Fordham Law Review

Volume 65 | Issue 6 Article 13

1997

Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a 1983 Police Misconduct Suit

Nicole G. Tell

Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a 1983 Police Misconduct Suit

Cover Page Footnote

I would like to thnak Professor Russell Pearce for his assistane with this Note and the Stein Scholars Program for sparking my interest in the study of legal ethics. In addition, I would like to thank my friends, family, and especially Rich for continued patience and support.

REPRESENTING POLICE OFFICERS AND MUNICIPALITIES: A CONFLICT OF INTEREST FOR A MUNICIPAL ATTORNEY IN A § 1983 POLICE MISCONDUCT SUIT

*Nicole G. Tell**

INTRODUCTION

In October 1996, in Bronx County, New York, police officer Francis X. Livoti was acquitted of criminally negligent homicide.[1] Officer Livoti was involved in a confrontation with Anthony Baez that ensued after a football Baez had been tossing hit Livoti's police car.[2] Officer Livoti placed Baez—who, according to Livoti, was resisting arrest—in a chokehold that resulted in Baez's death on December 22, 1994. The ultimate decision in the *Livoti* case sparked the public's already increasing distrust of police officers, and their strong belief that police officers, fueled by too much power and prejudice, commonly violate citizens' constitutional rights.[3] Because many believe that justice is not being served against police officers in criminal court, victims have increasingly turned, instead, to the civil halls of justice.[4] The public, however, may not be aware of the government's involvement in the civil process, where the municipality often provides representation for the police officer, and may also pay for any settlement or judgment amounts levied against the officer.

For example, the Baez family has brought a $48 million wrongful death suit against the city of New York.[5] In addition to a civil wrongful death suit, the Baez family also could bring a § 1983[6] action against

* I would like to thank Professor Russell Pearce for his assistance with this Note and the Stein Scholars Program for sparking my interest in the study of legal ethics. In addition, I would like to thank my friends, family, and especially Rich for continued patience and support.

1. State v. Livoti, 632 N.Y.S.2d 425 (1995).

2. David Gonzalez, *For a Mother, Vindication and Sorrow*, N.Y. Times, Feb. 8, 1997, at 23.

3. *See* David Kocieniewski, *Dismissal Is Urged for Police Officer in a Bronx Death*, N.Y. Times, Feb. 8, 1997, at 1. A large rally of citizens stood by the courthouse chanting and shouting, "No Justice, No Peace," as helmeted police officers cheered the verdict and attempted to keep the peace. Jorge Fitz-Gibbon et al., *Threats of Death vs. Livoti*, Daily News, Oct. 9, 1996, at 8; Mike McAlary, *The Police Cheer While the Citizens Jeer*, Daily News, Oct. 9, 1996, at 8.

4. This trend towards civil justice is not a recent phenomenon but has been increasing over the past twenty years. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); *see also* Allen v. City of Los Angeles, 66 F.3d 1052 (9th Cir. 1995) (describing the civil rights action brought by the passenger in Rodney King's car). As Judge Scheindlin read Officer Livoti's not guilty verdict, a man screamed, "Where do we go for justice?" Jim Dwyer, *Police Dept. Goes Soft on Its Brutes*, Daily News, Oct. 10, 1996, at 8.

5. Kocieniewski, *supra* note 3, at 1.

6. 42 U.S.C. § 1983 (1994).

Officer Livoti, in both his individual and official capacities, as well as against the City of New York. Section 1983 provides a civil right of action for violations of constitutional rights by persons acting under color of state law.[7] Under this statute, if the Baez family sued Livoti in his official capacity, the City would be liable if the Baez family could prove that their son's constitutional rights were violated while Officer Livoti acted according to a formal policy or custom of the municipality. The Baez family may also sue Officer Livoti in his individual capacity. In such an action, the Baez family would avoid the requirement of showing a formal policy or informal custom, and would merely need to prove that Livoti's actions deprived Anthony Baez of a constitutional right.[8] Officer Livoti's defense to his own personal liability would be that he was acting in the scope of his duties as a police officer, following the standard practice and procedure of such employment. This defense, if successful, would shield Officer Livoti from personal liability and would shift responsibility to the City of New York. New York City, as it has done in the Baez family's wrongful death action, would most likely argue that Officer Livoti was not acting according to any policy or custom, but rather for his own purposes.[9]

Although blame-shifting between defendants is common in § 1983 litigation,[10] the same attorney often defends both the police officer and the municipality in a § 1983 suit.[11] This dual representation, however, appears to contravene the ethical rules on conflicts of interest.[12] These prohibitions against representing clients with adverse, or even potentially adverse, interests have been at the core of every ethical code for lawyers since the beginning of the Anglo-American judicial

---

7. The statute provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

8. *See infra* part I.A.

9. *See* Jorge Fitz-Gibbon, *City Says Livoti Acted on His Own*, Daily News, Oct. 23, 1996, at 13.

10. *See* Dunton v. County of Suffolk, 729 F.2d 903, 907 (2d Cir. 1984) (explaining how the structure of § 1983 actions against municipalities and employees promotes liability shifting).

11. The Officer Livoti scenario is an egregious example. Due to the high level of publicity in this case and commentary about Livoti's questionable conduct, the New York City Corporation Counsel would most likely claim, as they did in the wrongful death action, that Officer Livoti was not acting as a city employee but rather on his own. *See* Fitz-Gibbon, *supra* note 9, at 13. In fact, Officer Livoti was fired from the police force and, therefore, would not be eligible for representation.

12. *See infra* part II (discussing the ethical rules that are potentially violated in § 1983 cases where the municipal attorney jointly represents the police officer and the municipality).

system.[13] Current ethical rules exist to guard against dual representation,[14] because such representation may undermine a lawyer's duty of loyalty[15]—a duty which encompasses all aspects of attorney-client relations, including duties of competence,[16] confidentiality,[17] and zealous advocacy.[18]

Despite the importance placed on avoiding such conflicts, evidence suggests that municipal attorneys often overstep ethical boundaries in their joint representation of police officers and municipalities in police misconduct cases. Attorney conflict of interest questions are among the most frequently litigated of all ethical cases,[19] and have been the subject of much scholarly discussion in the past few years.[20] Nonetheless, few courts or disciplinary bodies have questioned the conduct of municipal attorneys in this context.

This Note explores the conflicts that can arise when municipal attorneys attempt to represent both the police officer and the municipality in § 1983 police misconduct cases. This Note argues that inherent conflicts of interest should preclude a municipal attorney from representing both clients in the defense of a § 1983 action. This Note further argues that the only way a police officer's interests can be effectively represented is when he obtains outside counsel from the outset of the lawsuit. Although jurisdictions have been reluctant to adopt a per se rule against dual representation in § 1983 conflict of interest situa-

13. *See Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1292 n.43 (1981) [hereinafter *Developments*] (noting that simultaneous representation was prohibited in the London Ordinance of 1280, one of the earliest professional codes).

14. Model Rules of Professional Conduct Rule 1.7 (1983) [hereinafter Model Rules]; Model Code of Professional Responsibility Canon 5, Canon 9 (1980) [hereinafter Model Code]; *see* Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 Tex. L. Rev. 211, 211-12 (1982); Donald R. McMinn, Note, *ABA Formal Opinion 88-356: New Justification for Increased Use of Screening Devices to Avert Attorney Disqualification*, 65 N.Y.U. L. Rev. 1231, 1238 (1990).

15. Model Rules, *supra* note 14, Rule 1.7 cmt. 1.

16. *Id.* Rule 1.1.

17. *Id.* Rule 1.6.

18. *Id.* Rule 1.3 cmt. 1.

19. *See* Randall B. Bateman, *Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls*, 33 Duq. L. Rev. 249, 249 (1990) (explaining that there has been an increase in motions to disqualify attorneys for conflicts of interest); Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 Notre Dame L. Rev. 1, 1 (1990).

20. *See* 1 Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.1:101 (2d ed. Supp. 1997) [hereinafter Hazard & Hodes, Law of Lawyering]; Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 Fordham L. Rev. 1253, 1260 (1994); Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 Geo. J. Legal Ethics 195 (1987). *See generally Developments*, *supra* note 13 (discussing the various conflicts of interest faced by attorneys).

tions,[21] this Note will demonstrate why separate representation should be required from the beginning of the lawsuit. A per se rule will help overcome the difficulties that courts face in deciding whether a conflict is substantial enough to disqualify an attorney,[22] and will cure the lack of enforcement by courts and disciplinary bodies of conflict rules violations.[23] This solution may also help ease the stress on the municipal attorney, who must continually struggle to guard her client's confidences and protect their interests.[24]

By way of background, part I describes the basic structure of § 1983 police misconduct suits and highlights four key differences between the nature of a § 1983 action against a police officer and a municipality. Part II applies the attorney conflict rules to the representation of police officers and municipalities in § 1983 actions, and identifies when during the representation the conflicts are most likely to occur. In response, part III examines how courts and disciplinary bodies have addressed these conflicts, and finally, argues that a per se rule against municipal attorneys representing police officers and municipalities in § 1983 actions is warranted to avoid conflicts of interest.

I. LOCAL GOVERNMENT AND POLICE OFFICER LIABILITY UNDER SECTION 1983

Section 1983[25] creates a civil cause of action against persons who violate federal constitutional or statutory rights while acting under color of state law. Congress enacted § 1983 "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State [or local government] and represent it in some capacity, whether they act in accordance with their authority or misuse it."[26] Prior to 1978, the only local governmental actors that could be sued under § 1983 were the individual police officers or employees of the municipality.[27] In *Monell v. Department of Social Services*,[28] a

21. *See* Johnson v. Board of County Comm'rs, 85 F.3d 489, 493 (10th Cir. 1996); Silva v. Witschen, 19 F.3d 725, 732 (1st Cir. 1994); Coleman v. Smith, 814 F.2d 1142, 1147-48 (7th Cir. 1987); Gordon v. Norman, 788 F.2d 1194, 1198 (6th Cir. 1986); Richmond Hilton Assocs. v. City of Richmond, 690 F.2d 1086, 1089 (4th Cir. 1982); Kounitz v. Slaatten, 901 F. Supp. 650, 659 (S.D.N.Y. 1995); Clay v. Doherty, 608 F. Supp. 295, 305 (E.D. Ill. 1985); Barkley v. City of Detroit, 514 N.W.2d 242, 247 (Mich. Ct. App. 1994); Minneapolis Police Officers Fed'n v. City of Minneapolis, 488 N.W.2d 817, 819-20 (Minn. Ct. App. 1992); *In re* Opinion 552 of Advisory Comm. on Professional Ethics, 507 A.2d 233, 235 (N.J. 1986); Galligan v. City of Schenectady, 497 N.Y.S.2d 186, 187 (App. Div. 1986).

22. *See infra* part III.A; *see also* Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L. Rev. 71, 120-21 (1996) (describing the "fragmented" standards that courts employ to determine disqualification of attorneys).

23. *See infra* part III.A.

24. *See infra* part II.A.

25. 42 U.S.C. § 1983 (1994).

26. Scheuer v. Rhodes, 416 U.S. 232, 243 (1974) (quoting Monroe v. Pape, 365 U.S. 167, 171-72 (1961)).

27. *Monroe*, 365 U.S. at 187-92.

turning point in § 1983 litigation, however, the Court extended liability by finding municipalities to be liable under § 1983.[29] Now that both the municipality—the "deep pocket" defendant—and the police officer can be held liable for constitutional deprivations, most suits for police misconduct include claims against the municipality. Many differences exist, however, between § 1983 actions against municipalities and police officers. This section identifies the four major differences between these representations: 1) theories of liability; 2) available defenses; 3) damages; and 4) degree of control over both the nature of the representation and indemnification as to expenses and damages. As revealed later in this Note,[30] these differences present conflict problems for the representing attorney throughout the litigation.

A. *Police Officers and Municipalities Are Held Liable Under Different Theories*

The nature of the liability in a § 1983 action for the two defendants—the police officer and the municipality—are quite distinct. Police officers are found liable when, while acting under color of state law, their actions violate a person's constitutional rights. Municipalities, on the other hand, may be liable under § 1983, when the police officer's actions are found to follow an official policy or practice of the municipality.

1. Police Officers' Liability

Under § 1983, courts may hold police officers liable for constitutional violations when their actions are an abuse of their official position. Thus, if an officer, in the course of his duties "under color of [state law]," engages in activity which causes a deprivation of a constitutional right, the officer may be subject to suit under § 1983.[31]

When police officers are acting "under color of [law],"[32] they are directly liable both as police officers and individual persons because their actions violated the plaintiffs' constitutional rights. Therefore, plaintiffs may seek to bring suit against the officer in both his official, as well as his individual capacity.[33] There is, however, an important

28. 436 U.S. 658 (1978).

29. *Id.* at 690-91 (overruling *Monroe*, 365 U.S. 167); *see* Karen M. Blum, *Local Government Liability Under Section 1983*, *in* Section 1983 Civil Rights Litigation & Attorney's Fees 1994, 329, 335 (PLI Litig. & Admin. Practice Course Handbook Series No. 511, 1994).

30. *See infra* part II (discussing conflicts of interest for the municipal attorney in § 1983 litigation).

31. 42 U.S.C. § 1983 (1994).

32. *Id.*

33. When a plaintiff names the police officer in his individual capacity, he is seeking to "impose personal liability upon a government official for actions he takes under color of state law." Kentucky v. Graham, 473 U.S. 159, 165 (1985). A person being sued in his personal capacity comes to the court as an individual, and consequently, a

difference between bringing a § 1983 action against a police officer in his individual capacity and bringing one in his official capacity. Indeed, an official capacity suit is "only another way of pleading an action against an entity" and is considered a suit against the municipality.[34] As long as the government entity receives notice, an official capacity suit is in all respects but its name a suit against the entity.[35]

2. Municipalities' Liability

Although municipalities can be held liable under § 1983 for the actions of their employees or agents, this liability is not based on a respondeat superior theory; in fact, municipalities cannot be held liable under a theory of respondeat superior.[36] Municipalities may be liable only when the police officer's actions are based on policies or customs of the entity.[37] In addition, liability may be imposed on municipalities when the alleged conduct follows from a formally adopted policy or regulation, or when the practice constitutes an informal custom or usage.[38]

A § 1983 plaintiff may establish a municipality's liability under the "custom or usage" prong of *Monell* by demonstrating that the policymaking officials have actual or constructive knowledge of, and acquiesce to, the unconstitutional custom or practice.[39] A municipality

---

plaintiff need not establish a connection to a governmental policy or custom in order to show that the official, acting under color of state law, violated his constitutional rights. *Id.* at 166. Personal capacity suits do not necessarily imply that the officer was acting outside of his official capacity—for example, that the acts were unnecessary to the performance of his job when the alleged violation took place—they only indicate that he will be held personally responsible for these actions. *See* Hafer v. Melo, 502 U.S. 21, 28 (1991).

34. Johnson v. Board of County Comm'rs, 85 F.3d 489, 493 (10th Cir. 1996) (quoting Kentucky v. Graham, 473 U.S. 159, 165 (1985)); *see* Steven S. Cushman, *Municipal Liability Under Section 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C. L. Rev. 693, 699 (1993); Michael T. Jilka, *Immunity Under Section 1983*, 65 J. Kan. B. Ass'n 30, 31 (1996).

35. *See Graham*, 473 U.S. at 166. An official capacity suit, therefore, requires a plaintiff to establish the *Monell* requirements of an official policy or custom, or prove a failure to train which amounts to deliberate indifference to the plaintiff's needs. Blum, *supra* note 29, at 342; *see infra* part I.A.2.

36. Monell v. Department of Social Servs., 436 U.S. 658, 691-92 (1978); Blum, *supra* note 29, at 336; Cushman, *supra* note 34, at 701-02.

37. Harvey Brown & Sarah V. Kerrigan, *42 U.S.C. § 1983: The Vehicle for Protecting Public Employees' Constitutional Rights*, 47 Baylor L. Rev. 619, 622 (1995); Cushman, *supra* note 34, at 702-03; Neal Miller, *Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force*, 28 Creighton L. Rev. 733, 762 (1995).

38. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986); Bouman v. Block, 940 F.2d 1211, 1231 (9th Cir.), *cert. denied*, 112 S. Ct. 640 (1991); Cushman, *supra* note 34, at 706-07.

39. McNabola v. Chicago Transit Auth., 10 F.3d 501, 511 (7th Cir. 1993); Fletcher v. O'Donnell, 867 F.2d 791, 793-94 (3d Cir.), *cert. denied*, 492 U.S. 919 (1989); Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Ac-*

also may be liable, in more limited situations, for failure to train its employees when such failure indicates a "deliberate indifference" to the rights of its citizens.[40] In the context of an excessive force claim, a failure to train theory might be established if a plaintiff could show that the city failed to instruct police officers on the constitutional limitations on the use of deadly force.[41]

B. *Police Officers and Municipalities Have Different Defenses Available*

Police officers and municipalities may be subject to civil liability under § 1983 based on dissimilar theories of liability, and thus, have different defenses available to them. The most notable difference is the availability of the qualified immunity defense to police officers, but not to municipalities.

1. Police Officer's Defenses

Currently, police officers are afforded a qualified immunity defense in their individual capacity.[42] This qualified immunity is often referred to as a "good faith" defense because police officers may assert the defense if they can show that they acted in compliance with the law as they knew it at the time.[43] In *Anderson v. Creighton*,[44] the Court held that plaintiffs can defeat a police officer's claim of qualified immunity only when they can allege particular facts that show an established right, such that it is "sufficiently clear that a reasonable official would understand that what he is doing violates that right."[45]

---

countability Under Section 1983, 62 S. Cal. L. Rev. 539, 587 (1989); Miller, *supra* note 37, at 762-63.

40. City of Canton v. Harris, 489 U.S. 378, 390-92 (1989) (holding that inadequate police training may serve as a basis for § 1983 liability).

41. *See id.* at 390; *see also* Robinson v. City of St. Charles, 972 F.2d 974, 977 (8th Cir. 1992) (finding that plaintiff in an excessive force case must prove city both knew police training was inadequate and deliberately chose to ignore the situation).

42. The Supreme Court has held that, because the notion of official immunity was grounded in common law, Congress intended that common law absolute immunity should apply to § 1983 actions against government officials. Tower v. Glover, 467 U.S. 914, 920-21 (1984); Owen v. City of Independence, 445 U.S. 622, 637 (1980); Tenney v. Brandhove, 341 U.S. 367, 376 (1951). Throughout the twentieth century, however, the Court has chipped away the common law defense of absolute immunity for governmental officials, and instead has adopted a more functional approach to the immunity doctrine. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993); Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. Rev. 1467, 1499-500 nn.106-08 (1996). Because police officers exercise vast power, they enjoy a qualified, rather than an absolute, immunity. *See* Pierson v. Ray, 386 U.S. 547, 555-57 (1967); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 Ga. L. Rev. 597, 601-02 (1989).

43. Terry D. Edwards, *Police Legal Advisors—Friend or Foe? Ethical Dilemmas in 42 U.S.C. Section 1983 Litigation*, 17 J. Legal Prof. 143, 147 (1992).

44. 483 U.S. 635 (1987).

45. *Id.* at 640; *see* Denver Area Educ. Telecommunications Consortium, Inc., v. Federal Communications Comm'n, 116 S. Ct. 2374, 2390 (1996).

With this frequently-employed defense, police officers can partially or completely avoid personal liability—liability in their individual capacity—by proving that the act was done in good faith and pursuant to official policy.[46]

Additionally, a police officer has two different defenses available when the suit is brought against the police officer in both his individual and official capacities. Because an official capacity suit is technically a suit against the municipality,[47] a suit naming the police officer in both capacities is "treated as the transactions of two different legal personages."[48] Therefore, the police officer is regarded as two different people—the municipality and himself individually—with two different defenses, both requiring adequate representation. When the police officer is sued in his official capacity and is legally treated as the municipality,[49] "the only immunities available to the defendant . . . are those that the governmental entity possesses."[50]

2. Municipalities' Defenses

The municipality, unlike the officer, cannot assert a qualified immunity defense based on the good faith of its officials. In *Owen v. City of Independence*,[51] the Supreme Court held that "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense."[52] In disallowing the good faith rationale, the Court held that municipalities cannot assert a qualified immunity defense in § 1983 actions. Hence, a municipality can avoid liability only by claiming that no constitutional violation occurred or by shifting legal responsibility to the police officer by claiming that the police officer did not act with good faith, i.e., pursuant to a policy, practice, or custom of the municipality.[53]

---

46. Just because a police officer asserts a qualified immunity defense, however, it does not follow that the jury will accept this defense and relieve him of liability in his individual capacity. A jury may nonetheless believe that the officer acted recklessly or with wanton indifference and consequently, impose punitive damages on him in his personal capacity.

47. Kentucky v. Graham, 473 U.S. 159, 165-66 (1985).

48. Johnson v. Board of County Comm'rs, 85 F.3d 489, 493 (10th Cir. 1996) (quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 543 n.6 (1986)).

49. *See supra* part I.A.1.

50. Hafer v. Melo, 502 U.S. 21, 25 (1991). See *infra* part I.B.2 discussing defenses available to the municipality, and therefore, to the police officer sued in his official capacity.

51. 445 U.S. 622 (1980).

52. *Id.* at 651; *see* Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for* Owen*?*, 79 Iowa L. Rev. 273, 274 (1994).

53. *See* Gordon v. Norman, 788 F.2d 1194, 1197 (6th Cir. 1986); *see also* Johnson v. Board of County Comm'rs, 85 F.3d 489, 493 (10th Cir. 1996) (noting that the municipality's defense could be that the official "acted in a manner contrary to the policy or custom of the entity"). It should be noted, however, that the officer may be deprived of his qualified immunity defense if the municipality can prove that the officer did not act according to municipal or departmental policy. Furthermore, the evidence the

C. *Police Officers and Municipalities Are Liable for Different Types of Damages*

These co-defendants—the police officer and the municipality—may also be found liable for different types of damages. The most important difference between their damages is that the police officer, unlike the municipality, can be held liable for punitive damages.

1. Police Officers' Potential Damages

When a plaintiff sues a police officer in his individual capacity, the officer may be liable for both compensatory and punitive damages, the latter being available only if the plaintiff shows that the defendant acted recklessly or with wanton indifference.[54] Notwithstanding a finding that the police officer is not liable for compensatory damages, the fact-finder may still impose punitive damages on the police officer in his individual capacity, if the jury believes that he acted willfully or with reckless indifference.[55] The Supreme Court also has held that the liable defendant in § 1983 suits should pay the prevailing plaintiff's attorney's fees absent unusual circumstances that would render such payment unjust.[56]

2. Municipalities' Potential Damages

Even if the police officer successfully asserts his qualified immunity defense, a municipality may be found liable for the constitutional violation and may be required to pay both compensatory damages and plaintiff's attorney fees.[57] While punitive damages may be imposed on the individual police officer, the Supreme Court has found that it would be against public policy to impose punitive damages against municipalities.[58] Thus, the co-defendants' needs diverge significantly when they are exposed to relatively disproportionate liability.[59]

D. *The Degree of Control over the Nature of the Representation and Indemnification as to Expenses and Damages Are Different*

Even though the police officer and the municipality are co-defendants, and, therefore, co-clients of the municipal attorney, the municipality often has primary control over the scope of the representation,

---

municipality might use to support its defense "may very well be the same evidence establishing liability on behalf of the [police officer]." Edwards, *supra* note 43, at 147.

54. Smith v. Wade, 461 U.S. 30, 51 (1983); *Gordon*, 788 F.2d at 1199.

55. *Smith*, 461 U.S. at 51.

56. Newman v. Piggie Park Enters. Inc., 390 U.S. 400 (1968).

57. *See* Blum, *supra* note 29, at 349-50 (explaining that a plaintiff can establish a successful § 1983 action against the governmental entity even if the individual defendant is entitled to qualified immunity); Jilka, *supra* note 34, at 36 (same).

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

59. *See infra* part II.D.

as well as the degree, if any, of indemnification provided to the officer. In considering these matters, municipal attorneys are often guided by municipal statutes that allow or require the municipality to represent and indemnify police officers.

1. Municipalities Decide Whether to Provide Representation for the Police Officer

Most municipalities are mandated by statute to provide counsel for their employees, including police officers, in civil actions arising out of their employment.[60] Many municipal statutes specify that the municipality will provide representation only for employees acting within the scope of their employment.[61] For the purposes of the municipality's statutory duty to defend a police officer, an officer is acting within the scope of his employment "when he is engaged in work he was employed to perform or when the act is an incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or convenience[s]."[62] The question of whether an officer's actions are within the scope, however, must be measured objectively without regard to his malicious or evil intent.[63] A police officer is usually deemed to be acting within the scope of employment when the officer acts with the express or implied powers of his public duties,[64] even if he used improper methods to carry out his official duties.[65] This determination turns not on the specific conduct in question, but rather on whether the conduct is a foreseeable consequence of the officer's duties.[66]

---

60. *See, e.g.*, Cal. Gov't Code § 995 (West 1995) (ensuring representation of employees of any California public entity); N.J. Stat. Ann. § 40A:14-155 (West 1993) (authorizing representation to a member or officer of a municipal police department or force); N.Y. Pub. Off. Law § 18(3)(a) (McKinney 1988) (providing representation to officers and employees of public entities, except New York State employees or employees of municipalities that have adopted other local laws); N.Y. Gen. Mun. Law § 50-k(2) (McKinney 1986) (ensuring the defense of employees of New York City); N.Y. Gen. Mun. Law § 50-j(5) (McKinney 1986) (providing representation specifically to police officers).

61. *See, e.g.*, N.Y. Pub. Off. Law § 18(3)(a) (McKinney 1988) (stating that defense is provided for an employee "acting within the scope of his public employment or duties"); N.Y. Gen. Mun. Law §§ 50-k(2), 50-*l*, 50-m(1) (McKinney 1986) (same); *accord* Cal. Gov't Code § 995 (West 1995) (same).

62. Neal v. Gatlin, 35 Cal. App. 3d 871, 875 (1973) (citing Burgdorf v. Funder, 246 Cal. App. 2d 443 (1966)); *see* Joel Berger, *New York City Corporation Counsel's Viewpoint*, 9 J. Suffolk Acad. L. 69, 72-73 (1994) (explaining that New York City does not consider officers to be in the scope of their employment when they act as individuals in personal altercations).

63. Coleman v. Smith, 814 F.2d 1142, 1149 (7th Cir. 1987).

64. *See* Eugene P. Ramirez, Note, *Police Misconduct Suits: The Duty to Defend; The Duty to Indemnify; And Whether There Is a Duty to Provide Separate Counsel Under California Government Code Section 825*, 8 Whittier L. Rev. 1041, 1045 (1987).

65. *Coleman*, 814 F.2d at 1149.

66. *See* Blood v. Board of Educ., 509 N.Y.S.2d 530, 532 (App. Div. 1986); *see also* Ramirez, *supra* note 64, at 1045 (explaining the California test for determining "scope

Larger municipalities, such as New York City, are often more strict when deciding whether to represent a police officer,[67] and, therefore, have additional requirements in their representation statutes.[68] Furthermore, some large municipalities have formalized procedures to determine whether the police officer is eligible for representation by the municipal attorney.[69] Smaller municipalities often do not have such procedures, which frequently leads to conflicts problems later in the representation.[70] Even with so-called "formal" office policies, however, unforeseen conflicts may nonetheless arise[71] because most municipalities do not have written guidelines on how to make the determination.[72]

---

of employment"). For example, in *Blood*, a New York State appellate court found that a school teacher accused of striking a student in the eye with a bookbag was acting within the scope of the teacher's employment. *Blood*, 590 N.Y.S.2d at 530. Because a teacher's anger is a generally foreseeable consequence of his duties, only extreme conduct, completely removed from his occupational duties, would warrant a determination by corporation counsel that representation was not required. *Id.* at 532. This broad definition indicates that a municipality may determine that a police officer acted within the scope of employment in order to provide him with representation, yet argue that the officer did not act in good faith. *See infra* part II.B.

67. *See* Linda M. Cronin, *Defending the Individual Police Officer*, 9 J. Suffolk Acad. L. 83, 89-90 (1994). Cronin explains that suburban Nassau County is more willing to represent its police officers in a variety of situations than New York City, which is less responsive to officers' requests for representation. She relates that New York City no longer thinks of its police officers as "24-hour cops" and will likely find officers acting outside the scope of employment when off-duty. *Id.* at 90-91.

68. The New York City Corporation Counsel will not represent a police officer who was "in violation of any rule or regulation of his agency at the time the alleged act or omission occurred." N.Y. Gen. Mun. Law § 50-k(2) (McKinney 1986). Additionally, New York City police officers are not eligible for Corporation Counsel's representation if any disciplinary proceedings are pending against them by the police department. N.Y. Gen. Mun. Law § 50-k(5) (McKinney 1986). If the plaintiff files a complaint with the Civilian Complaint Review Board and the investigation is in progress, this would immediately prohibit the city from representing the officer. *See* Cronin, *supra* note 67, at 95.

69. The New York City Corporation Counsel requires that a police officer send a request for representation to his commanding officer, who makes a recommendation about representation and then refers the request to the police department's deputy commissioner of legal matters. If the deputy commissioner endorses the representation, the request is forwarded to the Corporation Counsel, who makes an additional determination. Telephone Interview with a Managing Attorney, The New York City Corporation Counsel (Nov. 19, 1996) [hereinafter Corporation Counsel Interview]. In Detroit, the city council considers the report and recommendation of the corporation counsel to determine whether the officer should be represented by the corporation counsel. Barkley v. City of Detroit, 514 N.W.2d 242, 243 (Mich. Ct. App. 1994).

70. *See infra* part II.C.

71. *See infra* part II.C.

72. Telephone Interview with a Managing Attorney, The New York City Corporation Counsel (Mar. 4, 1997); Telephone Interview with Taso Kalapoutis, Deputy County Attorney, The Nassau County Attorney's Office (Mar. 5, 1997) [hereinafter Nassau Interview]; Telephone Interview with Bob Cabble, Chief of the State and Federal Torts Bureau, The Suffolk County Attorney's Office (Mar. 6, 1997) [hereinafter Suffolk Interview]. Additionally, no written procedures—either formal or informal—exist to guide the municipal attorney throughout the litigation.

2. Municipalities Decide Whether to Indemnify the Police Officer

In addition to representing police officers, municipalities will often indemnify officers who are found personally liable under § 1983. Indemnification statutes typically require that the officer's actions be within the scope of employment.[73] Furthermore, even though the municipality initially must have determined for the purpose of providing representation that the officer was acting within the scope of employment, the municipality usually makes an independent assessment subsequent to the litigation for the purposes of determining whether the officer will be indemnified.[74]

Municipalities have varying standards for affording indemnification to police officers sued in their individual and official capacities. For example, New York City makes clear "that representation does not automatically lead to indemnification."[75] Many municipalities will defend a police officer only after he signs a letter which allows a municipality to defend the officer, but reserves the indemnification decision until an internal fact-finding process determines that he acted within the scope of employment.[76]

Indemnification statutes usually indemnify police officers against expenses, compensatory damages, or settlement amounts.[77] But unlike municipalities, police officers liable in their individual capacity may also have punitive damages imposed against them.[78] Police officers' fears of personal liability have resulted in low morale,[79] and have prompted numerous municipalities to also indemnify for punitive damages levied against them in their individual capacity.[80] Mu-

73. *See* Cal. Gov't Code § 825(a) (West 1995); N.Y. Pub. Off. Law § 18(4)(a) (McKinney 1988); N.Y. Gen. Mun. Law §§ 50-k(3), 50-*l*, 50-m (McKinney 1986).

74. In New York City, the city's comptroller makes the final indemnification determination after the litigation. Corporation Counsel Interview, *supra* note 69. The municipality is most likely concerned with expending limited funds; consequently, the decision whether to indemnify is made subsequent to litigation when the municipality can better evaluate the police officer's actions and calculate how much public money has already been spent on the defense. Nassau County's statute, however, requires such scope for indemnification to be determined prior to representation by a majority vote of a three-person panel. N.Y. Gen. Mun. Law § 50-*l* (McKinney 1986). In Nassau County, indemnification is provided in a vast majority of the cases. Nassau Interview, *supra* note 72.

75. Berger, *supra* note 62, at 74.

76. *See* Ramirez, *supra* note 64, at 1056. Furthermore, under some "reservation of rights" letters, the public entity can recover the cost of the defense from the police officer if it determines that the police officer acted outside the scope of his employment. *Id.* at 1054.

77. *See id.* at 1050-51.

78. *See supra* part I.C.

79. Ramirez, *supra* note 64, at 1041.

80. *See, e.g.*, Cal. Gov't Code § 825(b) (West 1985) (amending earlier statute to allow city counsel to decide whether to indemnify for punitive or exemplary damages); N.Y. Gen. Mun. Law § 50-*l* (McKinney 1986) (allowing Nassau County to indemnify police officer for punitive damages); N.Y. Gen. Mun. Law § 50-m (McKinney 1986) (same for Suffolk County).

nicipalities lacking direct statutory authority to indemnify for punitive damages may nevertheless have the discretion, after the fact, to indemnify for such damages.[81] But it is often difficult to determine in advance whether the municipality will indemnify for punitive damages, or limit indemnification to compensatory damages.

II. Applying the Conflicts Rules to the Representation of Police Officers and Municipalities in Section 1983 Suits

The differences between § 1983 suits against police officers and municipalities explained above may result in conflicts of interest for municipal attorneys who attempt to jointly represent both defendants. This part highlights potential ethical conflicts implicated in the context of joint representation, and reveals how the ethics rules are often too vague to be applied with any uniformity, and how municipal attorneys often fail to adhere to current ethics rules. In addition, this part demonstrates that the municipalities' representation statutes provide little or no guidance to a municipal attorney facing a conflict. Moreover, most municipalities lack written office procedures on how to proceed in conflict situations.

The four principle conflicts for a municipal attorney are: (1) protecting the police officer's communications during the initial screening interview between the police officer and the attorney; (2) jointly representing the municipality and the police officer after determining, at the initial interview, that the officer may have acted outside the scope of his employment; (3) continuing the municipality's representation after the realization by the attorney, during the joint representation, that the officer may have acted outside the scope of his employment; and (4) handling issues of settlement, indemnification, and appeal during the joint representation of the municipality and the police officer.

A. *Protecting the Police Officer's Communications During the Initial Screening Interview*

In most jurisdictions, the municipal attorney is counsel to the municipal defendant in § 1983 suits against the municipality. In addition, most municipal statutes specify that the municipality will defend the police officer if he acted within the scope of his employment during the conduct in question.[82] Accordingly, it is essential that the municipal attorney first determine whether the officer acted within the scope, and hence, whether the municipal attorney will provide repre-

81. In New York City, the New York General Municipal Law does not directly provide for indemnification of punitive damages. N.Y. Gen. Mun. Law § 50-k(3). Rather, the Corporation Counsel makes a recommendation regarding whether punitive damages should be indemnified and the Comptroller makes the final determination. Corporation Counsel Interview, *supra* note 69.

82. *See supra* part I.D.1.

sentation for the police officer along with the municipality. The municipal attorney often decides this by reviewing the police department's investigatory reports and conducting a screening interview with the police officer.[83]

A potential conflict for the municipal attorney may arise during the initial screening interview when the police officer may share important information which may not necessarily be held in confidence. This situation violates Model Rule 1.6, which provides that a lawyer cannot reveal information about her client's representation to anyone, except as necessary for authorized actions in carrying out such representation.[84] Accordingly, at this stage, the primary concern is determining if, and when, an attorney-client relationship is created, which would dictate whether the lawyer owes the police officer a duty of confidentiality with regard to any information exchanged at the interview.

"[N]o specific formalities are required to create an attorney-client relationship," such as a fee agreement, a written letter of acceptance, or even a handshake.[85] Frequently when clients meet with lawyers to discuss their legal problems and seek or obtain advice, an attorney-client relationship may form.[86] Indeed, the American Bar Association ("ABA") has found that unless a "lawyer takes adequate measures to limit the information initially imparted by the would-be client," Rule 1.6 is applicable to information provided by a prospective client, even if the lawyer does not eventually undertake this representation.[87] The ABA and many courts take a "functional" approach to determining whether an attorney-client relationship exists in screening interviews or initial consultations.[88] It is important to look at what the prospective client reasonably believed the relationship between himself and

83. Corporation Counsel Interview, *supra* note 69; Nassau Interview, *supra* note 72; *see* William H. Pauley III, *Representing the Police Department*, 9 J. Suffolk Acad. L. 77, 78 (1994).

84. Model Rules, *supra* note 14, Rule 1.6. Rule 1.6 applies to any information revealed to the lawyer relating to the client's representation, and is not restricted to communications by the client. *Id.* Rule 1.6 cmt. 5. The lawyer's duty of confidentiality is different from the attorney-client evidentiary privilege that protects the disclosure of certain client communications in judicial proceedings. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 358, at 3 (1990) (explaining the difference between the Model Rule duty of confidentiality and the attorney-client evidentiary privilege).

85. Debra Bassett Perschbacher & Rex R. Perschbacher, *Enter at Your Own Risk: The Initial Consultation & Conflicts of Interest*, 3 Geo. J. Legal Ethics 689, 702 (1990).

86. Bridge Prods., Inc. v. Quantum Chem. Corp., No. 88-C10734, 1990 WL 70857, at *4 (N.D. Ill. Apr. 27, 1990); Perschbacher & Perschbacher, *supra* note 85, at 702-03 nn.50-52.

87. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 358, at 1 (1990).

88. *Id.* at 8.

the lawyer to be when he disclosed communications.[89] The lawyer can properly guard against this imposition of an attorney-client relationship, however, by clearly explaining to the prospective client that communications may not be held in confidence, or by obtaining a waiver of confidentiality from the prospective client.[90]

In addition, Model Rule 1.13, guiding the conduct of organizational attorneys, alters the requirements of Rule 1.6.[91] It provides that when organizational attorneys conduct interviews to investigate wrongdoing, Rule 1.6 protects the employee's confidences from being revealed to third parties only, but not from the entity client.[92] Therefore, the municipal attorney may be permitted to reveal the officer's communications to the municipality, as long as this process is clearly and fully explained to the officer in advance.

The problem, however, is that without formal policies to guide them, municipal attorneys are not uniformly trained to fully explain their role during the screening interview. For example, even in New York City, where the corporation counsel "Mirandizes" the police officer during the screening interview,[93] the attorneys are not told that they have to explain to the police officer exactly what those conflicts might be.[94] Additionally, there is no standard procedure that municipal attorneys are required to follow in order to explain the structure of § 1983 suits and joint representation.[95] For this reason, an officer

89. *See id.*; Bridge Prods., Inc. v. Quantum Chem. Corp., No. 88-C10734, 1990 WL 70857, at *4 (N.D. Ill. Apr. 27, 1990) (focusing on what the client, rather than the attorney, reasonably believed about the relationship); DCA Food Indus., Inc. v. Tasty Foods, Inc., 626 F. Supp. 54, 59-60 (W.D. Wis. 1985) (applying test set out in Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978)); Perschbacher & Perschbacher, *supra* note 85, at 703 & n.52 (noting that attorney-client relationships have been found where the client reasonably believed the attorney was acting in such a capacity).

90. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 358, at 6 (1990); *see* John J. Doyle, Jr. & Michael L. Blumenthal, *The Defendants' Perspective: Ethical Considerations in Representing and Counseling Multiple Parties in Employment Litigation*, 10 Lab. Law. 19, 32-33 (1994).

91. *See* Model Rules, *supra* note 14, Rule 1.13 cmt. 3.

92. *Id.* For example, an in-house corporate attorney who is interviewing an employee of the corporation in order to investigate corporate wrongdoing cannot reveal any information she obtains to outside authorities, but may reveal those confidences to the corporate officers in charge.

93. Perschbacher & Perschbacher, *supra* note 85, at 690; Richard C. Solomon, *Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer*, 25 Sw. U. L. Rev. 265, 333-34 (1996). The New York City Corporation Counsel's municipal attorneys explain to the police officer that they currently represent the city, but reserve the right to determine whether they will also represent the officer. The municipal attorneys also explain that the officer's communications will not necessarily be held in confidence and that conflicts may exist in the joint representation of the municipality and the police officer. Corporation Counsel Interview, *supra* note 69.

94. Corporation Counsel Interview, *supra* note 69.

95. *Id.*; Nassau Interview, *supra* note 72; Suffolk Interview, *supra* note 72. The court in *Dunton v. County of Suffolk* recognized this problem when they noted that

may be unsure about the true purpose of the initial screening interview, and unaware of the attorney's duty of confidentiality, or lack thereof, during the screening interview. Moreover, some municipalities, New York City for example, obtain the police officer's waiver of Rule 1.6's duty of confidentiality.[96] This waiver permits an attorney to turn over information gathered during the initial interview, and during the defense of the police officer, to third parties, such as the District Attorney's office or other appropriate enforcement agencies.[97] This waiver is very "controversial"[98] because it is difficult to determine whether the police officer's consent to the waiver is fully informed and not coerced.[99]

More importantly, municipal attorneys who provide no explanation of their role create an implied attorney-client relationship,[100] because the officer could reasonably believe that an attorney-client relationship exists. Therefore, any subsequent conduct of the attorney must follow the rules of formal attorney-client relationships. Often, when the police officer walks into the municipal attorney's office, he already thinks that she is his attorney.[101] If the police officer believes that he is meeting with his personal lawyer, then it becomes extremely problematic when municipal attorneys fail to explain their role as mere screening agents.

The power that most municipal representation statutes vest in municipal attorneys creates an additional conflict. The initial determination of whether the officer's actions were within the scope of his employment, so as to qualify him for representation, is within the municipal attorney's discretion.[102] Because the municipality may not be obligated to provide for the police officer's defense if the officer was acting outside the scope of his employment, the municipal attorney

---

the initial letter to the police officer informing him of potential conflicts was inadequate. 729 F.2d 903, 909 (2d Cir. 1984); *see* Doyle & Blumenthal, *supra* note 90, at 23; *see also* England v. Town of Clarkstown, 634 N.Y.S.2d 958, 959 (Sup. Ct. 1995) (finding that Town failed to contradict officers' claims that they were never informed of the potential conflicts that could occur in § 1983 actions, and that they could be found personally liable).

96. Berger, *supra* note 62, at 75.

97. *See id.* (discussing the representation letter the police officer must sign requiring him to waive his attorney-client confidentiality ethical rule).

98. *Id.*

99. Mary C. Daly, *An Overview of Ethical Dilemmas*, 9 J. Suffolk Acad. L. 113, 120 (1994).

100. *See supra* notes 88-89 and accompanying text; Perschbacher & Perschbacher, *supra* note 85, at 703.

101. *See* Perschbacher & Perschbacher, *supra* note 85, at 690, 702-03.

102. *See* Barkley v. City of Detroit, 514 N.W.2d 242, 244 (Mich. Ct. App. 1994) (finding that the city council's decision to represent is final); Williams v. New York, 476 N.E.2d 317, 317 (N.Y. 1985) (stating that scope-of-employment determination is to be made by corporation counsel); Nassau Interview, *supra* note 72.

may be pressured to closely scrutinize the police officer's conduct.[103] The municipality has an interest in preserving limited public funds and labor, and the possibility exists that pressure from her superiors may influence the municipal attorney's finding as to the officer's actions.[104] Therefore, a municipal attorney may be inclined to deem any questionable conduct by the police officer to be outside the scope of his employment, thus leaving the police officer to pay for his own representation.[105]

B. *Jointly Representing the Municipality and the Police Officer After Initially Determining that the Police Officer May Have Acted Outside the Scope of Employment*

If the municipal attorney determines, after the initial interview, that the police officer may have been acting outside the scope of his employment, the co-defendant's defenses will diverge. If the municipality argues that the police officer was not acting within the scope of his employment, it may escape liability and shift responsibility to the police officer in his individual capacity. In contrast, the officer, to avoid liability in his individual capacity, will always argue that his actions were in fact done pursuant to an official policy or custom—thus shifting legal responsibility to the municipality.

The above example presents multiple ethical conflicts. The ethical rules prohibit a lawyer from simultaneously representing two or more clients when the interests of one may be in conflict with another.[106] Except for a few limited exceptions, Model Rule 1.7(a) bars a lawyer from representing a client whose interests are "directly adverse" to

---

103. This is most apparent in municipalities that refuse to reimburse a police officer who retains outside counsel. In some municipalities, however, an attorney who thinks that the officer may have done something wrong will transfer the case to outside counsel paid for by the municipality. This is the usual practice in Nassau County, Long Island. Nassau Interview, *supra* note 72.

104. *See* Minneapolis Police Officers Fed'n v. City of Minneapolis, 488 N.W.2d 817, 822 (Mich. Ct. App. 1992) (finding that city tends to "make choices of representation that maximize economy, expertise, and efficiency"); Robert W. Schmidt, *The Nassau County System of Indemnification*, 9 J. Suffolk Acad. L. 43, 47 (1994) (explaining the pressure placed upon municipal attorneys to keep cases in-house).

105. *See* Cronin, *supra* note 67, at 95. The determination that the police officer acted outside the scope of his employment may also impact the municipality's decision about indemnification. *See supra* part I.D.2. Additionally, due to the broad definition of "within the scope," the attorney may make a hasty determination that the officer acted within the scope of employment to provide him with representation. *See supra* notes 61-66 and accompanying text. This may create problems later in the litigation. *See infra* part II.C.

106. Model Rules, *supra* note 14, Rule 1.7. Rule 1.7(a) provides:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.

Id.

another client.[107] Comments to the Model Rules suggest that subsection (a) would apply only to the representation of opposing parties in litigation.[108] The comments do recognize, however, that "impermissible conflict" may arise in other situations if there is a "substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement . . . or liabilities in question."[109] Model Rule 1.7(a), however, allows an attorney to jointly represent multiple clients if two prerequisites are met: fully informed consent by both parties to the representation,[110] and the lawyer's reasonable belief that this representation will not adversely affect the relationship with the other client.[111]

When municipal attorneys jointly represent both a municipality and a police officer, who may have acted outside the scope of his employment, they violate the ethics rules.[112] An ethical violation occurs because a direct conflict exists between the co-defendant's defenses, and Rule 1.7(a) would prevent such simultaneous representation.[113] Due to outside pressures, it seems unlikely that there could be any meaningful waiver of the conflicts by the clients in this situation.[114] In addition, even if the clients could waive the conflicts, no attorney could

107. *Id.*; *see* Hazard & Hodes, Law of Lawyering, *supra* note 20, § 1.7:207.

108. Model Rules, *supra* note 14, Rule 1.7 cmt. 7.

109. *Id.*

110. *Id.* Rule 1.7(a)(2).

111. *Id.* Rule 1.7(a)(1). The Model Rules shed no light on the meaning of "reasonably believes" in this context, except to say that the term indicates situations in which the lawyer thinks the matter or circumstances are reasonable. *Id. Terminology* cmt. 8.

112. The *Dunton v. County of Suffolk* case provides a classic example of the dangers involved in jointly representing these co-defendants. 729 F.2d 903 (2d Cir. 1984). In that police misconduct action, the Suffolk County Attorney answered the complaint with the affirmative defense that Officer Pfeiffer was acting in good faith pursuant to official policy. *Id.* at 906. At trial, however, he argued that Pfeiffer did not act within the duties of a police officer. *Id.* (finding the County Attorney's remarks that Pfeiffer "was acting as an irate husband rather than a police officer" to be indicative of actions outside the scope of employment). The *Dunton* court held that the County Attorney had violated the ethics rules prohibiting an attorney from representing clients with adverse interests and those cautioning against the appearance of impropriety. *Id.* at 908.

113. Additionally, when a suit is brought against the police officer in his individual and official capacities, the same conflict of interest would exist for an attorney who attempts to represent the police officer in both capacities. As noted above, an official capacity suit is considered to be a suit against the entity, and as such is conceived as if equivalent to the action against the municipality. *See supra* notes 34-35 and accompanying text. Hence, if a direct conflict exists between the defenses of these co-defendants, the ethical rules would prohibit the same attorney from representing the police officer in both capacities. Under Model Rule 1.7(a), the police officer would need one attorney to represent him in his official capacity—the municipal attorney—and a different attorney to represent him in his individual capacity. *See* Model Rules, *supra* note 14, Rule 1.7(a).

114. Each client must consent after consultation. *See* Model Rules, *supra* note 14, Rule 1.7(a)(2).

reasonably believe that the representation of the municipality would not adversely affect the police officer's representation.[115]

Meaningful waiver, by either the police officer or the municipality, would be unlikely for a number of reasons. First, a municipal attorney and a police officer may be pressured to agree to the joint representation in order to meet the waiver requirements of Rule 1.7(a). Also, a police officer may waive a conflict because the municipal attorney has not adequately explained the conflicts to the officer.[116] In addition, the police officer may not be able to afford separate representation.[117] Therefore, a police officer may be inclined to waive the conflict due both to lack of resources and a failure to comprehend the consequences of joint representation.

Even if the police officer waives the conflict, it is also necessary to secure consent of the municipal-client. Often, however, it is not clear who is authorized to consent to such a waiver on the municipality's behalf.[118] Often the municipal attorney herself or her supervisor determines whether the municipality's consent is warranted in a particular situation. Accordingly, the two requirements of Rule 1.7(a)—consent of both parties and the attorney's determination that neither client's representation will be adversely affected—collapse into one requirement. The vagueness of the Model Rule places too much power in the hands of the municipal attorney, who may feel pressure to maintain joint representation.[119] Additional pressure exists in municipalities like New York City—where lawsuits are often brought against the Corporation Counsel by an officer the city has refused to represent—because it believes he acted outside the scope of his employment.[120] Finally, the municipality also may consent to joint repre-

115. The Model Rules require that "the lawyer reasonably believ[e] the representation will not adversely affect the relationship with the other client . . . ." *Id.* Rule 1.7(a)(1).

116. *See supra* part II.A.

117. There is the possibility that police unions could play a role in providing representation to police officers in § 1983 actions. *See infra* note 241.

118. Government lawyers frequently have difficulty identifying their client in order to determine who has authority to give instructions. Model Rules, *supra* note 14, Rule 1.13 cmt. 7. According to Rule 1.13, an attorney may undertake the dual representation of the organization and an individual constituent, but must still meet all the conflicts of interest parameters of Model Rule 1.7. *Id.* Rule 1.13. The problem of determining when a lawyer can reasonably represent two clients with potential conflicts under Rule 1.7 is exacerbated, however, when one of the clients is an entity. Because it is difficult to determine the specific identity of the government client, its interests become hard to define.

119. This is particularly true for municipal attorneys who would transfer the case to outside counsel, paid for by the municipality, if a conflict arose. *See* Schmidt, *supra* note 104, at 47.

120. Cronin, *supra* note 67, at 94-95; Corporation Counsel Interview, *supra* note 69; *see* Harris v. Rivera, 921 F. Supp. 1058, 1060-61 (S.D.N.Y. 1995). Sometimes, the police officer brings an action against the municipality if it refuses to indemnify for expenses or damages. *See* Mothersell v. City of Syracuse, No. 95-CV-1452 (FJS) (GJD), 1997 WL 27574, at *1 (N.D.N.Y. Jan. 22, 1997); Torres v. New York City Dep't

sentation because it would likely help the municipality prove that the police officer was not acting within the scope of employment.[121]

Even if the municipal attorney does not attempt to jointly represent the police officer and the municipality, the mere determination that the officer may have acted outside the scope of his employment creates policy concerns. First, in municipalities statutorily required to provide representation for the police officer,[122] this determination may have more than just a financial effect on the police officer who must then find his own representation. Separate representation may also prejudice the judge and jury against the police officer: they may assume that he is not represented by municipal counsel because there is a concern that his actions were not made in good faith and within the scope of his employment. As this Note will demonstrate, due to these concerns, it is better for the police officer to be provided with separate representation from the initiation of the suit.

C. *Continuing the Municipality's Representation After Realizing, During the Joint Representation, That the Police Officer May Have Acted Outside the Scope of Employment*

If the municipal attorney believes that the officer's actions were within the scope of his employment, she will usually agree to simultaneously represent both the police officer and the municipality.[123] It is possible, however, that as the simultaneous representation unfolds,

---

of Corrections, No. 93 Civ. 6296 (MBM), 1995 WL 63159, at *1 (S.D.N.Y. Feb. 15, 1995); Coker v. City of Schnectady, 613 N.Y.S.2d 746, 747 (App. Div. 1994). These suits, brought on behalf of the police officer by the police officer's union, add to the continued fight between the union and the Corporation Counsel on how to best handle § 1983 litigation involving police officers. *See* Cronin, *supra* note 67, at 90.

121. One alternative to providing joint representation is to transfer the police officer's representation to a municipal attorney other than the screening attorney, thus creating the impression of separate representation. A police officer, with limited funds and limited knowledge of the legal and ethical implications, may be more inclined to consent to this type of representation, as he may believe it has less chance of creating conflicts for the municipal attorney or problems for the police officer.

The transfer of the police officer's representation to another division or to another municipal attorney, however, does not cure the ethical problem. Vicarious disqualification under Rule 1.10 would prohibit a different municipal attorney from representing the police officer. *See* Model Rules, *supra* note 14, Rule 1.10(a). Model Rule 1.10 is employed to prevent the sharing of client confidences between lawyers in the same firm. Under Rule 1.10, when one lawyer is prohibited from representing a client due to a conflict of interest, all lawyers associated with her firm are also prohibited from representing that client. *Id.* This "vicarious disqualification" helps to preserve the lawyer's duty of loyalty and to avoid the appearance of impropriety against which the Model Code cautions. *See* Model Code, *supra* note 14, Canon 9; Steinberg & Sharpe, *supra* note 19, at 10-11.

122. *See supra* note 60.

123. *See* Minnesota Police Officers Fed'n v. City of Minneapolis, 488 N.W.2d 817, 820 (Minn. Ct. App. 1992) (finding that the city attorney can represent co-defendants when their legal positions are consistent); Schmidt, *supra* note 104, at 45; Corporation Counsel Interview, *supra* note 69; Nassau Interview, *supra* note 72; Suffolk Interview, *supra* note 72.

the municipal attorney will discover information indicating that the officer was not acting, in fact, within the scope of his employment.[124] At this point, the municipality's best interests will be served by abandoning the officer and arguing that the officer was not acting in good faith.[125]

This abandonment is effectuated when the police officer's municipal attorney "cuts him loose," thus requiring the police officer to retain separate counsel.[126] The process of "cutting loose" the police officer during the joint representation creates a conflict for the municipal attorney who then continues to represent the municipal client once she has been privy to the police officer's communications.[127] This creates a different conflict than the one discussed earlier in which the municipal attorney continues to represent the municipality after the initial screening interview with the police officer.[128] At this stage in the representation, the police officer has obviously become the municipal attorney's client and different ethical rules are applicable.[129]

The conflict of interest ethics rules do not only prohibit the representation of a person whose interests are adverse to a present client, but also prohibit such representation when the interests are adverse to a former client's interests.[130] Model Rule 1.9(a) bars lawyers from representing a client in the "same or a substantially related matter" to that in which they had represented a former client, if the present client's interests are "materially adverse" to the former client's interests.[131] Such "successive representation" is permissible only with the

124. *See* Clay v. Doherty, 608 F. Supp. 295, 303 (N.D. Ill. 1985) (describing the possible conflicts that might arise if new evidence is uncovered); Pauley, *supra* note 83, at 78 (discussing how during discovery the attorney can learn information from other police witnesses); Schmidt, *supra* note 104, at 49-50 (explaining that the initial determination whether to provide representation may change if additional facts are learned).

125. *See supra* part II.B. Although this creates the type of direct conflict of interest predicament anticipated by Model Rule 1.7(a), municipalities with no—or perhaps vague—statutory direction may be inclined to continue the joint representation.

126. Corporation Counsel Interview, *supra* note 69. Conversely, it is possible that due to the objective "in-scope" determination for representation by a municipality, the attorney would continue to find that the officer acted within the scope of his employment in order to continue to provide representation, while at the same time argue that the officer acted in bad faith. *See supra* notes 61-66 and accompanying text.

127. The Nassau County Attorney would continue to represent the county after obtaining separate representation for the police officer. Nassau Interview, *supra* note 72. Suffolk County, however, has never been in the position of "cutting loose" a police officer once an attorney-client relationship has been established, although the possibility exists for this to happen. Telephone Interview with Bob Cabble, Chief of the State and Federal Torts Bureau, The Suffolk County Attorney's Office (Mar. 18, 1997).

128. *See supra* part II.B.

129. *See supra* notes 85-90 and accompanying text.

130. *See* Marshall J. Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U. L. Rev. 1115, 1117 (1982); Steinberg & Sharpe, *supra* note 19, at 5-6.

131. Model Rules, *supra* note 14, Rule 1.9(a).

former client's consent.[132] This rule attempts to guard the lawyer's duty of confidentiality to clients, a duty that is essential to both a lawyer's duty of loyalty, and to the lawyer-client relationship in general.[133]

Although Rule 1.9(a) prohibits the attorney from representing the municipality without the former client's consent,[134] some municipal attorneys continue representing the entity without the consent of the police officer.[135] The municipal attorney cannot assume that the police officer's consent to the original joint representation is sufficient consent to the subsequent representation of the municipality.[136] This procedure would appear to directly violate the ethics rules on successive representation.

The municipal attorney's representation of the municipal client violates Rule 1.9 because such representation cannot pass the "substantial relationship" test that courts use to determine whether an attorney's disqualification is warranted in a successive representation conflict.[137] Courts will look closely at the two matters involving the lawyer and the former client to determine whether there is a substantial relationship between the issues, rather than just between the general subject matter.[138] In this situation, the underlying action still involves the same issues as the representation of the police officer. In addition, the test is based on an irrebuttable presumption that the attorney received information from the former client.[139] The police officer confided in the attorney and these confidences could be used

132. *See id.*; Doyle & Blumenthal, *supra* note 90, at 31; Steinberg & Sharpe, *supra* note 19, at 5-6.

133. *See* Solomon, *supra* note 93, at 343-44; Steinberg & Sharpe, *supra* note 19, at 6; *see also* Model Rules, *supra* note 14, Rule 1.6 cmt. 21 (stating that "[t]he duty of confidentiality continues after the client-lawyer relationship has terminated").

134. Model Rules, *supra* note 14, Rule 1.9(a).

135. Nassau Interview, *supra* note 72; *see* Barkley v. City of Detroit, 514 N.W.2d 242, 246 (Mich. Ct. App. 1994) (explaining that city attorneys violate Rule 1.9 when information they have received from a former client becomes relevant to a current client).

136. *See* N.Y.S. Bar Ass'n. Comm. on Professional Ethics, Op. 674, at 9 (1995).

137. T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953); *see* Bateman, *supra* note 19, at 252; Susan R. Martyn, *Conflict About Conflicts: The Controversy Concerning Law Firm Screens*, 46 Okla. L. Rev. 53, 53-54 (1993); Solomon, *supra* note 93, at 347.

138. *T.C. Theatre Corp.*, 113 F. Supp. at 268; *see* Bateman, *supra* note 19, at 252-53; *Developments*, *supra* note 13, at 1328; Martyn, *supra* note 137, at 54.

139. Bateman, *supra* note 19, at 252; *Developments*, *supra* note 13, at 1328-29; Martyn, *supra* note 137, at 54. The test has undergone some modifications and many jurisdictions are more reluctant to disqualify lawyers in cases that would not have passed the original substantial relationship test. For example, the Second Circuit will allow a lawyer to rebut the presumption of shared confidences. Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975). The Second Circuit has also stated that the standard of proof to rebut the presumption should not be "unattainably high." Cheng v. GAF Corp., 631 F.2d 1052, 1056-57 (2d Cir. 1980) (quoting Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1975)), *vacated*, 450 U.S. 903 (1981).

against the police officer in the municipality's defense of the § 1983 action. Additionally, a municipal law office that transfers the municipality's representation, at this stage, to another municipal attorney in its office[140] does not cure the ethical conflict under Rule 1.9. Rule 1.10(a), as discussed above,[141] would vicariously disqualify all municipal lawyers from such representation once one lawyer in the firm is prohibited from the representation.[142]

Recently, however, due to an increased acceptance of screening mechanisms, courts are more willing to tolerate representation of the present client by another attorney in the firm so long as it is not the former client's counsel.[143] Courts will allow an attorney to rebut the presumption of shared confidences between herself and the former client, as well as between herself and the former client's attorney.[144] In order to prevent confidential information from being shared, lawyers often construct screening mechanisms between the two attorneys involved in the litigation. These institutional screening mechanisms seek to prevent the "tainted" attorney from interacting with the newly assigned attorney.[145] The mechanisms used may be one or more of the following: structural, such as separating attorneys either physically or departmentally;[146] procedural, such as restricting access to files;[147] or educational, such as providing programs for lawyers to explain what information can be discussed and how to respect the screening procedures.[148]

With effective screening mechanisms in place, it can be argued that vicarious disqualification, in former client conflict contexts, should not apply to large, highly structured law-offices because they will be better

140. The practice of the New York City Corporation Counsel, which has the luxury of being a larger office, is to transfer the municipality's representation to an attorney in a different division. Corporation Counsel Interview, *supra* note 69.

141. *See supra* note 121.

142. *See* Model Rules, *supra* note 14, Rule 1.10(a) (stating that lawyers in the same firm cannot represent a client when any one lawyer in the firm is prohibited under Rule 1.9).

143. Bateman, *supra* note 19, at 267-68; McMinn, *supra* note 14, at 1254-55; *see* Craig A. Peterson, *Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel*, 59 Notre Dame L. Rev. 399, 409-11 (1984) (advocating screening); Linda A. Winslow, Comment, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 Wash. L. Rev. 863, 881-85 (1987) (same).

144. Bateman, *supra* note 19, at 267-68; McMinn, *supra* note 14, at 1255.

145. These institutional mechanisms are often referred to as "Chinese Walls," but this Note will use the phrase "screening mechanisms." Steinberg & Sharpe, *supra* note 19, at 20; *see* Bateman, *supra* note 19, at 251; McMinn, *supra* note 14, at 1233 n.15; Andrew P. Romshek, Comment, *The Nebraska "Bright Line" Rule: The Automatic Disqualification of a Law Firm Due to a New Lawyer's or Nonlawyer's Prior Affiliations . . . Sensible Solution or Serious Setback?*, 28 Creighton L. Rev. 213, 223 (1994).

146. Breger, *supra* note 130, at 1145-46; Steinberg & Sharpe, *supra* note 19, at 28.

147. Breger *supra* note 130, at 1145; Steinberg & Sharpe, *supra* note 19, at 27.

148. Steinberg & Sharpe, *supra* note 19, at 27-28.

able to protect a former client's confidences.[149] In large cities, many government offices are structured in the same departmentalized manner as large corporate law firms.[150] The New York City Corporation Counsel, for example, is a large government law office consisting of numerous divisions.[151] When the lawyer in the General Litigation Division decides that a conflict exists between the city and the police officer, the representation of the city will be transferred to an attorney in their Torts Division or another division.[152] The city has put into place certain screening mechanisms between these two lawyers, such as forbidding the lawyers from discussing the case.[153]

Screening mechanisms, however, may not be as effective in government law offices—even large ones—as they can be in complex private law firms. First, screening mechanisms may be difficult to construct in government offices where lawyers often have shared support staff, filing cabinets, and computer files.[154] Additionally, in contrast to the private sector, government lawyers are not subject to, and thus will not be deterred by, pecuniary measures such as prohibiting the screened attorney from benefitting economically from the representation.[155] Moreover, the cost of implementing proper screening mechanisms may outweigh the cost of retaining outside counsel.[156] A final thing to consider, in any law office contemplating the use of screening mechanisms, is their inability to protect against intentional disclosures.[157]

In response to charges that government offices' screening mechanisms are ineffective, it can be argued that vicarious disqualification should not even be required of government attorneys. This argument rests on the premise that government attorneys, as advocates for the public interest, already have the necessary ethical checks on their con-

149. *Id.* at 13-14.

150. Model Rules, *supra* note 14, Rule 1.10 cmt. 3 (commenting that in certain circumstances government lawyers who work in separate units should not be considered as part of the same firm). Some states do not even include an attorney general or city attorney's office in its definition of law "firm" for the purposes of vicarious disqualification. *See* Minneapolis Police Officers Fed'n v. City of Minneapolis, 488 N.W.2d 817, 821 (Minn. Ct. App. 1992).

151. *See* City of New York, The 1994-95 Green Book 228-30 (1995).

152. Corporation Counsel Interview, *supra* note 69.

153. *Id.*

154. In the Nassau County Attorney's Office, for example, screening mechanisms would be ineffective due to the small size of the County Attorney's Office and the fact that the attorneys have shared responsibilities on all § 1983 cases. Nassau Interview, *supra* note 72.

155. *See* Breger, *supra* note 130, at 1146; Solomon, *supra* note 93, at 327.

156. Solomon, *supra* note 93, at 327; *see* Breger, *supra* note 130, at 1148-49 (discussing how legal aid offices often lack the financial resources necessary to construct effective screening mechanisms).

157. Martyn, *supra* note 137, at 60; Steinberg & Sharpe, *supra* note 19, at 28.

duct to protect a former client's confidences.[158] For instance, public lawyers do not have the same personal financial incentive that private lawyers have in their cases.[159] Furthermore, there is a notion that government lawyers seek justice above all else,[160] and have less of an incentive, as compared to private lawyers, to reveal client confidences or favor one client over another.

If we take the present ethical rules literally, however, government attorneys are not, and should not, be exempt from the ethics rules' vicarious disqualification provisions. Therefore, without effective screening mechanisms—that are difficult and expensive to construct in government offices—a municipal attorney cannot continue to represent the municipality after withdrawing from the police officer's representation.

D. *Handling Issues of Settlement, Indemnification, and Appeal During the Joint Representation of the Municipality and the Police Officer*

In cases where the police officer is found to have acted within the scope of his employment, municipal attorneys who undertake the joint representation often do not seem cognizant of the continuing difficulties that arise with the sensitive issues of settlement, judgment, indemnification, and appeal. Each of these concerns invokes the attorney's duty, under Rule 1.7(b), to reasonably determine whether her representation of the police officer will be "materially limited" by her responsibilities to the municipality.[161] As this Note demonstrates, municipal attorneys often do not adhere to this requirement.

---

158. *See, e.g.*, Keith W. Donohoe, Note, *The Model Rules and the Government Lawyer, A Sword or Shield? A Response to the D.C. Bar Special Committee on Government Lawyers and The Model Rules of Professional Conduct*, 2 Geo. J. Legal Ethics 987, 1000 (1989) (concluding that the government's client is the public interest); Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. Rev. 625, 629 (1979) (finding that the government lawyer has special responsibilities to the public interest); Jack B. Weinstein & Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, 1 Touro L. Rev. 1, 4-5 (1985) (stating that the government attorney represents the entity and the public).

159. Breger, *supra* note 130, at 1130-31.

160. *See* Lawry, *supra* note 158, at 627.

161. Model Rules, *supra* note 14, Rule 1.7(b). Rule 1.7(b) provides:

> (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. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id.; *see* Model Code, *supra* note 14, EC 5-15 (stating that anytime an attorney represents multiple clients with potentially differing interests, she should carefully examine whether her loyalties will be divided and, when in doubt, decline representation).

Model Rule 1.7(b) applies to simultaneous representation of parties—either co-parties or two clients involved in a similar matter—whose interests *may* conflict.[162] Therefore, Rule 1.7(b) applies even to situations in which there is a potential, rather than a direct conflict as Rule 1.7(a). In Rule 1.7(b) situations, the lawyer can undertake the representation only if the client consents after consultation[163] and the lawyer "reasonably believes" that the representation will not be affected.[164] Because Rule 1.7(b) encompasses more questionable conflict situations than Rule 1.7(a), it "forces a case-specific inquiry into the precise effect that a particular combination of conflicting responsibilities might engender."[165]

As shown earlier, because of the differences between § 1983 actions against municipalities and actions against police officers, the co-defendants will have different needs and interests with regard to their liability,[166] defenses,[167] potential damages,[168] and decisions to represent[169] and indemnify.[170] The municipality is often ultimately responsible for the representation of the police officer, and possibly his settlement or judgments.[171] In addition, the municipality must consider the expenditure of public funds on a lengthy litigation.[172] For

162. *See* Model Rules, *supra* note 14, Rule 1.7 cmt. 7 (commenting that "[s]imultaneous representation of parties whose interests . . . may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b)").

163. *Id.* Rule 1.7(b)(2). Rule 1.7(b) differs from 1.7(a) in that 1.7(a) requires consent of both clients. Rule 1.7(b), however, only requires the consent of this particular client.

164. *Id.* Rule 1.7(b)(1). Rule 1.7(b) differs from 1.7(a) in that 1.7(a) focuses on the effect another client's representation will have on this client. Rule 1.7(b), however, asks if this client's representation will be affected by anything at all.

165. Hazard & Hodes, Law of Lawyering, *supra* note 20, § 1.7:301. The Model Rules make clear that in order for a client's consent to multiple representation to be valid, the consultation "shall include explanation of the implications of the common representation and the advantages and risks involved." Model Rules, *supra* note 14, Rule 1.7(b)(2). In the analogous section of the Model Code, the lawyer must provide "full disclosure" to the clients before they can consent to simultaneous representation. Model Code, *supra* note 14, DR 5-105(C). This would require the lawyer to inform the clients of "both relevant facts and principles of law, the attorney's relationship to the other client, the possible conflicts which may argue for independent counsel, and the scope of the representation." *Developments*, *supra* note 13, at 1312 n.137. As seen in the initial screening interview phase of the representation, the municipal attorney does not always fully inform the police officer of the structure of § 1983 suits and the impact that joint representation can have on the police officer's individual liability. *See supra* part I.A.

166. *See supra* part I.A.

167. *See supra* part I.B.

168. *See supra* part I.C.

169. *See supra* part I.D.1.

170. *See supra* part I.D.2.

171. *See supra* part I.D.2.

172. *See supra* part I.D.2. An example of the amount of money a muncipality may need to expend in defense of police lawsuits is New York City, which spent $270 million between 1986 and 1995 for police lawsuits, and in 1995 alone, the city paid $31 million in damages for police lawsuits. Dwyer, *supra* note 4, at 8.

these reasons, the municipal client may want to settle quickly, and hopefully cheaply, to avoid a long and costly trial. The municipal attorney, likewise, may be concerned over the use of taxpayers' money to fight an expensive litigation that may result in the imposition of significant damages against the municipality. Also, the municipality may worry that a trial would bring negative publicity to the municipality and the entire police department. These reasons may cause the attorney to pressure the police officer to agree to settle rather than continue the litigation.

The police officer, in contrast, may have a greater concern for clearing his name of any wrongdoing and fighting the suit to the end; to him a settlement may constitute a personal admission of wrongdoing. The police officer must contend with the fear of punitive damages being imposed against him in his individual capacity,[173] and the fear that the municipality will not indemnify him for such damages.[174] A police officer facing the possibility of compensatory *and* punitive damages may want to obtain his own private lawyer, although some municipalities will not indemnify officers who seek their own counsel.[175] The issue of indemnification may also affect each defendant's interests in settlement negotiations. During settlement negotiations, the attorney discusses settlement amounts with both clients, but most municipalities allow the municipal client the final say in a settlement agreement.[176] In New York City, for example, the statute that provides representation for the police officer requires the city comptroller to approve the amount of any settlement.[177] Although this policy attempts to promote a client-centered approach to litigation, it fails the ethics rules' proscription on client-driven representation.[178] It also

173. *See supra* part I.C.1.

174. *See supra* part I.D.2.

175. In New York City, the reservation of rights letter that the officer must initially sign in order to request representation presents a "catch-22" for the police officer; the letter makes clear that the city will not indemnify for judgments entered against officers who obtain outside counsel. *See* Cronin, *supra* note 67, at 93-94.

176. Corporation Counsel Interview, *supra* note 69; Nassau Interview, *supra* note 72. In Suffolk County, the County Attorney has the discretion to settle any amount below $25,000. In cases involving amounts larger than $25,000, however, legislative approval by the county is required because the county is self-insured. Suffolk Interview, *supra* note 72; *see* Barkley v. City of Detroit, 514 N.W.2d 242, 247 (Mich. Ct. App. 1994) (explaining that the Detroit representation statute requires the officer to consent to *any* city-approved settlement in order to receive representation by the city).

177. N.Y. Gen. Mun. Law § 50-k(3) (McKinney 1986).

178. The ethics rules prescribe a client-centered approach to representation: The client directs the litigation, defines the lawful objectives of the representation, accepts or rejects settlement offers, and decides when to appeal a decision. *See* Model Rules, *supra* note 14, Rule 1.2(a); Model Code, *supra* note 14, EC 7-7 (stating that the "authority to make decisions is exclusively that of the client"); *see also* Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892, 895 (10th Cir. 1975) (finding that the lawyer lacked authority to settle a client's claim without client ratification).

underscores how the police officer's representation might be "materially limited," thus violating Rule 1.7(b).[179]

The defendants' often divergent concerns also surface when deciding whether to appeal an unfavorable decision. If the police officer and the municipality are found liable at the end of litigation, the officer may want to file an appeal in order to fight his liability to the very end. Depending on the specific facts, the municipality may not want to spend additional public funds on an appeal. Because the officer's case is one of many that the municipality must defend, it may prefer to save limited funds to fight other, more important cases.[180] In New York City, for example, the Chief of Appeals Division at the Corporation Counsel, while considering the police officer's wishes, ultimately decides the issue of appeal.[181]

Model Rule 1.8(f) forbids a lawyer from accepting third-party compensation for representation, unless such party does not interfere in the attorney-client relationship and the lawyer's independent judgment.[182] Hence, when the municipal client's interests are allowed to predominate in the joint representation, and the attorney's ability to zealously advocate for one of her clients is affected—simply because the municipality is paying—the ethics rules are violated.[183] In this situation, the municipal attorney's representation of the police officer is affected so greatly by the municipality's funding of the representation that the attorney should withdraw from the joint representation.

Additionally, it is difficult to prevent an attorney representing co-defendants from using the shared confidences of one client against that client in the defense of the other client.[184] Therefore, adherence to Rule 1.6's protection of client confidences is immeasurably important to a lawyer who is simultaneously representing two clients on a similar matter.[185] A lawyer must also remember that they must adhere to the strict confidentiality requirements of Rule 1.6 when a third

179. Model Rules, *supra* note 14, Rule 1.7(b).

180. *See* William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 How. L.J. 539, 552-55 (1986) (describing a case in which the corporation counsel and the client so greatly disagreed on whether to appeal that the client sought an order to remove counsel); *supra* note 104 and accompanying text.

181. Corporation Counsel Interview, *supra* note 69.

182. Model Rules, *supra* note 14, Rule 1.8(f).

183. "Loyalty to a client is also 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." *Id.* Rule 1.7 cmt. 4.

184. *See supra* notes 154-57 and accompanying text.

185. Model Rules, *supra* note 14, Rule 1.6; *see* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 358, at 4-5 (1990) (explaining that adherence to Rule 1.6, for one client, may require a lawyer to withdraw from the representation of another client).

person is paying for the client's representation.[186] A person who provides compensation for another's representation does not gain the status of a client and cannot become privy to information related to the representation. Even though the municipality is also a party to a § 1983 action, the municipal attorney must still adhere to Rule 1.6 and protect the police officer's communications from all others, including other clients. The municipal attorney faces a struggle in attempting to both protect these co-defendant's communications and advocate zealously for each of her clients; an almost impossible task for any attorney in such a situation.

The municipality's indemnification of the police officer in § 1983 suits also seemingly presents conflict of interest problems for a municipal attorney jointly representing the police officer and the municipality. Practice reveals, however, that the municipal attorney sets aside the issue of indemnification until after the litigation has terminated and tends to discount it as only a potential conflict during the litigation.[187] Many municipal attorneys assert, and courts have agreed,[188] that as long as both defendants claim the same affirmative defense—that the officer was acting in the scope of his employment—and the municipality agrees to indemnify the police officer, that a presumed alignment of interests precludes an actual conflict.[189] These, however, are not adequate safeguards in light of the differences that may arise between the police officer's and the municipality's needs, as well as the potential divided loyalties of the municipal attorney.[190] For instance, some municipalities determine whether to indemnify the police officer at the end of the litigation, and the decision to represent does not necessarily lead to indemnification.[191] Therefore, these municipalities cannot guarantee protection from conflicts. Furthermore, municipalities may extend indemnification as a virtual certainty to a police officer, in order to obtain his consent to a settlement or even to waive conflicts that may arise. The uncertainty of indemnification is

186. Model Rules, *supra* note 14, Rule 1.8(f)(3) (stating that a lawyer can only accept payment from a third party if the lawyer protects client confidences in accordance with Rule 1.6).

187. In *Ricciuti v. New York City Transit Authority*, the Corporation Counsel ignored the potential conflict involved in indemnification and argued that there was no danger of conflict because the officer was found to have acted within the scope of his duties in order to receive representation. 796 F. Supp. 84, 87 (S.D.N.Y. 1992).

188. *See* Richmond Hilton Assocs. v. City of Richmond, 690 F.2d 1086, 1089 (4th Cir. 1982); Manganella v. Keyes, 613 F. Supp. 795, 799 (D. Conn. 1985); Minneapolis Police Officers Fed'n v. City of Minneapolis, 488 N.W.2d 817, 820 (Minn. Ct. App. 1992); *In re* Opinion 552 of Advisory Comm. on Professional Ethics, 507 A.2d 233, 236 (N.J. 1986).

189. *Opinion 552*, 507 A.2d at 236.

190. Even the practices in Nassau and Suffolk Counties, where the indemnification boards determine at the outset of litigation whether they will indemnify the police officer, do not cure the conflicts that arise regarding settlement and appeal. *See* Doyle & Blumenthal, *supra* note 90, at 29.

191. *See supra* part I.D.2.

exacerbated by the fact that only the police officer is susceptible to punitive damages, and that it is often less clear whether a municipality will indemnify these damages.[192] Municipal attorneys and police officers may be willing to ignore any conflicts that arise because they believe, however erroneously, that there is only a small chance that the police officer will be held personally liable so long as both defendants claim the same affirmative defense.[193]

As this section demonstrates, problems arise even if a municipality argues that the police officer acted within the scope of his employment, and says it will provide indemnification for any damages. Municipal attorneys, however, do not view these important issues as actual conflicts of interest during the joint representation, and consequently continue the joint representation without the close scrutiny that these issues warrant. Moreover, in municipalities where outside representation is provided to police officers in certain conflict situations, the municipal attorney may be pressured to retain the representation in-house to keep costs to a minimum. Therefore, she may be willing to close her eyes to situations of differing interests and needs.

To summarize this part, four main conflicts of interest arise for municipal attorneys representing police officers and municipalities in § 1983 suits. First, the lawyer's duty to explain her role and the conflicts that may arise, as well as Rule 1.6's duty of confidentiality, are critical at the initial consulation phase. Second, municipal attorneys risk violating Rule 1.7(a)'s prohibition against simultaneous representation when they jointly represent municipal clients and police officers who may have acted outside the scope of their employment. Third, municipal attorneys—whether the original screening attorney or not—violate Rule 1.9's prohibition against representing clients whose interests are adverse to a former client's interests when they continue to represent the municipality after withdrawing from the police officer's representation. And finally, looking at the totality of the conflicts that can occur—particularly in regard to settlement, judgment, indemnfication, and appeal—municipal attorneys likely violate Rule

192. *See supra* part I.D.2.

193. Linda M. Cronin, an attorney at a firm that represents the New York City police officers' union, offers this story to illustrate how some municipalities' current indemnification procedures add to the problems that arise in this joint representation context:

> [T]he police officers were represented by the city of New York through the trial. The city said . . . the police officers had done nothing wrong. [T]he jury returned a verdict against the police officers for compensatory damages in excess of $70 million. The jury also returned a verdict against each of the police officers for $1 million in punitive damages. The city appealed the verdict and is now backpedaling as to whether it will indemnify the police officers for the compensatory and punitive damages. . . . [I]t appears that even under these optimal circumstances, there is no guarantee of indemnification for the police officer or payment of the judgment for the plaintiff.

Cronin, *supra* note 67, at 97.

1.7(b)'s prohibition against representing clients whose representation may be affected by outside factors. The next part will discuss institutional responses to these conflicts.

III. Attempts to Reconcile the Conflicts of Interest in the Joint Representation of Police Officers and Municipalities in Section 1983 Suits

Few courts or ethics committees have addressed the conflicts of interest discussed in part II. This part describes the limited role that courts and ethics committees have taken in the conflicts of interest debate. In response to this lack of attention, this part also proposes a new approach to the representation of police officers and municipalities in § 1983 actions.

A. *Courts' and Ethics Committees' Responses to the Joint Representation of Police Officers and Municipalities*

In the context of § 1983 joint representation actions involving municipal attorneys, courts usually enter the picture when a disqualification motion is brought against the attorney who is representing the police officer and the municipality.[194] In addition to suits brought by the oppposing party, the police officer himself sometimes moves for disqualification when he wishes to retain separate representation paid for by the municipality.[195] Courts may also review a police officer's request to reverse a judgment against him based on his claim that he did not receive adequate representation.[196]

A court's decision to grant or deny a disqualification motion, however, does not necessarily indicate whether an attorney has committed an ethical violation. This may be because courts vary in their treatment of the conflict rules in determining whether a lawyer should be disqualified.[197] Some courts rely exclusively on the ABA ethical rules, while others reject that approach and instead look to the spirit of the rules in light of the circumstances of a particular case.[198] Conse-

194. *See, e.g.*, Clay v. Doherty, 608 F. Supp. 295, 297 (N.D. Ill. 1985) (noting that plaintiff is seeking disqualification of defendants' counsel); Shadid v. Jackson, 521 F. Supp. 87, 88 (E.D. Tex. 1981) (stating that plaintiffs filed motion to disqualify defense counsel).

195. *See* England v. Town of Clarkstown, 634 N.Y.S.2d 958, 959 (App. Div. 1995); Galligan v. City of Schenectady, 497 N.Y.S.2d 186, 187 (App. Div. 1986).

196. *See* Gordon v. Norman, 788 F.2d 1194, 1196 (6th Cir. 1986); Dunton v. County of Suffolk, 729 F.2d 903, 907-08 (2d Cir. 1984).

197. *See* Bateman, *supra* note 19, at 250-51; Green, *supra* note 22, at 77; McMinn, *supra* note 14, at 1236.

198. *See* Green, *supra* note 22, at 77 & n.32. For example, the court in *Galligan*, looked to the municipality's representation statute to determine the existence of a conflict that would warrant disqualification. *Galligan*, 497 N.Y.S.2d at 187. *But see* England, 634 N.Y.S.2d at 960 (rejecting statutory approach and adopting focus on ethical considerations to conflicts).

quently, a court's dismissal of a disqualification motion does not necessarily clear the attorney of a violation of the ethics conflict rules.[199]

Moreover, most courts have been reluctant to disturb the police officer's choice of counsel without an actual, present conflict of interest.[200] In part, this is because many courts do not wish to serve as disciplinarians for members of the bar.[201] Also, as explained above, not every court employs the ABA ethics rules in determining disqualification motions, and therefore, their definition of an ethical conflict of interest may be different than the Model Rules' definition.[202] Accordingly, courts faced with a disqualification motion in a § 1983 suit have found that an actual conflict of interest exists only when the co-defendants' defenses are in direct conflict.[203] Additionally, courts are hesitant to disqualify an attorney in the event of a mere potential conflict of interest because courts are often of the view that disqualification serves a remedial function and should only be employed to avert actual harm to the client or the court.[204] Courts also may be unwilling to disqualify attorneys because the conflict may be outweighed by the heavy burden disqualification places on the court and the litigants.[205]

No court has specifically addressed the conflicts that can arise as a result of the differing interests between the police officer and the municipality with regard to settlement, punitive damages, indemnification, and appeal. Many courts have held that as long as a municipality agrees to indemnify the officer and continues to contend that the officer acted in his official capacity, no conflicting interests exist and joint representation is permissible.[206] This view, however, contradicts the ethical rules that prohibit a fee arrangement by a third party to influence the lawyer's professional judgment,[207] or affect his adherence to the conflicts rules[208] and the attorney-client relationship.[209]

199. *See, e.g.*, Smith v. City of New York, 611 F. Supp. 1080, 1091 (S.D.N.Y. 1985) (finding that violations of a Model Code Canon is not enough for disqualification).

200. *See, e.g.*, Clay v. Doherty, 608 F. Supp. 295, 303-04 (N.D. Ill. 1985) (finding that until an actual and unreasonable conflict exists choice of "counsel should not be disturbed"); *Galligan*, 497 N.Y.S.2d at 187 (stating that the New York statute does not require the court to determine the possibility of a conflict).

201. *See Clay*, 608 F. Supp. at 304 (reasoning that the court will yield to the bar's self-regulation); Green, *supra* note 22, at 74.

202. *See supra* note 197 and accompanying text.

203. *See, e.g.*, Richmond Hilton Assocs. v. City of Richmond, 690 F.2d 1086, 1089 (4th Cir. 1982) (affirming trial court's determination that disqualification cannot be based on the possibility that co-defendants' positions may conflict).

204. Smith v. City of New York, 611 F. Supp. 1080, 1091 (S.D.N.Y. 1985) (discussing denial of disqualification motions unless the conduct of an attorney will "taint the underlying trial"); *see* Green, *supra* note 22, at 74-75 & n.15.

205. *See* Green, *supra* note 22, at 90. Professor Green argues that disqualification burdens the client rather than punishing the conduct of the lawyer. He proposes personal sanctions against the lawyer personally as the proper punishment for lawyers who violate conflict rules. *Id.* at 91-95; *see* McMinn, *supra* note 14, at 1249-50.

206. *See supra* note 188 and accompanying text.

207. *See* Model Rules, *supra* note 14, Rule 1.8(f)(2).

208. *See id.* Rule 1.8(f)(3) & cmt. 4.

Courts' analyses of these conflicts are even more unsettling because they tend to confuse the meaning of "official capacity" suits and the police officer's defense that he was acting "within the scope of his official duties." Two cases in the Southern District of New York exemplify this problem. In *Katz v. Morgenthau*,[210] for example, the court correctly found that a conflict of interest will not exist if the police officer is only sued in his official capacity because, in this situation, he will not be held personally liable.[211] A few years later, another court disagreed with the *Katz* court's logic and found that a potential conflict exists so long as the officer, in his official capacity, can assert a qualified immunity defense while the municipality cannot assert this defense.[212] In a § 1983 action, however, a police officer *cannot* assert a qualified immunity defense in his official capacity because an official capacity suit is treated as a suit against the municipality.[213] The police officer can only plead the defenses available to the municipality and qualified immunity is not one of the available defenses.[214] The courts' confusion has increased the need for a coherent examination of multiple representation of co-defendants in § 1983 actions.

Additionally, it must be remembered that a municipality has the ability to change its defense at any time,[215] and courts have refused to adopt a per se rule prohibiting joint representation even in light of this fact. Most jurisdictions have instead adopted a case-by-case evaluation of the adequacy of representation in § 1983 suits.[216] These courts have called for an increased "sensitivity to the risk of conflict,"[217] as well as an awareness by judges and litigants of their duty to guard client's interests and ensure that the client fully understands the situation.[218]

---

209. *See id.* Rule 1.8(f)(2).

210. 709 F. Supp. 1219 (S.D.N.Y. 1989).

211. *Id.* at 1227-28.

212. Ricciuti v. New York City Transit Auth., 796 F. Supp. 84, 88 (S.D.N.Y. 1992).

213. Hafer v. Melo, 502 U.S. 21, 25 (1991); *see supra* part I.B.

214. *See supra* part I.B.

215. *See supra* part II.C.

216. *See supra* note 21 and accompanying text.

217. Coleman v. Smith, 814 F.2d 1142, 1147 (7th Cir. 1987); *accord* Gordon v. Norman, 788 F.2d 1194, 1198 (6th Cir. 1986).

218. *See Gordon*, 788 F.2d at 1198; Dunton v. County of Suffolk, 729 F.2d 903, 909 (2d Cir. 1984) (explaining that attorneys are officers of the court and should notify court of conflicts). Some courts have adopted a procedure whereby counsel notifies the court of the potential conflict. Johnson v. Board of County Comm'rs, 85 F.3d 489, 494 (10th Cir. 1996); Kounitz v. Slaatten, 901 F. Supp. 650, 659 (S.D.N.Y. 1995) (explicating test established in *Dunton*, 729 F.2d 903). The court then determines whether the individual defendant fully understands the conflict. *Johnson*, 85 F.3d at 494; *Dunton*, 729 F.2d at 908; *Kounitz*, 901 F. Supp. at 659. The individual defendant, then, is entitled to waive the conflict and choose joint representation. *Johnson*, 85 F.3d at 494; *Dunton*, 729 F.2d at 909 n.5; *Kounitz*, 901 F. Supp. at 659.

Only one court has found the potential conflicts in § 1983 suits so serious as to make joint representation impermissible.[219] A federal district court in Texas found that even if an actual conflict did not arise at trial, separate counsel should be the norm in § 1983 suits.[220] The court held that the high potential for abuse, as well as the hardship that would be imposed on the court should separate counsel be retained in the middle of litigation, warranted separate counsel in actions against police officers in their individual and official capacities.[221]

Moreover, because most courts have approached § 1983 attorney conflicts of interest violations on a case-by-case basis, they have failed to look at the joint representation conundrum with an eye toward proposing broader solutions for the recurring problems discussed earlier. Courts have called upon legislatures and ethics committees to examine the great potential for conflict in this type of joint representation.[222] But neither ethics committees, nor other types of disciplinary agencies, have effectively answered this call to enforce violations of the conflict rules.[223] This failure is demonstrated by one ethics committee's unsuccessful attempt to formulate a per se rule against joint representation. In 1985, the New Jersey Supreme Court Advisory Committee on Professional Ethics adopted a formal opinion banning simultaneous representations of a governmental body and a government official or employee in a § 1983 action.[224] The Committee found that due to the "infinite combination of factual and legal circumstances . . . under which the problem of dual representation of governmental bodies and their officials and employees will arise, and the wide variety of conflicting decisions which members of the bar would arrive at,"[225] one rule applicable to solve all the problems—qualified immunity, liability for punitive damages, and issues of settlement, indemnification, and appeal—was justified.[226] Less than one year later, however, the New Jersey Supreme Court issued an opinion disagreeing with the Committee's formal opinion.[227] The New Jersey Supreme Court found the per se rule of prohibition against joint representations to be overly broad and unnecessary to solve the possible ethical

219. *See* Shadid v. Jackson, 521 F. Supp. 87 (E.D. Tex. 1981).
220. *See id.* at 89-90.
221. *Id.*
222. *See, e.g.*, Gordon v. Norman, 788 F.2d 1194, 1199 n.5 (6th Cir. 1986) (noting that these representations are "a troublesome area" and that courts "should be aware of potential ethical violations and possible malpractice claims").
223. *See Developments in the Law: Lawyers' Responsibilities and Lawyers' Responses*, 107 Harv. L. Rev. 1547, 1597-605 (1994); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 801, 829 (1992).
224. N.J. Sup. Ct. Advisory Comm. on Professional Ethics, Op. 552 (1985).
225. *Id.*
226. *Id.*
227. *In re* Opinion 552 of Advisory Comm. on Professional Ethics, 507 A.2d 233 (N.J. 1986).

problems.[228] The New Jersey court admitted that it was moved, in particular, by the financial burden a per se rule would impose on local governments and individual defendants who would have to retain independent counsel.[229] This argument, as well as the belief that litigants are entitled to counsel of their choice,[230] and that municipal counsel will be able to objectively determine when joint representation will be appropriate,[231] has driven most jurisdictions to adopt a case-by-case approach.[232]

B. *A Proposal for a Per Se Prohibition Against the Joint Representation of Police Officers and Municipalities in Section 1983 Actions*

The approach of municipalities and courts to the representation of police officers and municipalities in § 1983 actions illustrates that numerous ethical violations occur both prior to and during the joint representation.[233] Joint representation of police officers and municipalities in the § 1983 context places too many burdens on those involved in the litigation. These burdens include: (1) burdens on the municipal attorney to balance both clients' interests and confidences; (2) burdens on courts who must closely supervise the litigation to ensure that all clients are fully informed of potential conflicts; (3) burdens on police officers who must ensure that the municipal attorney is truly meeting their legal needs; and (4) burdens on the municipality which must continually supervise the litigation to determine whether to represent and indemnify the officer. This complicated web of varying interests justifies a prohibition against joint representation.

A per se rule prohibiting dual representation is the only way to effectively guard against the inherent conflicts of interest that exist in the joint representation of police officers and municipalities in § 1983 actions. To avoid being overbroad, the per se rule should prohibit joint representation only when the police officer is sued in both his individual and official capacities, or in his individual capacity alone.[234] The rule would automatically require separate representation of the police officer and the municipality from the moment that notice of the

228. *Id.* at 235-36.

229. *Id.* at 239.

230. *See* Clay v. Doherty, 608 F. Supp. 295, 304 (N.D. Ill. 1985) (stating that until defendant's choice of counsel "gives rise to actual and *unreasonable* conflicts, [his] choice of counsel should not be disturbed").

231. *See id.* (stating that courts must assume that government attorneys adhere to ethical rules); Minneapolis Police Officers Fed'n v. City of Minneapolis, 488 N.W.2d 817, 821 (Minn. Ct. App. 1992) (same); *Opinion 552*, 507 A.2d at 239 (finding that attorney can best decide when joint representation is appropriate).

232. *See supra* note 21 and accompanying text.

233. *See supra* part II.

234. If the police officer is sued only in his official capacity, the possibility for conflicts to arise may be less substantial, and thus may not necessarily require separate representation.

suit is served. A municipal attorney could represent the municipal client, but could not represent the police officer.

If municipalities do away with the requirement that the attorney must first determine the scope of the officer's action in order to provide representation, conflicts that arise in the initial screening interview between the police officer and the municipal attorney vanish.[235] Such a per se rule also removes the pressure on police officers, municipalities, and municipal attorneys to waive conflicts of interest that occur in order to preserve less-expensive in-house representation.[236] This procedure will guard against the attorney's need to withdraw from the police officer's representation during the course of the litigation.[237] In addition, attorneys will avoid a violation of Rule 1.9, which prohibits representing clients whose interests are adverse to former clients' interests once they "cut loose" the police officer during the representation.[238] Even if the officer's separate attorney learns that the officer was not acting within the scope of his employment, she has no allegiances to another client—for example, the municipality—who could use this information to its advantage. Moreover, separate representation will better protect the police officer's communications to his attorney from use by the municipality or third persons.[239] Separate representation will ensure that attorneys are not pressured to violate their ethical duty of confidentiality to one client to help advocate for another client.[240] The police officer's counsel will be empowered to work with the municipal attorney to determine the best course of action for the litigation based on the information that her police officer client has given her. Accordingly, all clients will be provided with an attorney to exclusively advocate for their best interests in deciding issues of settlement, appeal, and litigation strategy.[241]

---

235. *See supra* notes 93-101 and accompanying text.

236. *See supra* notes 116-20 and accompanying text.

237. *See supra* part II.C.

238. *See supra* notes 130-37 and accompanying text; Model Rules, *supra* note 14, Rule 1.9.

239. *See supra* part II.A.

240. *See supra* text accompanying note 121.

241. *See supra* part II.D. This proposal, however, raises the question of how to diminish the financial burden that conflict-free representation would impose on municipalities and police officers. One answer is to have a specific § 1983 litigation legal fund for police officers. The fund could be financed partly through moderate dues of the police officers, but largely by the municipality. The fund would be allotted a fixed annual budget that, of course, must be sizable enough to pay the full cost of litigation. Indemnification should be determined as early as possible during the litigation. Hopefully, the benefits gained by providing the police officer with separate representation would minimize the conflicts that would occur even if the police officer is faced with the uncertainty of whether he will receive full indemnification. With representation being provided to almost all police officers, regardless of the scope of their actions, it is important that the municipality get the opportunity to evaluate the officer's actions before committing the public's taxdollars.

Without a per se rule, conflicts will continue to go unchecked in cases where municipal attorneys represent both police officers and municipalities. Disciplinary bodies are not effective enforcers of violations of the ethics rules.[242] Although courts have an "overall responsibility . . . to supervise the ethical conduct of the Bar,"[243] courts have been reluctant, absent a direct conflict of interest, to disturb a client's choice of counsel or to disrupt the litigation by disqualifying attorneys.[244] In addition, a court's disqualification of an attorney, or an attorney's withdrawal from the representation of the police officer, does not solve every conflict of interest problem. Courts have been virtually silent about the inherent conflicts of interest that municipal attorneys face in § 1983 litigation. For example, no court has addressed the municipal attorney's ethical violations of the former client rule when she continues the representation of the municipal client after withdrawing from the police officer's defense.[245] Even though the possibility always exists that this conflict will arise, the nature of § 1983 actions has caused courts to be reluctant in disqualifying attorneys based simply on the fact that the municipality may change its defense later in the litigation.[246] This is due, in part, to courts' increasing tolerance of screening mechanisms that they believe safeguard abuse.[247]

In view of courts' reluctance to address the inherent conflicts in § 1983 joint representations, the ABA should take the lead in promulgating a per se rule prohibiting joint representation of police officers and municipalities. It should also lobby states and local municipalities to amend the representation statutes to that effect. Many would argue that the cost of requiring separate representation would be overwhelming for a public entity, and therefore, joint representation is sufficient unless an actual conflict—a situation in which the co-defendants are arguing conflicting defenses—exists. The inference from this argument is that due to limited funds, and the nature of particular law practices, certain types of lawyers should be exempt from the professional code of ethics. Nowhere in any of the ethical codes do the authors suggest that the rules are inapplicable to a particular class of lawyers.[248] Municipal attorneys, like all attorneys, should be

242. *See* Green, *supra* note 22, at 88-89; *supra* note 223.
243. Dunton v. County of Suffolk, 729 F.2d 903, 908 n.4 (2d Cir. 1984).
244. *See supra* notes 200-05 and accompanying text.
245. *See supra* notes 130-36 and accompanying text.
246. *See supra* part I.B.
247. *See supra* notes 143-48 and accompanying text.
248. *See* Model Rules, *supra* note 14, *Scope.* The National Bar Association of Attorneys General tried unsuccessfully to persuade the American Bar Association to specify that several of the Model Rules, such as the conflicts of interest provisions, were inapplicable to government lawyers. Josephson & Pearce, *supra* note 180, at 557 n.86. This rejection highlights the legal community's fear that allowing government lawyers to disregard the traditional ethical approach will give them too much discretion.

held to the same ethical standards of conduct and should adhere to the traditional conflict of interest rules. Any other approach will infringe on the present attorney-client structure in which the client directs the representation,[249] and will severely restrict the interests of municipal-employee clients like police officers.

CONCLUSION

An inherent divergence of interests exists everytime a municipal attorney represents both a police officer and a municipality in the same § 1983 police misconduct case. These differing interests substantially affect the actions of the municipal attorney and give rise to several instances of divided loyalties that cause the attorney to violate the ethical conflict of interest rules. Additionally, the many statutes that currently allow municipal attorneys to jointly represent police officers and municipalities also violate the ethics rules and do not provide a sufficient guide for how municipal attorneys should handle conflict situations.

The many potential conflicts of interest that can arise are "far too serious to permit joint representation . . . even in the face of an apparent waiver signed by both of these defendants."[250] A per se rule against joint representation of a municipality and a police officer in cases where a police officer is sued in his individual and official capacity, is the only way to guard against the endless conflicts that can arise, and to ensure that both defendants are provided with zealous advocates.

249. Model Rules, *supra* note 14, Rule 1.2(a); Model Code, *supra* note 14, EC 7-7; *see id.* EC 7-8.

250. Shadid v. Jackson, 521 F. Supp. 87, 90 (E.D. Tex. 1981).