

## **ETHICS OPINION**

**RO-00-03**

**[Redacted Copy]**

### **SUMMARY:**

An attorney previously represented a City, but his services were terminated following a change in administration. The attorney currently represents individual officers of the City in pending litigation where the officers were sued for acts or omissions in the line and scope of their previous employment. The attorney reports to and is paid by the insurance carrier for the City, and the City (or its insurer) will probably be responsible for payment of any judgment rendered against the individuals through insurance or statutory indemnity obligations. The attorney wishes to accept representation of another client in administrative proceedings against the City while the existing unrelated litigation is pending. The City objects to the attorney's representation of the client based upon alleged conflicts of interest.

### **QUESTION:**

"[My partner] and I represent [a] police officer in an administrative review proceeding before the [X] City-County Personnel Board of his termination by the City... . My partner and I were retained to represent the interest of [the police officer] on or about August 13, 2000. ... No lawsuit or other legal action has been filed against the City of [X], its officers, agents or employees, by [the police officer] at this time. Our representation of [the police officer] at this time is solely in regards to his appeal to the City-County Personnel Board and request that the City of [X]'s termination of his employment be overturned.

...My partner and I both served as City Attorneys for the City of [X] in the past. ... Subsequent to our entering private practice, our firm was retained on a case-by-case basis by the then Mayor...to represent the City of [X] and various named individuals. We also performed the task of representing the City of [X] in prosecuting appeals from Municipal Court to Circuit Court. For many years during [the former Mayor's] administration, the City of [X] was insured through an insurance carrier for claims filed against the City and/or its employees. In many of those situations, [my partner] and I were retained by

the insurance company and received case assignment through the insurance company to represent the named defendants in the particular action in which we were involved.

...To our knowledge, [my partner] and I have not represented the City or another City employee in the same or a substantially related matter to that of [the police officer we wish to represent] which would be materially adverse to the interest of the City of [X]. Additionally, we have acquired no information from our previous representation of the City or its officers, agents or employees, which would be to the disadvantage of the City of [X] in this matter. ... To [my partner's] and my knowledge and belief, we have obtained no confidences or secrets in the representation of the City of [X] which could be used to the disadvantage of the City of [X] in this matter. ... In particular, our client has specific knowledge of the Police Department and its activities which have not been gained or acquired by [my partner] or me during the time that the current administration has been in office. ... [My partner] and I contend that the fact that we have once represented the City of [X] does not preclude us from using generally known information about the City of [X] when later representing another client.

...[In November, 1999, the incumbent Mayor was defeated]. Shortly thereafter, our services were terminated in representing the City of [X] in all city appeals and most civil cases. In February, 2000, [my partner] and I received letters from the then City Attorney, who advised us that the remaining cases had been slated for reassignment and further requested that we give our opinion as to whether the defense of these cases would be compromised if they were reassigned. At that time, [my partner] and I each advised the current administration that we no longer wished to represent the City and we withdrew as attorney of record in all cases where we represented the City of [X] except for one case, which I was scheduled to try in federal court in a matter of days. We continued to represent ... the former Mayor,...former Fire Chief,...and ...former Deputy Chief, all from the prior administration, who each voiced a conflict with their representation by the new administration... . We also continued to represent a police officer because of a conflict in his defense and that of the City. ... We were hired by [Acme] Indemnity Insurance.

...Three (3) of those conflict cases involve the [former] Mayor, who was sued pursuant to 42 USC §1983 for employment discrimination in his individual capacity along with the City of [X] and [an unidentified] Chief. Because of certain statements that were made by the current Mayor... about [the former] Mayor's involvement in these employment discrimination cases, [the former] Mayor expressed a conflict with any

appointment of an attorney by the new administration to represent his individual interests and requested that [my partner] continue the representation of him in his individual capacity only. The conflict that existed between [the former] Mayor and the new administration...was clear and unequivocal. However, the City has a duty under the law to indemnify actions taken by [the former Mayor] that were taken in the line and scope of his employment while he was Mayor. [Two of these cases are pending].

...In one other conflict case, [my partner] represents former City employees in their individual capacities. This case involves the former Fire Chief and Deputy Fire Chief of the City of [X] Fire Department. This Title 42 USC §1983 action...involves the termination of a firefighter for violating certain rules and regulations of the City of [X] Fire Department. As in the [former Mayor's] three cases, [the former Fire Chief and former Deputy Chief] expressed a conflict between the position of the current administration...and their interests in the case. The conflict in their case is also clear and unequivocal, and they do not wish the current administration to appoint someone other than [my partner] to represent their interests. The aforementioned case is presently on appeal... .

...In each of the cases involving [my partner], the insurance coverage is administered through an outside agency...who administers most of the City of [X]'s governmental liability insurance claims. Insurance coverage begins at [\$abc], but [the agency] still administers claims for less than [\$abc]. There is no contract of insurance for claims or judgments less than [\$abc]... It is our understanding that it is like a [\$abc] deductible. ... [My partner's] reports, and any correspondence regarding his representation of these individuals, is made to [the agency] claims manager and not to the City of [X]. All costs and expenses incurred, including fees, are handled by the [agency's] claims management service and are drawn for payment on an [agency] account.

...I represent a police officer in his individual capacity because there had arisen a conflict between the former officer's defense and the position of the City of [X]. ...[Another attorney] had undertaken to represent both the officer and the City and then determined the conflict. [The City's then insurer] hired me after being informed of the conflict... . My reports, and any correspondence regarding my representation of the officer, are made to [an insurer] and not to the City of [X]. All costs and expenses incurred, including my fees, are administered by [the insurer].

...The current administration attempted to remove [my partner] from representing [the former Mayor] and had a lawyer call [the former Mayor] advising him that he would now be representing [the former Mayor]. The [former Mayor] told him he already had a lawyer and did not want his counsel changed in the middle of litigation. The current administration only agreed for [the former Mayor] to retain [my partner] as his attorney after threat of litigation for acting in bad faith for firing [him from the former Mayor's] representation for no reason other than political patronage during the process of litigation. Litigation was also threatened on behalf of the former Fire Chief and Deputy Fire Chief based on the same principle. In the case of the individual police officer..., the City had no control over the attorney selected by [the insurer]. ...

...Under Title 42 USC §1983, there is no respondeat superior liability for the City of [X]. The City may only be held liable if a policy or custom of the City is the moving force behind the alleged constitutional violation. The individual defendants could be held liable in the litigation and the City not be held liable. State law creates a duty for the municipality to indemnify the employee, but state law does provide that a municipality may not pay a settlement or judgment in excess of \$100,000. ... [I]t is unclear whether or not the City's duty to indemnify would be limited to the \$100,000 if a judgment were returned in excess of \$100,000.

...We believe the City of [X]...cannot control our representation of these individual defendants. The responsibility of our firm is to represent the individual defendants, and our duty is owed to them. We have a duty to act independently of the City in our representation of the former Mayor and the other defendants. We may not allow the City of [X] to interfere with our independent professional judgment or with our attorney-client relationship in representing these individuals.

...The attorney for the City in [the matter involving the police officer we to represent] contends that the firm has a conflict of interest in representing [the officer] because of the firm's representation of the City in the past and because of the ongoing representation of the former Mayor and the other individuals in the pending cases.

[My partner] and I would like your written opinion as to whether we may appropriately represent [the police officer] in this matter. ... .”

**ANSWER QUESTION ONE:**

If the pending litigation is against officers in their official capacities (or both individual and official capacities), the suit is essentially against the entity for purposes

of Rule 1.7(a). Consent of the entity is required before you undertake to represent another client against the entity, even if the matters are unrelated.

**ANSWER QUESTION TWO:**

If the pending litigation is against officers in their individual capacities, but the entity (or its insurer) may be responsible for payment of any judgment rendered against the officers in the course of your representation, consent of the entity is required before you undertake representation against the entity under Rule 1.7(a).

**ANSWER QUESTION THREE:**

If the pending litigation is against officers in their individual capacities only, and the entity will not be responsible for the payment of any judgment rendered, then consent of the entity is not required and you must evaluate your potential representation of the new client under Rule 1.9.

**APPLICABLE RULES**

**RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE**

*(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.*

*(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.*

**RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT**

*A lawyer who has formerly represented a client in a matter shall not thereafter:*

*(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation; or*

*(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.*

**RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE**

*(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 ... [or] 1.9 .*

**RULE 1.13 ORGANIZATION AS CLIENT**

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

...

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

*(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, to the provisions of Rule 1.7. If the organization's consent to the dual representation is*

*required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.*

**DISCUSSION:**

The Commission understands that you are representing current or former constituents of an entity who have been sued based upon their positions with the entity in the following contexts:

- in 3 cases, you or your partner represent the former Mayor sued for employment discrimination while in the line and scope of his employment with the City;
- in one case, you or your partner represent a police officer because of a conflict between the defense of the officer and that of the City. The type of case is not specified;
- in one case, you or your partner represent the former Fire Chief and Deputy Chief who are being sued for alleged violations of certain rules and regulations of the City Fire Department.

You or your partner now wish to represent a police officer who is appealing his termination from employment with the City through the City Personnel Board, to which the City has objected. It is not clear whether the officers you currently represent are sued both in their individual and official capacities in the unrelated pending litigation, and if so, whether you represent them in both capacities. Your question states that the conflicts which exist between the City and the former officers are “clear and unequivocal”; however, the Commission cannot determine whether the conflicts were personal or political, or were conflicts based upon actual or potential adverse interests in the course of litigation.

All of the pending claims are being administered by the insurer for the City, and all of your reports are made to and fees are paid by the insurer. There is no indication that you are operating under a reservation of rights status.

Although “the individual defendants could be held liable and the City not be held liable”, your question indicates that the City (or its insurer depending upon the amount) will be liable for any judgment rendered against the officers at least up to \$100,000.

For purposes of this opinion, the answers provided apply to both you and your partner under Rule 1.10.

### **Current Client Analysis Under Rule 1.7**

In analyzing entity representation, defining who is the “client” is a common problem:

To a surprising degree, the problems involved in “entity” or organizational representation can also be traced back to uncertainty about client identity, and hence client loyalty. ... In any event, once the problem of “who is the client” is resolved in the entity context, Rule 1.7(b) can then be applied to determine whether client and non-client interests can successfully be accommodated. Hazard & Hodes, The Law of Lawyering, §1.7:302 (1998).

Rule 1.13 recognizes the “entity” theory of representation, and the Comment makes it clear that constituents of the entity are not automatically clients of the lawyer. This is particularly true when the interests of the entity are distinct from, or adverse to, the interests of the constituents. It is recognized that a lawyer for an entity could represent the entity **against** individual officers, and can “litigate on behalf of the entity against its former constituents, because they do not qualify as former clients for purposes of Rule 1.9.” Hazard & Hodes, The Law of Lawyering, §1.13:106 (1998). In those cases, there can clearly be a separation of the clients being served in the course of representation since the entity and constituents do not share the same legal interests.

When the interests of the entity and its constituents are not separate - such as where there is a common risk of loss in litigation - analyzing the duties owed by the lawyer becomes more difficult because the lines are less clear:

[I]f the entity is the lawyer’s primary client, then various “constituent” elements of the entity - such as members or officers... - may well be said to be the lawyer’s derivative clients. Hazard & Hodes, The Law of Lawyering, §1.3:108 (1998).

The Comment to Rule 1.7 illustrates that the primary emphasis in conflict analysis is on fair dealing and loyalty:

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. ... As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.... When more than one client is involved, the question of conflict must be resolved as to each client. ...

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit **and if both clients consent upon consultation.** ... The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation. (emphasis added)

Keeping in mind that the function of the Disciplinary Commission is restricted to the interpretation of the Rules of Professional Conduct rather than issues of law, it is clear that if the individuals you represent are sued in their official capacities (whether as the sole claim or in combination with individual capacity claims), the suit is effectively against the City of [X]:

[A] suit against a governmental officer 'in his official-capacity' is the same as a suit against [the] entity of which [the] officer is an agent, (citation omitted) and ... victory in such an 'official-capacity' suit imposes liability on the entity that [the officer] represents.

*McMillian v. Monroe County, Alabama*, 520 U.S. 781, 785 n. 2, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997). [O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. *Monell v. Department of Social Services.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Further, "... a judgment for or against a public officer, in an action brought by or against him in his official capacity, is conclusive on the municipal corporation which he represents, it being the real party in interest, and it is also binding on other officers and agencies of the municipal corporation." 50 C.J.S. Judgments § 796(a), at 337 (1947); *Almon v. Battles*, 541 So.2d 519, 521 (Ala. 1989).

Thus, where the suit is against officers in their official capacity and you represent them in that capacity, the Disciplinary Commission believes that consent from both the officers and the entity is required under Rule 1.7(a)(2) prior to your representation of the new client, even though the matters may be wholly unrelated.

A more difficult question is presented if you are representing the officers in their individual capacity only. If the legal interests of the individuals are or may be adverse to the entity and the entity is not liable for any judgment rendered, then it may be said that the entity is not a client and Rule 1.7(a) would not be applicable. For example, your request states that you represent a police officer "because of a conflict in his defense and that of the City". In that case, the identity of the client (and corresponding duties of loyalty and confidentiality) may be more distinct.

Your question also states, however, that any judgment against the individuals you represent will be paid by the City (or its insurer), at least up to \$100,000. In that sense, the same principles would apply as in the case of the insurer-insured-attorney conflict questions. In RO-94-08, the Disciplinary Commission held that for purposes of Rule 1.7(a), a lawyer retained by an insurance company to defend an action against an insured represents the insured and well as the insurance company. The Commission based its opinion upon *Mitchem v. Hudgens*, 533 So.2d 194 (Ala. 1988), wherein the Court held that the typical insurance relationship means that an attorney-client relationship exists between the attorney and the insured and insurer:

The three parties may be viewed as a loose partnership, coalition or alliance directed toward a common goal, sharing a common purpose which lasts during the pendency of the claim or litigation against the insured. *Id.* at 198.

The same analysis applies in the context of your request. If the entity is responsible for payment of the judgment rendered against your individual clients, then the participants - city, individual, attorney and insurer - “share a common purpose which lasts during the pendency of the claim or litigation against the insured”. The issues of loyalty and fair dealing are thus applicable in the same manner to all parties sharing the same goal and who have the risk of the same adverse result.

Whether entity representation is analyzed under such concepts as “derivative-primary clients”, or “quasi-clients”, or “sub-agents”, the basic principle is that the attorney has a professional responsibility obligation of fair dealing. To that extent, representation against an entity while simultaneously representing individuals for whom the entity is liable potentially runs afoul of the basic premise, and consent under Rule 1.7(a)(2) should be required.

Our Rules recognize that acceptance of representation may require an attorney to decline other representation, and such a possibility is a factor to consider when determining a reasonable attorney fee under Rule 1.5(a)(2). *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983). By choosing to continue to represent the individual officers in the contexts described, neither you nor your partner may represent another client against the entity without its consent until the initial representation is concluded.

### **Former Client Analysis Under Rule 1.9**

To the extent your representation of the former or current officers in pending litigation does not invoke Rule 1.7 (where the interests are adverse and the entity is not liable for any judgments), you would be representing a client against a former client. Such representation is permitted under the circumstances described in Rule 1.9. The Comment to Rule 1.9 provides, in part:

The scope of a "matter" for purposes of paragraph (a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. **[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the**

**subsequent representation involves a position adverse to the prior client.** ...The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, **the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.** (emphasis added).

You have represented to the Commission that you have no privileged or confidential information gained from your prior representation of the City of [X] either as City Attorney or in civil litigation. Based upon the facts as represented in your request, you would not be prohibited from representing the police officer in his appeal from employment termination based solely upon your previous representation of the City in litigation or as City attorney. It should be noted, however, that it is usually presumed that a former client shared confidential information with the former lawyer, and as such, accepting representation of a new client may not be possible:

A lawyer has no duty to accept a particular client or matter, but once having accepted, she loses a certain amount of freedom to take on new matters, even when the first representation is over. ... [In deciding whether to accept a new client under Rule 1.9], the lawyer involved has to make a judgment call.... If the case is reasonably close, the lawyer usually serves everyone's interest - including her own -by initially assuming that the rule *does* apply and then seeking the former client's consent. Hazard & Hodes, The Law of Lawyering, §1.9:103, 104, 202 (1998).

**Disciplinary Commission**

**10/18/00**

