

**RETAINING OUTSIDE COUNSEL—  
THE PRIVATE PRACTITIONER’S PERSPECTIVE**

**Andrew W. Lester  
Lester, Loving & Davies, P.C.  
1505 South Renaissance Boulevard  
Edmond, Oklahoma 73013-3018  
Tel. (405) 844-9900  
Fax (405) 844-9958  
Email: alester@lldlaw.com**

**TABLE OF CONTENTS**

<b>TO RETAIN OR NOT TO RETAIN: THAT IS THE QUESTION .....</b>	<b>1</b>
<b>HIRING OUTSIDE COUNSEL.....</b>	<b>2</b>
<b>IDENTIFYING THE CLIENT .....</b>	<b>2</b>
<b>CONFLICTS OF INTEREST .....</b>	<b>4</b>
<b>WHO PAYS? .....</b>	<b>6</b>
<b>APPLYING THE ABSTRACT TO THE REAL .....</b>	<b>7</b>
<b>SECTION 1983 .....</b>	<b>7</b>
<b><i>DUNTON V. COUNTY OF SUFFOLK</i>.....</b>	<b>9</b>
<b><i>JOHNSON V. FREMONT COUNTY</i>.....</b>	<b>10</b>
<b>Applying <i>Johnson</i> and the Rules of Professional Conduct in a Typical Section 1983 Case. 12</b>	
<b>APPLYING THE RULES IN OTHER TYPES OF LITIGATION .....</b>	<b>14</b>
<b>CONCLUSION.....</b>	<b>16</b>

TABLE OF AUTHORITIES

CASES

UNITED STATES SUPREME COURT

*Anderson v. Creighton*,  
483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed.2d 523 (1987).....9

*City of Canton v. Harris*,  
489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed.2d 412 (1989).....8

*City of Newport v. Fact Concerts, Inc.*,  
453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed.2d 616 (1981).....13

*Davis v. Scherer*,  
468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed.2d 139 (1984).....9

*Garcia v. San Antonio Metropolitan Transit Authority*,  
469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed.2d 1016 (1985).....4

*Harlow v. Fitzgerald*,  
457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed.2d 396 (1982).....9

*Malley v. Briggs*,  
475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed.2d 271 (1986).....9

*Monell v. Department of Social Services*,  
436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978).....8

*Oklahoma City v. Tuttle*,  
471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed.2d 791 (1985).....8

*Owen v. City of Independence*,  
445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed.2d 673 (1980).....9

*Pembaur v. Cincinnati*,  
475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed.2d 452 (1986).....12

*Smith v. Wade*,  
461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed.2d 632 (1983).....13

*St. Louis v. Praprotnik*,  
485 U.S. 112, 108 S. Ct. 915, 99 L. Ed.2d 107 (1988).....8

United States Courts of Appeals

*Coleman v. Smith*,  
814 F.2d 1142 (7th Cir. 1987).....9

*D.T. v. Independent School Dist. No. 16 of Pawnee County, Okla.*,  
894 F.2d 1176 (10th Cir. 1990).....8

*Dunton v. County of Suffolk*,  
729 F.2d 903 (2nd Cir. 1984).....9, 11, 13

*Gordon v. Norman*,  
788 F.2d 1194 (6th Cir. 1986).....9

*Houston v. Reich*,  
932 F.2d 883 (10th Cir. 1991).....12, 15

<i>In re: Grand Jury Proceedings v. U.S.</i> , 156 F.3d 1038 (10 <sup>th</sup> Cir. 1998) .....	16
<i>Johnson v. Board of County Commissioners of the County of Fremont</i> , 85 F.3d 489 (10th Cir. 1996) .....	10, 11, 12, 14
<i>Lee v Hutson</i> , 810 F.2d 1030 (11th Cir. 1987) .....	9, 10
<i>Medina v. Housing Authority. of San Miguel County</i> , 1992 WL 218990 (10th Cir. 1992) .....	11
<i>Ross v. U.S.</i> , 910 F.2d 650 (7th Cir. 1990) .....	9

#### UNITED STATES DISTRICT COURTS

<i>Kounitz v. Slaatten</i> , 901 F. Supp. 650 (S.D.N.Y. 1995) .....	11
<i>Lee v. Hutson</i> , 600 F. Supp. 957 (N.D. Ga. 1984) .....	9
<i>Manganella v. Keyes</i> , 613 F. Supp 795 (D. Conn. 1985) .....	10
<i>Smith v. City of New York</i> , 611 F. Supp. 1080 (S.D.N.Y. 1985) .....	10

#### Oklahoma Supreme Court

<i>Holman by and through Holman v. Wheeler</i> , 1983 OK 72, 677 P.2d 645 .....	15
<i>State ex rel. Oklahoma Bar Association v. McNaughton</i> , 1986 OK 25, 719 P.2d 1279 .....	13

#### OTHER COURTS

<i>Krahmer v. McClafferty</i> , 282 A.2d 631 (Del. 1971) .....	3
<i>Silver v. Downs</i> , 493 Pa. 50, 425 A.2d 359 (1981) .....	3

#### STATUTES

##### Federal Statutes

42 U.S.C. § 1983 .....	7, 8, 9, 10, 12, 13
42 U.S.C. § 2000e .....	10

##### Oklahoma Statutes

11 O.S. § 10-119.....	3
11 O.S. § 15-101.....	3
11 O.S. § 23-101.....	3, 15, 16
11 O.S. § 50-108.....	3
12 O.S. § 2502.....	16
12 O.S. § 3226.....	3
25 O.S. § 301.....	3
51 O.S. § 24A.1.....	3
51 O.S. § 151.....	14
51 O.S. § 152.....	14
51 O.S. § 152.1.....	14
51 O.S. § 153.....	14
51 O.S. § 160.....	10, 16
51 O.S. § 162.....	15, 16
51 O.S. § 163.....	15
51 O.S. § 166.....	4

**RULES**

**Federal Rules of Civil Procedure**

Fed. R. Civ. P. 26.....	3
-------------------------	---

**Oklahoma Rules of Professional Conduct**

5 O.S., Ch. 1, App. 3-A, Terminology.....	13, 14
5 O.S., Ch. 1, App. 3-A, Rule 1.4.....	14
5 O.S., Ch. 1, App. 3-A, Rule 1.6.....	6
5 O.S., Ch. 1, App. 3-A, Rule 1.7.....	4, 5, 6, 7, 13, 15
5 O.S., Ch. 1, App. 3-A, Rule 1.8.....	6, 7
5 O.S., Ch. 1, App. 3-A, Rule 1.10.....	16
5 O.S., Ch. 1, App. 3-A, Rule 1.13.....	3, 4, 12

**RETAINING OUTSIDE COUNSEL—  
THE PRIVATE PRACTITIONER'S PERSPECTIVE**

**Andrew W. Lester  
Lester, Loving & Davies, P. C.  
1505 South Renaissance Boulevard  
Edmond, Oklahoma 73013-3018  
Email: alester@lldlaw.com  
Tel. (405) 844-9900  
Fax (405) 844-9958**

**TO RETAIN OR NOT TO RETAIN: THAT IS THE QUESTION.**

In the morning mail, you receive from the city clerk a new lawsuit. Some citizen has sued the city, the mayor, every member of the city council, two former council members, the city manager, the police chief, a police captain, and three police officers. According to the allegations, the claims arise under federal and state law.

You have an excellent relationship with all of the elected officials, the manager, the chief and the captain, and used to have a pretty good relationship with the former council members. Although you know the named officers, your dealings with them have been fairly limited. As you read through the several pages long pleading, you realize that you have never heard anything about the facts stated in the complaint.

So, you decide you need to investigate the situation. First you call the manager. After telling you everything he knows, the manager directs you to the mayor and the police chief. The mayor tells you some facts, but then says that one of the former council members is really the person who knows a lot about this situation. The police chief directs you to one of the three officers.

You interview the former council member and the police officer. Your investigation leads you to believe that the defendants' position will prevail, though you also realize it will take

quite a bit of litigating before you will win.

Shortly after you reach your conclusions, the ex-council members and two of the three officers request that the city retain outside counsel for them. When you mention this to the city manager, he tells you that the council will be unlikely to agree to that, given the city's budget constraints and the fact that most of the incumbents ran on a fiscal responsibility platform.

What do you do?

### **HIRING OUTSIDE COUNSEL.**

City attorneys face a dilemma when deciding how to defend lawsuits that name multiple municipal defendants. Elected officials want to spend the government's scarce resources on delivering various services to the public. Generally, legal representation of the government and its employees is not one of the more favored services. Government attorneys, however, are bound by the same ethical rules that govern private practitioners. Often, those rules dictate a result that differs from the demands of the governmental client. This is especially true when simultaneous representation of multiple clients arises.

When confronting such a circumstance, at least three questions arise. Who is the client? Is there a conflict of interest? What is in the best interest of the various individuals? The city attorney must evaluate the pending or potential litigation in light of the appropriate substantive law, through the prism of the applicable ethical rules, in determining how best to proceed.

### **IDENTIFYING THE CLIENT.**

Who is the city attorney's client? At first blush, this question appears to have a simple answer. Obviously, the client is the city. A city, however, is not some abstraction. City attorneys deal not with some amorphous entity known as "The City;" rather, they conduct their business with numerous individuals who together perform the work of the municipality. Like

other entities, cities can act only through individual. Thus, identifying the client actually requires a much deeper analysis.

Does the city attorney represent city management or the city council?<sup>1</sup> In planning for litigation, the city attorney usually must confer with city management. If, however, the employee with whom the attorney is conferring is not a “duly authorized constituent,” and therefore not a client, what are thought to be confidential conversations may be subject to disclosure via discovery or otherwise.<sup>2</sup> Furthermore, in those situations where city management is in conflict with the city council, the city attorney must remember the identity of the client so as to safely navigate through the hazards of the conflict of interest rules.

Individual city council members rely so heavily on the advice of the city attorney that they often consider the incumbent of that position to be their personal lawyer as well. Of course, that is not so. Indeed, city council members often find themselves in opposition to other members, or even to the entire city council or to city staff. Here, too, it is well to remember that the client is not any individual, but rather the city as an entity.<sup>3</sup>

Rule 1.13 of the Oklahoma Rules of Professional Conduct<sup>4</sup> states:

(a) A lawyer employed or retained by an organization represents the

---

1 Conflicting substantive law confuses the matter. For some purposes, the city attorney is supposed to act like the state’s attorney general. See, e.g., 11 O.S. §§ 15-101 *et seq.* (role of city attorney in initiative and referendum process). Other statutes require the city attorney to defend city employees at the direction of the city council. See, e.g., 11 O.S. §§ 23-101 *et seq.* (city attorney defends employees in certain civil action). Still others make the city attorney a department head, answerable to the city manager. See, e.g., 11 O.S. § 10-119 (council-manager form of government). At times, the city attorney may even represent boards other than the city council. See, e.g., 11 O.S. § 50-108 (city attorney as legal advisor to local police pension board).

2 Cf. 12 O.S. § 3226; Rule 26, Fed. R. Civ. Proc.; 25 O.S. §§ 301 *et seq.*; 51 O.S. §§ 24A.1 *et seq.*; 5 O.S., Ch. 1, App. 3-A, Rule 1.13

3 Cf. *Krahmer v. McClafferty*, 282 A.2d 631 (Del. 1971); *Silver v. Downs*, 493 Pa. 50, 425 A.2d 359 (1981).

4 5 O.S., Ch. 1, App. 3-A.

organization acting through its duly authorized constituents.

\* \* \*

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

The import of Rule 1.13 is straightforward. The Rules adopt the entity approach to determining the duties of an entity's attorney. Thus, the lawyer who represents the government does not represent any individual, but rather the entity "acting through its duly authorized constituents." Unfortunately, as the comments accompanying Rule 1.13 testify, "defining precisely the identity of the client and prescribing the resulting obligations of such lawyers *may be more difficult in the government context.*"<sup>5</sup> That this is true should not be surprising.

The conceptual background of Rule 1.13 comes from a synthesis of two areas of private business law – the law of corporations and the law of agency. Governments, however, differ significantly from private corporations. Virtually every branch of government law recognizes that there are times that a public entity exercises quasi-business<sup>6</sup> functions. But to apply business law to the public setting often proves unsatisfactory. This is one of those situations.

#### **CONFLICTS OF INTEREST.**

Rule 1.7 of the Oklahoma Rules of Professional Conduct states the general standard regarding conflicts of interest:

---

<sup>5</sup> Emphasis added.

<sup>6</sup> I.e., proprietary. See, e.g., 51 O.S. § 166 (distinction between governmental and proprietary functions is preserved under the Governmental Tort Claims Act); but cf. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed.2d 1016 (1985) (calling into question the validity of a governmental/proprietary distinction).



## 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.

Although this rule raises several concerns for municipal attorneys, we shall focus on a couple of them:

1. Whether one lawyer may simultaneously represent both the city and some of its employees;
2. What is the proper role for the lawyer who is paid for legal services from one source but represents a different person.

Underlying these concerns, as well as Rule 1.7 as a whole, is the need to identify the client. Particularly in the municipal context, determining the identity of the client is paramount.

Rule 1.7 is much more permissive than was Canon 5 of the Model Code. The ethical considerations under Canon 5 had indicated that "a lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be

justified in representing in litigation multiple clients with potentially differing interests.”<sup>7</sup> Rule 1.7 liberalizes this flat prohibition.

According to the official comments to Rule 1.7:

An impermissible conflict may exist by reason of 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 of the claims or liabilities in question.

Especially in the tort and tort related cases in which cities so often seem enmeshed, the problem of simultaneous representation may be considerable.

### **WHO PAYS?**

Special rules also apply where the lawyer is paid from a source other than the client. Rule 1.8 provides:

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - (1) the client consents after consultation;
  - (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and
  - (3) information relating to representation of a client is protected as required by Rule 1.6.

Several problem areas regularly arise. In particular, three situations concern us here:

1. Where the government has insurance to cover the costs of defense and potential liability;
2. Where the government hires outside counsel to defend its employees; and
3. Where the government provides its own attorney to defend its employees.

The proper allegiance of insurance defense counsel is clear. An attorney hired by an insurance

---

<sup>7</sup> EC 5-15.

company to defend a public entity owes allegiance not to the source of the funds, the insurance company, but to the client, the insured.<sup>8</sup> This rule applies equally to the attorney paid directly by the government itself, even if that attorney is an in house municipal counselor. Although this rule of conduct often seems to defy reality, it is explicit, unambiguous, and indisputable.

#### **APPLYING THE ABSTRACT TO THE REAL.**

The issues we are discussing tend to arise in the city context in civil rights and torts settings. The substantive law contains many potential pitfalls. There are differing rules of liability between municipal and individual defendants, and differing rules of municipal responsibility for the acts of an individual defendant dependent on whether the claim is brought under federal or state law.

#### **SECTION 1983.**

Much of the litigation involving municipal attorneys in simultaneous representation situations has arisen under the Civil Rights Act of 1871,<sup>9</sup> where one attorney jointly defends both the government as an entity and its employees. A brief Section 1983 primer will provide the background.

---

<sup>8</sup> According to the official comments to Rule 1.7:

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client.

Cf. Rule 1.8(f) (lawyer cannot accept compensation from third person unless the client consents, there is no interference with lawyer's judgment or attorney-client relationship, and client confidences are not compromised). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

<sup>9</sup> 42 U.S.C. § 1983.

The United States Supreme Court has held that a local government has no liability for the acts of its employees under the doctrine of *respondeat superior*. “Instead, it is when execution of a government’s policy or custom ... inflicts the injury that the government as an entity is responsible under § 1983.”<sup>10</sup> Indeed, the Court has stated that it is impermissible to “infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy.”<sup>11</sup> The first inquiry “is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation.”<sup>12</sup> Local governing bodies will “be held responsible when, and only when, their official policies cause their employees to violate another person’s constitutional rights.”<sup>13</sup>

The problem is remoteness. If the government does not have a deficient policy, it has no liability under Section 1983. This is so even though an employee, acting within the scope of employment, deprives a person of some federally protected right.<sup>14</sup>

An individual capacity suit against a government official does not create entity exposure. To prove the case against the government, the civil rights plaintiff must demonstrate a direct causal link between a municipal policy and the alleged harm. No such requirement, however, applies to individual capacity suits. Only the normal tort requirements of causation apply. Thus, the plaintiff must prove that the individual defendant committed the unconstitutional act, and that

---

10 *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed.2d 611, 638 (1978).

11 *Oklahoma City v. Tuttle*, 471 U.S. 808, 831, 105 S. Ct. 2427, 2440, 85 L. Ed.2d 791, 809 (1985) (Brennan, J., concurring in the judgment).

12 *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 1203, 103 L. Ed.2d 412, 424 (1989).

13 *St. Louis v. Praprotnik*, 485 U.S. 112, 122, 108 S. Ct. 915, 923, 99 L. Ed.2d 107, 117 (1988).

14 *D.T. v. Independent School Dist. No. 16 of Pawnee County, Okla.*, 894 F.2d 1176 (10th Cir. 1990).

the bad act caused the plaintiff damage.

Unlike the government, however, an individual defendant may claim absolute or qualified immunity.<sup>15</sup> “Qualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’”<sup>16</sup> A public official has liability only if the law was clearly established at the time of the violation.<sup>17</sup>

#### ***DUNTON V. COUNTY OF SUFFOLK.***

The lead case concerning multiple representation in a Section 1983 claim is *Dunton v. County of Suffolk*.<sup>18</sup> In *Dunton*, the Second Circuit held that the simultaneous representation of a county and its police officer in an excessive force case created a conflict of interest so great as to deprive the individual defendant of a fair trial. Defense counsel provided an absolute defense for his entity client by subverting the immunity claim of his individual client. He urged at trial that the officer acted not as a police official, but instead as an irate individual.

Since *Dunton*, most reported decisions have limited the Second Circuit’s holding. Courts have uniformly agreed that there is no *per se* requirement of multiple attorneys for multiple defendants.<sup>19</sup> Courts have also generally agreed that if the government agency admits that the

---

<sup>15</sup> *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed.2d 673 (1980); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed.2d 396 (1982).

<sup>16</sup> *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038, 97 L. Ed.2d 523, 530 (1987), quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed.2d 271, 278 (1986).

<sup>17</sup> *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed.2d 139 (1984).

<sup>18</sup> 729 F.2d 903 (2nd Cir. 1984), *modified on other grounds*, 748 F.2d 69 (2nd Cir. 1984).

<sup>19</sup> See, e.g., *Gordon v. Norman*, 788 F.2d 1194 (6th Cir. 1986) (risk of conflict exists, but no conflict ever realized); *Coleman v. Smith*, 814 F.2d 1142 (7th Cir. 1987) (dual representation not improper if there is no divided loyalty); *Ross v. U.S.*, 910 F.2d 650 (7th Cir. 1990) (recognizing that some conflicts are unavoidable and that separate counsel may be required); *Lee v. Hutson*, 600 F. Supp. 957 (N.D. Ga. 1984), *aff’d in part, rev’d in part*, 810 F.2d

employee acted within the scope of employment, no disqualifying conflict exists.<sup>20</sup>

The nature of the litigation, and the applicable substantive law, may be determinative. There is no single answer applicable in all contexts.

The potential for a disqualifying conflict in Section 1983 litigation is especially strong. This results from the differing bases for liability for the entity and the individual defendant.

***JOHNSON V. FREMONT COUNTY.***

In *Johnson v. Board of County Commissioners of the County of Fremont*,<sup>21</sup> several former employees sued the sheriff alleging sex discrimination under Title VII of the Civil Rights Act of 1964<sup>22</sup> and Section 1983. The county made an initial determination that the sheriff acted outside the scope of his authority and that therefore it would not defend him individually. Counsel filed an answer for the sheriff in his official capacity only. Only several months later did the defendant file an answer in his official capacity.

The court found that counsel had violated the Rules of Professional conduct by limiting her representation to the official capacity claim. Because there was no evidence regarding whether the defendant himself understood the significance of counsel's determination to represent him only in his official capacity, the Tenth Circuit affirmed the trial judge's order finding that counsel had breached her ethical duties.

---

1030 (11th Cir. 1987) (court required defense counsel to explain implications of joint representation to all defendants).

<sup>20</sup> See, e.g., *Smith v. City of New York*, 611 F. Supp. 1080 (S.D.N.Y. 1985) (no disqualifying conflict where entity admits that officials acted in discharge of their public duties); *Manganella v. Keyes*, 613 F. Supp 795 (D. Conn. 1985) (state statute holding public employees harmless from negligent, wanton, willful, malicious or *ultra vires* acts mitigates harm from possible conflict). But cf. 51 O.S. § 160 (government has right of recovery against employee who acted outside the scope of employment).

<sup>21</sup> 85 F.3d 489 (10th Cir. 1996).

<sup>22</sup> 42 U.S.C. §§ 2000e *et seq.*

If *Johnson* were limited to the unusual facts of the case, those representing municipal defendants might view it as a curiosity. However, the Tenth Circuit wrote its opinion broadly, purporting to cover all civil rights litigation involving an entity and its employees as defendants.

The court stated first noted the hidden snares of multiple representation in Section 1983 litigation:

The distinctions between suits against an official in his individual and official capacities give rise to differing and potentially conflicting defenses. Most notably, the government entity could defend itself by asserting that the official whose conduct is in question acted in a manner contrary to the policy or custom of the entity. Also, an individual capacity defendant could assert the defense of qualified immunity.<sup>23</sup>

The court then gave defense counsel this warning:

Given the potential conflict between the defenses available to a government official sued in his individual and official capacities, we have admonished that separate representation for the official in his two capacities is a “wise precaution.”<sup>24</sup>

Although the court rejected the existence of a *per se* rule of disqualification, it cited *Dunton* with approval, and held that “if the potential conflict matures into an actual material conflict, separate representation would be required.”<sup>25</sup> It went on to state discuss how such conflicts should be confronted:

We embrace the Second Circuit’s procedure whereby counsel notifies the district court and the government defendant of the potential conflict, the district court determines whether the government defendant fully understands the potential conflict, and the government defendant is permitted to choose joint representation.<sup>26</sup>

---

23 85 F.3d at 493.

24 *Id.*, quoting *Medina v. Housing Authority. of San Miguel County*, 1992 WL 218990 (10th Cir. 1992) (unpublished disposition).

25 *Id.*

26 *Johnson v. Fremont County*, 85 F.3d at 493, citing *Kounitz v. Slaatten*, 901 F. Supp. 650, 659 (S.D.N.Y. 1995) (denying plaintiff’s motion to disqualify “unless, within ten days, the County Attorney provides an affidavit from either the municipality stating that it does not deny

But the court didn't stop there. It added a curious injunction:

In addition, the defendant should be told it is advisable that he or she obtain independent counsel on the individual capacity claim.<sup>27</sup>

Given such comments, let's consider how to apply this holding in Section 1983 litigation.

#### **APPLYING *JOHNSON* AND THE RULES OF PROFESSIONAL CONDUCT IN A TYPICAL SECTION 1983 CASE.**

How does this ruling apply in the typical case? Let's combine the substantive law with the ethical rules. First, where the individual defendant plainly qualifies as the government's policy maker, the law will likely impute the challenged action to the entity.<sup>28</sup> In most such situations, it is unlikely that a conflict exists. This is so because of Rule 1.13, which states that an entity operates through its "duly authorized constituents." In a civil rights action, the words, "duly authorized constituents" certainly should include those with policy making authority for the challenged activity. Other, lower level employees may also qualify.

In some contexts, such as police misconduct litigation, however, the likelihood of a conflict is strong. This is so because the standard for holding an officer individually liable includes some degree of ill will. If the police officer has liability at all, both actual and punitive damages may be appropriate. If the court makes that type of finding, it almost certainly must mean that the officer acted individually, not officially.<sup>29</sup>

---

that the individual defendants were acting within the scope of their public employment and in the discharge of their duties, or from each individual defendant stating that she fully understands the nature of the conflict inherent in joint representation of herself in her individual capacity and of the municipality.").

<sup>27</sup> *Id.*

<sup>28</sup> Cf. *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed.2d 452 (1986) (single act of person whose actions represent city policy suffices to impose government liability).

<sup>29</sup> Cf. *Houston v. Reich*, 932 F.2d 883 (10th Cir. 1991) (concerning definition of "scope of employment" under the Governmental Tort Claims Act, and its relationship to Section 1983



The existence of a conflict does not end the matter. In such situations, the *Dunton* disqualification still does not necessarily apply. This is so because of what is perhaps the most significant reform in the Model Rules – the ability of clients to consent.<sup>30</sup>

Of course, consent alone does not make a simultaneous representation appropriate.<sup>31</sup> The lawyer must also reasonably believe that the representation of each client “will not be adversely affected.” Use of the word, “reasonably,” implies that the determination of whether the representation of a client will be adversely affected is determined on an objective basis. That is, it is not only the individual lawyer’s determination, but also that of a reasonably prudent and competent lawyer.<sup>32</sup> “When a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”<sup>33</sup>

Furthermore, the consultation which results in the consent must include a detailed “explanation of the implications of the common representation and the advantages and risks involved.”<sup>34</sup> As used in the Rules of Professional Conduct, the word “consultation” “denotes

---

litigation); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed.2d 616 (1981) (municipalities are immune from Section 1983 liability for punitive damages); *Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 75 L. Ed.2d 632 (1983) (individuals have Section 1983 exposure to punitive damages for their willful or malicious conduct).

30 Note also that the Second Circuit decided *Dunton* under the Code of Professional Responsibility. Given the relative liberality of the Rules of Professional Conduct, it is at least debatable whether the Second Circuit would have decided the case differently had the newer code of conduct been the applicable law.

31 Cf. *State ex rel. Oklahoma Bar Association v. McNaughton*, 1986 OK 25, 719 P.2d 1279 (holding under Code of Professional Responsibility that simultaneous representation of criminal defendant charged with lewd molestation and of minor victim and her family in matters connected with the prosecution is improper, regardless of consent).

32 See 5 O.S., Ch. 1, App. 3-A, Terminology (definition of “reasonable” and “reasonably”).

33 Comments to Rule 1.7.

34 Rule 1.7.

communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.”<sup>35</sup> The requirement is of a forthright explication, detailing all of the benefits and detriments of the proposed joint representation. This can be tricky. It can involve anticipation of all sorts of potential events, from trial strategies to settlement offers.

Obtaining consent, preferably in writing, is vital. As the Tenth Circuit stated:

We reinforce that, as with many issues relating to the relationship between attorney and client, the crucial element is adequate communication.<sup>36</sup>

The consent should be clear and succinct. Better practice is to deliver a copy to the client and to keep one in the lawyer’s own file.

### **Applying the Rules in Other Types of Litigation.**

Different claims might require different results. Consider, for example, litigation under the Governmental Tort Claims Act.<sup>37</sup> Under that law, the state and its political subdivisions have liability for the torts committed by their employees acting within the scope of their employment. They have no liability, however, for acts committed by employees acting outside the scope of their employment.<sup>38</sup> Employees, on the other hand, have absolute sovereign immunity for their own torts if they committed the torts while acting within the scope of their employment.<sup>39</sup>

Tort claims litigation would seem to present a fairly straightforward situation for the municipal lawyer’s ethical consideration. The Act is explicit. It specifically prohibits the

---

35 5 O.S., Ch. 1, App. 3-A, Terminology (definition of “consult” or “consultation”). See also Rule 1.4 regarding communication:

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

36 *Johnson v. Board of County Commissioners of the County of Fremont*, 85 F.3d at 493

37 51 O.S. §§ 151 *et seq.*

38 51 O.S. § 153(A). See also 51 O.S. § 152(9).

39 *Id.* See also 51 O.S. § 152.1(A).

prosecution of claims against an employee who was acting within the scope of employment.<sup>40</sup> This provision would appear to create a fairly easy determination regarding whether to represent several clients simultaneously.<sup>41</sup>

Liability of the government or the individual employee should be an either/or proposition. In other words, if the government is liable, the individual actor cannot be liable, at least not for the same act. Conversely, if the individual acted in an individual capacity, the government did not act. This dichotomy makes sense, for the government cannot act unless it is for the purpose of benefiting the public health, safety or welfare.

Looks, however, can be deceiving. Courts have defined the term, “scope of employment,” as often requiring a jury determination.<sup>42</sup> This reading can place the defense lawyer between a rock and a hard place. The lawyer who successfully defends the entity may face allegations of improper conflict of interest where the individual defendant is found liable.<sup>43</sup> Because the primary duty of the municipal counselor is to represent the government as an entity, the government attorney must determine the advisability of representing multiple defendants from both an ethical and a government powers perspective.<sup>44</sup>

Similarly, the attorney the government provides to its employee owes allegiance to the

---

40 51 O.S. § 163(c).

41 Cf. 11 O.S. §§ 23-101 *et seq.* (city attorney defends employees in certain civil action).

42 See, e.g., *Holman by and through Holman v. Wheeler*, 1983 OK 72, 677 P.2d 645.

43 Cf. *Houston v. Reich*, 932 F.2d 883 (10th Cir. 1991) (city has no duty to pay judgment against individual employee who acted outside the scope of employment). See also 51 O.S. § 162 (concerning duty to indemnify employee for federal law violations).

44 The officially adopted comment to Rule 1.7 states:

Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties’ testimony, incompatibility in positions in relation to an opposing party or

employee, not to the entity. State law clearly allows, indeed demands, that the government provide a defense to public employees in certain situations.<sup>45</sup> But the interests of the government often diverge from those of its employee. For example, state law provides that the government may have a right of recovery from its employee for acts committed “outside the scope of his employment, or if the employee fails to cooperate in good faith in the defense of the claim or action.”<sup>46</sup> Obviously, where the interests of the co-defendants diverge, the rules regarding client allegiance can be vital guideposts for defense counsel.

### CONCLUSION.

Is simultaneous representation of multiple defendants a good idea? Be careful. Common practice, even common sense, may provide a different answer than the Oklahoma Rules of Professional Conduct. And the courts may themselves add their own distinctive gloss.

Yet, though one attorney or firm (or in house law department) may not be able to represent all defendants,<sup>47</sup> there is generally no reason that defense counsel should work at cross-purposes. Usually, it serves the mutual interests of the defendants to cooperate, or even to engage in a joint defense.<sup>48</sup>

It is often said that two heads are better than one. In the representation of multiple

---

the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

45 See, e.g., 11 O.S. §§ 23-101 *et seq.* (municipality to provide defense to its employees in certain civil actions); 51 O.S. § 162 (government to provide defense of certain civil rights actions against government employees).

46 51 O.S. § 160.

47 Rule 1.10.

48 12 O.S. § 2502(B)(3) (recognizes “common interest” doctrine in pending litigation); see also *In re: Grand Jury Proceedings v. U.S.*, 156 F.3d 1038 (10<sup>th</sup> Cir. 1998) (party asserting joint defense privilege as to documents must demonstrate that “(1) the documents were made in the course of a joint-defense effort; and (2) the documents were designed to further that effort.” 156 F.3d at 1043). The better practice is to reduce a joint defense agreement to writing.

defendants, it may be that two lawyers are better than one; and, even if not necessarily better, two lawyers may be required.