, then, the position of the attorney representing an officer in § 1983 police misconduct litigation who learns of information, as a result of interviewing the client, conducting an investigation to defend the litigation, reviewing materials generated in discovery, or reviewing the evidence that the plaintiff intends to present (or actually presents) at trial, which suggests that the police officer client has violated the excessive-force policy of the law enforcement agency that employs the officer. In light of the attorney's obligation to protect the interests of the client, and the prohibition on disclosing even nonprivileged information adverse to the client, the attorney would be likely to conclude that the best course of action is to settle the lawsuit and avoid disclosing adverse information to the department that employs the officer. After all, given the ubiquity of indemnification, the client's financial interests are unlikely to be harmed by a settlement, but if the matter proceeds, there is a risk that information will come to the attention of the client's employer and could lead to discipline. Even if the case fails to settle and instead goes to trial, the attorney would retain an obligation not to disclose information to the officer's employer that is adverse to the client's interests. (article pp. 25-26)

Cautionary Cases

- Johnson v. Bd. of Cnty. Comm'rs, 85 F.3d 489, 493-94 (10th Cir. 1996) (concluding counsel must advise individual public employee of need for separate representation); Ross v. United States, 910 F.2d 1422, 1432 (7th Cir. 1990) (discussing "serious potential for conflict" between interests of county and its employee); Gordon v. Norman, 788 F.2d 1194, 1196-99 (6th Cir. 1986) (discussing need for counsel to be cautious about representing both public employer and employees); Dunton v. County of Suffolk, 729 F.2d 903, 907-10 (2d Cir. 1984) (attorney could not represent both public employer and employee in light of availability of defense that employee did not act within the scope of employment); Van Ooteghem v. Gray, 628 F.2d 488, 495 n.7 (5th Cir. 1980) ("[A] serious problem of conflict of interest could exist in future § 1983 actions in which one attorney represents both a county and a county official individually."). *Cf.* 28 C.F.R. § 50.15(a)(2) (2020) ("Upon receipt of the individual's request for counsel, the litigating division [of the U.S. Department of Justice] shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States. In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the litigating division (e.g. because of the possible existence of inter-defendant conflicts) the litigating division may delegate the fact-finding aspects of this function to other components of the Department or to a private attorney at federal expense.").

Data from Police Misconduct Cases

(91.8% of cases name individual officers as defendants and seek damages)

District	Joint Rep.	Separate Rep.	N/A	?
E.D. Pa.	294 (82%)	7 (2%)	38 (11%)	18 (5%)
M.D. Fla.	97 (65%)	25 (17%)	20 (13%)	7 (5%)
N.D. Cal.	183 (88%)	5 (2%)	8 (4%)	13 (6%)
N.D. Ohio	106 (82%)	15 (12%)	6 (5%)	2 (1%)
S.D. Texas	72 (72%)	18 (18%)	7 (7%)	4 (4%)
Total	752 (80%)	70 (7%)	79 (8%)	44 (5%)

Explanation?

MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2002) ("[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. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client . . . and (4) each affected client gives informed consent, confirmed in writing.")

745 Ill. Comp. Stat. 10/2-302

If any claim or action is instituted against an employee of a local public entity based on an injury allegedly arising out of an act or omission occurring within the scope of his employment as such employee, the entity may elect to do any one or more of the following:

(a) appear and defend against the claim or action;

(b) indemnify the employee or former employee for his court costs or reasonable attorney's fees, or both, incurred in the defense of such claim or action;

(c) pay, or indemnify the employee or former employee for a judgment based on such claim or action;

(d) pay, or indemnify the employee or former employee for, a compromise or settlement of such a claim or action.

Objection: Officers Become Witnesses

SHORT OF THAT:

- Separate Representation
- No Joint Defense
- Municipal Counsel Should Monitor Discovery
    - Hardball on potential liability for punitives?