Committee Opinion
February 28, 1996

LEGAL ETHICS OPINION 1661

CITY ATTORNEY'S REPRESENTATION OF CITY EMPLOYEE IN CIVIL SUIT WHEREIN EMPLOYEE WOULD BE RESPONSIBLE FOR PAYMENT OF ANY AWARD FOR PUNITIVE DAMAGES; CITY ATTORNEY'S PARTICIPATION IN SETTLEMENT NEGOTIATIONS.

You have presented a hypothetical situation concerning representation of a City employee by the City Attorney. A City police officer was involved in an incident arising from his employment and creating the possibility of a civil suit against the officer for compensatory and punitive damages. The officer has asked the City Attorney to represent him in the civil matter. Initially, it appears that the officer was acting within the scope of his employment at the time of the incident. The City Code provides that the City Attorney will defend employees and cases arising from their actions as City employees. Although the City Code provides for payment of judgments against employees, the City Code states that the City will not be responsible for payment of punitive damage awards.

Under the facts you have presented, you have asked the committee to opine as to the propriety of the City Attorney representing the employee when the City does not have a duty to pay all or part of a judgment that may be entered against the employee. Additionally, if the City Attorney does represent the employee, what role may the City Attorney take in attempting to settle the case?

The appropriate and controlling disciplinary rules relative to your inquiry are DR:4-101, DR:5-105(A), (B), and (C), and DR:5-106. DR:4-101 requires an attorney to preserve client confidences and secrets.

DRs 5-105(A) and (B) prohibit an attorney from undertaking or require withdrawal from employment where the lawyer's independent professional judgment is likely to be adversely affected by representing multiple clients with conflicting interests.

DR:5-105(C) permits multiple representation if it is obvious the attorney can adequately represent each client, and each client consents to the representation after full disclosure of the possible effect of the representation on the attorney's exercise of independent professional judgment on behalf of each client.

DR:5-106(B) states that an attorney shall not allow another who pays for or employs his services to direct or regulate his professional judgment on behalf of a client.

The committee observes that the potential conflicts arising out of your hypothetical situation are similar to those which an insurance defense attorney occasionally faces when employed by an insurance carrier to represent its insured. The committee has previously opined that, although paid by the insurer, the lawyer must represent the

insured with undivided loyalty. LE Op. 598 (Approved by the Virginia Supreme Court, March 8, 1985). See also, Norman v. Insurance Co. of North America, 218 Va. 718, 727 (1978) (attorney employed to represent insured is bound by the same high standards which govern all attorneys in their representation of private clients). Thus, the insured/client may presume that his attorney has no interest which will interfere with his devotion to the matter confided to him. The attorney is barred from disclosing or using confidences and secrets which may create a policy defense for the insurance company. LE Op. 598, supra. The attorney may not settle the case contrary to the directions of the insured, and if the insured and insurer disagree, and their differences cannot be reconciled, the attorney must withdraw. LE Op. 616 (November 13, 1984).

In insurance defense cases, some courts have ruled that a conflict of interest arises when an insurer provides a defense to the insured while disclaiming coverage for punitive damages. Previews, Inc. v. California Union Ins. Co., 640 F.2d 1026 (9th Cir. 1981); Parker v. Agricultural Ins. Co., 109 Misc.2d 678, 440 N.Y.S.2d 964 (1981). In Illinois Municipal League Risk Mgmt. Assoc. v. Siebert, 223 Ill. App. 3d 864, 585 N.E. 2d 1130 (1992), the court recognized that the conflict can be resolved by full disclosure and consent by the parties. Therefore, it has been held that when punitive damages are alleged and the insurance carrier disclaims coverage, the insured has a right to independent counsel paid for by the insurer. City of Newark v. Hartford Accident & Indemnity Co., 134 N.J.Super. 537, 342 A.2d 513 (1975); Hartford Accident & Indemnity Co. v. Village of Hempstead, 48 N.Y.2d 218, 422 N.Y.S.2d 47, 397 N.E.2d 737 (1979).

The committee believes that attorneys employed by municipal governments are not automatically disqualified from defending both the municipality and individual employees in the same lawsuit based upon the employee's conduct in his official capacity. Joint representation of both the governmental entity and the employee is permitted, despite some potentially differing interests, provided there is consent after full and adequate disclosure, and there is a substantial identity of interests between them in terms of defending the claims. Petition for Review of Opinion 552, 102 N.J. 194, 507 A.2d 233, 238 (1986) (no realistic possibility for conflict in joint representation of government and individual defendant sued strictly in official capacity and government required to fully indemnify individual defendant); Police Officers Fed'n v. Minneapolis, 488 N.W.2d 817 (Minn. App. 1992) (assistant city attorney did not have conflict of interest that disqualified him from representing both city and officer in federal civil rights action, where city obligated to pay punitive damages and defenses were consistent rather than antagonistic).

In Aetna Casualty & Surety Company v. United States, et al., 570 F.2d 1197 (1978), the Fourth Circuit Court of Appeals found that it was appropriate for a deputy assistant attorney general to represent the interest of the United States and four federally-employed air traffic controllers who were named defendants in a suit arising from a plane crash. Acknowledging it was conceivable that the controllers would try to shift full blame to the United States and vice versa, the court nonetheless emphasized the need to look at "practical considerations" to evaluate whether an actual conflict of interests will likely arise. The court accepted the statement of government counsel that there was no dispute

among the controllers with respect to their duties and responsibilities or the details of the crash. Moreover, even assuming the existence of a conflict, the controllers had, after consultation with their union counsel, consented to the representation by the deputy assistant attorney general. The court's analysis of DR:5-105(C) in this context is instructive:

> . . . it is `obvious ' that the government can adequately represent the interest of the air traffic controllers. Indeed, it appears to us that such representation is highly desirable since these defendants will have the benefit not only of government counsel but also the reservoir of the government's expertise in this highly involved and technical litigation,
> and will be spared the burden upon their time and resources incident to the employment of independent counsel.

570 F.2d 1202.

The committee adopts the reasoning of the Aetna case insofar as the question of the government attorney's representation of employees sued for actions arising during the course of their employment should be decided on a case-by-case basis with an analysis of the practical considerations involved in the representation. The committee is of the view that the question of multiple representation is best resolved by the local government attorney depending on the circumstances of each case. As at least one court has observed, a per se prohibition on multiple representation would impose a significant burden on local governments and employees who must obtain independent counsel. Petition for Review of Opinion 552, supra.

Your preliminary fact analysis indicates that the actions of the officer were not egregious to the extent that they would take him outside the scope of his employment. Therefore, it appears that the officer's potential exposure to punitive damages is relatively small when compared to his and the City's potential exposure to compensatory damages. If the insured police officer's interest and risk in the litigation is small when compared with the City's, representation by the City Attorney may be appropriate. Parker v. Agricultural Insurance Co., 440 N.Y.S.2d 964 (1981). The reasoning of the Parker court, like that of the Fourth Circuit in the Aetna case, supra, recognizes the practical considerations which must bear on the question of multiple representation:

> Indisputedly, the great bulk of litigation involving insureds, wherein punitive damages may be routinely tacked onto the ad damnum clause, may be predictably, regularly and properly defended and controlled by the insurer.

440 N.YS.2d 968.

The committee is of the opinion that the practical considerations in your case may adequately resolve the potential conflict of interest created by the lack of coverage for punitive damages. See, Aetna Casualty and Surety Company, supra; Richmond Hilton Associates v. The City of Richmond, 690 F.2d 1086 (4th Cir. 1982); and Tessier v.

Plastic Surgery Specialists, Inc., 731 F.Supp. 724, 729 (E.D. Va. 1990). From the information you provided us, it appears that the City and its police officer agree upon the facts which give rise to the potential litigation and that the defenses are consistent rather than antagonistic. In addition, you have explained that the officer has sought representation by the City Attorney. However, before representation by the City Attorney is permissible, the City Attorney should advise the police officer in writing that the suit may seek punitive damages which are in excess of the City's available coverage and that the officer has a right to seek independent counsel at the City's expense to defend the punitive damages claim. See, State Farm v. Floyd, 235 Va. 136 (1988), and DR:5-105(C).

Given our conclusion that representation may be appropriate in certain cases, you have asked what role the City Attorney may take in attempting to settle the case. The City Attorney would, of course, have an obligation to convey settlement offers to the police officer which may significantly affect settlement or resolution of the case. DR:6-101(D); State Farm Mutual Auto Insurance v. Floyd, supra. The role of the City Attorney in pursuing settlement is comparable to that of insurance defense counsel, whose goal is to achieve a speedy and successful resolution of the case for both the insurer and its insured. Therefore, if the officer and the City have differences about a settlement proposal and those differences cannot be reconciled, then the City Attorney would be required to withdraw from representation. LE Op. 616. In addition, the City Attorney would be required to withdraw from representation if discovery reveals the appropriateness of antagonistic defenses or that the officer acted contrary to City policy or outside the scope of his employment.