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When the Interests of Municipalities and Their Officials Diverge: Municipal Dual Representation and Conflicts of Interest in § 1983 Litigation

ABSTRACT. In many cases, municipal attorneys defend both a municipality and a municipal official against § 1983 claims. Some defenses available to the two types of defendants are incompatible and may give rise to conflicts of interest. This Note analyzes the problems associated with these conflicts of interest. The Note categorizes and describes the strengths and shortcomings of existing approaches to addressing these conflicts. Finally, it proposes a hybrid approach that may better address conflicts of interest in municipal dual representation.

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INTRODUCTION

Constitutional tort litigation pursuant to 42 U.S.C. § 1983 has generally increased over the past forty to fifty years,¹ particularly after the Supreme Court's decisions in *Monell v. Department of Social Services* and *Owen v. City of Independence*.² These decisions authorized and expanded, respectively, the liability of municipalities under § 1983. Plaintiffs can now bring claims against municipal officials or municipalities themselves for constitutional violations committed under color of law, and frequently they bring claims against both.³ One empirical study finds that approximately 82% of constitutional tort cases involve multiple defendants,⁴ which usually means a government entity has been sued along with one or more of its officials. That statistic is consistent with the experiences of an attorney in the New York City Law Department, who reported that out of approximately 1250 § 1983 lawsuits then being handled by the Department's Special Federal Litigation division, the vast majority named the City and one or more officials as defendants.⁵

Because many of the same facts and elements relate to § 1983 claims against municipalities as to § 1983 claims against municipal officials in their individual capacity, the same legal team frequently will defend both a municipality and its official in a § 1983 case.⁶ This dual representation creates significant potential

1. See MICHAEL AVERY, DAVID RUDOVSKY & KAREN M. BLUM, POLICE MISCONDUCT: LAW AND LITIGATION § 1.1 (2002), available at WL POLICEMISC s 1:1; Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 523 (1982) (discussing the growth of § 1983 litigation).
2. *Owen v. City of Independence*, 445 U.S. 622 (1980); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); see JAMES T. TURNER, HANDBOOK OF HOSPITAL SECURITY AND SAFETY 30 (1988) (“[*Monell* and *Owen*] have paved the way for the significant increase in the use of Section 1983 as a remedy for the abuse of police power.”); see also RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 100-01 tbl.4.2 (1999).
3. *E.g.*, *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009).
4. David K. Chiabi, *Police Civil Liability: An Analysis of Section 1983 Actions in the Eastern and Southern Districts of New York*, 21 AM. J. CRIM. JUST. 83, 89 (1996).
5. Telephone Interview with Muriel Goode-Trufant, Chief, Special Fed. Litig. Div., N.Y. City Law Dep't (Dec. 23, 2008) [hereinafter Goode-Trufant Interview].
6. See *Dunton v. County of Suffolk*, 729 F.2d 903, 907 (2d Cir. 1984); Goode-Trufant Interview, *supra* note 5; Memorandum from Dennis J. Herrera, City Att'y, Office of the City Att'y, City & County of S.F., on Client of the City Attorney, to Mayor-Elect Gavin Newsom 2 (Dec. 12, 2003), <http://www.sandiego.gov/charterreview/pdf/deo/070907citysfmemocityattorney.pdf> [hereinafter Herrera Memorandum]. In some cases, state or local law requires or encourages this dual representation. See, e.g., *Dunton*, 729 F.2d at 907.

for conflicts of interest to arise between the municipality as an entity and its individual officials.

The courts that have recognized this issue have seen it as a powerful problem. Thus, a number of courts have called for special sensitivity to the risk of conflicts of interest in § 1983 suits in which a municipality and its official are dually represented by municipal attorneys.⁷ Several courts have noted that the threat of a conflict of interest is inherent in § 1983 cases because of the incompatible defenses that can be asserted by the municipality and by its officials;⁸ a few even call the threat “imminent” and “serious.”⁹

The consequences of these potential conflicts of interest may be severe. When plaintiffs recover damages in § 1983 actions, the awards can be staggering.¹⁰ Even settled cases generally result in damages.¹¹ And even if compensatory recovery against a municipal official is lower than it would be against a municipality,¹² officials still must worry about the possibility that the jury will award substantial punitive damages against them.¹³ Moreover, when a plaintiff sues a municipal official in his individual capacity, courts levy the

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7. *E.g.*, *Wilson v. Morgan*, 477 F.3d 326, 345 (6th Cir. 2007); *Johnson v. Bd. of County Comm’rs*, 85 F.3d 489, 493-94 (10th Cir. 1996); *Ross v. United States*, 910 F.2d 1422, 1432 (7th Cir. 1990); *Marderosian v. Shamshak*, 170 F.R.D. 335, 340 (D. Mass. 1997).
 8. *E.g.*, *Patterson v. Balsamico*, 440 F.3d 104, 114 (2d Cir. 2006); *Arthur v. City of Galena*, No. 04-2022-KHV-DJW, 2004 U.S. Dist. LEXIS 20148, at *10-11 (D. Kan. June 2, 2004); *Minneapolis Police Officers Fed’n v. City of Minneapolis*, 488 N.W.2d 817, 819 (Minn. Ct. App. 1992).
 9. *Dunton*, 729 F.2d at 907; *Van Ooteghem v. Gray*, 628 F.2d 488, 495 n.7 (5th Cir. 1980); *Smith v. City of New York*, 611 F. Supp. 1080, 1087 (S.D.N.Y. 1985); *Shadid v. Jackson*, 521 F. Supp. 87, 89 (E.D. Tex. 1981).
 10. See ALTHEA LLOYD, MONEY DAMAGES IN POLICE MISCONDUCT CASES: A COMPILATION OF JURY AWARDS AND SETTLEMENTS 5 (1983); Chiabi, *supra* note 4, at 92; Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987); Stephen F. Kappeler & Victor E. Kappeler, *A Research Note on Section 1983 Claims Against the Police: Cases Before the Federal District Courts in 1990*, 11 AM. J. POLICE 65, 71 (1992).
 11. See Chiabi, *supra* note 4, at 92, 100.
 12. Of course, if juries assume that municipal officials will be indemnified, they might render higher compensatory awards against the officials than they otherwise would. See Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer’s § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1243-46 (2001).
 13. *E.g.*, *Keenan v. City of Philadelphia*, 983 F.2d 459, 472 (3d Cir. 1992) (upholding a jury’s punitive damages award of over \$600,000 across three individual defendants).

damage award against the official's personal assets;¹⁴ a single finding of liability under § 1983 can bankrupt an official.¹⁵

With such high amounts at stake, there can be great temptation or pressure for a municipal attorney to favor one or the other of her clients when their interests come into conflict. In light of the strong relationships between municipal attorneys and municipalities as compared to those between the attorneys and individual officials, municipal attorneys not infrequently may favor the municipality's interests despite ethical obligations to do otherwise. Sadly, because § 1983 municipal liability doctrine is rather complex, many officials may not realize when their attorneys have subverted their interests,¹⁶ and courts may not realize either unless someone brings the issue to their attention. A court instead may assume the municipal attorney made various strategic choices simply because the evidence in the case supported those choices.

Thus, despite their importance, conflicts of interest in municipal dual representation are "frequently overlooked by litigants" in § 1983 cases, and the issue "has received scant attention in appellate opinions."¹⁷ Legal scholarship has also left this topic virtually unaddressed.¹⁸

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14. See *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).
 15. Cf. William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1129 (1996) (referring to the effect of "the pall of personal liability" on federal employees).
 16. E.g., *Dunton v. County of Suffolk*, 729 F.2d 903, 907-08 (2d Cir. 1984).
 17. AVERY ET AL., *supra* note 1, § 4.26, available at WL POLICEMISC s 4:26; see *Gordon v. Norman*, 788 F.2d 1194, 1199 n.5 (6th Cir. 1986).
 18. A few works mention conflicts of interest in dual representation of governments and their officials, but do not analyze the specific sources of these conflicts (for example, the conflicting defenses available to municipalities and their officials in § 1983 suits) in much depth. See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 84-85 (1983). Most recent legal scholarship on dual representation conflicts has failed to mention municipal dual representation, see, e.g., Debra Lyn Bassett, *Three's a Crowd: A Proposal To Abolish Joint Representation*, 32 RUTGERS L.J. 387 (2001), with the exception of two brief student notes, both published in 1997. One of these notes focused almost exclusively on the Tenth Circuit's 1996 decision in *Johnson v. Board of County Commissioners*. Ann M. Scarlett, Note, *Representing Government Officials in Both Their Individual and Official Capacities in Section 1983 Actions After Johnson v. Board of County Commissioners*, 45 U. KAN. L. REV. 1327 (1997). The other primarily described how municipal conflicts of interest impact various stages of § 1983 litigation. Nicole G. Tell, Note, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a § 1983 Police Misconduct Suit*, 65 FORDHAM L. REV. 2825 (1997). Both propose banning municipal dual representation, Scarlett, *supra*, at 1327; Tell, *supra*, at 2828, an approach that this Note evaluates and rejects.

To remedy the gap in the literature, this Note examines more closely the nature of the conflicts of interest that arise when a municipal attorney defends both a municipality as an entity and a municipal official sued in his individual capacity against § 1983 claims for damages predicated on the same facts. The Note proposes a solution to assist the municipal attorneys who litigate such claims and the courts that hear them.

Part I explains the features of municipal dual representation that most often give rise to conflicts of interest. Specifically, it examines how incompatible defenses available only to the municipality, or available only to its official, may pressure attorneys to assert defenses that advance the interests of one client at the expense of the other—a course of action likely to favor the municipality over the municipal official.

Part II discusses and evaluates existing approaches to prevent these conflicts of interest, and to handle them after they arise. It particularly focuses on three main approaches that courts have employed: (1) imposing per se bans on dual representation, (2) waiting until actual conflicts of interest arise before intervening to impose requirements, and (3) requiring municipalities to make advance commitments that align the interests of the municipality and its officials.

Part III proposes a hybrid solution to address problems associated with these conflicts of interest while preserving municipal officials' access to attorneys and minimizing taxpayer expense. The proposal recommends that municipal attorneys more explicitly inquire into potential conflicts in particular cases upfront, and obtain specific informed consent to the potential conflicts from each client at the outset of the litigation. Where the potential conflict does not yet pose a "significant risk" of materially limiting the attorney's representation, dual representation may continue, and if the municipal official chooses not to be dually represented, he should pay for his own counsel regardless of the municipality's obligation to pay for his outside counsel in the event of a conflict. If the potential conflict comes to comprise a "significant risk," the municipal attorney must obtain further consent for dual representation to continue; if such consent is not given, the municipality must either permit separate representation (and pay for the official's outside counsel if state or municipal law so requires) or align its interests with those of its official. Finally, in the event that a municipality and its official choose definitively to assert conflicting defenses, no waiver of the conflict should be permitted and the municipality should be required to permit separate representation (and pay for the official's outside counsel if state or municipal law so requires) or to align its interests with those of its official.

I. THE PROBLEM OF CONFLICTS OF INTEREST IN DUAL REPRESENTATION OF MUNICIPALITIES AND THEIR OFFICIALS

A. The Municipal Liability Landscape

42 U.S.C. § 1983 provides that “every person” under color of state law who deprives a person within U.S. jurisdiction of rights secured by the Constitution or certain federal laws shall be liable to the party injured.¹⁹ Congress enacted § 1983 as part of the Civil Rights Act of 1871,²⁰ but courts have only firmly established municipal liability under § 1983 over the last thirty years.²¹ Indeed, between 1961 and 1978, the Supreme Court’s decision in *Monroe v. Pape*²² precluded the liability of municipalities, and of municipal officials sued in their official capacity,²³ under § 1983. It was only in 1978 that the Supreme Court overturned *Monroe* in *Monell v. Department of Social Services*, which held that municipalities in fact constitute “persons” for the purposes of § 1983.²⁴

Meanwhile, it had been clear even before *Monell* that municipal officials, when sued in their *individual* capacity,²⁵ constitute “persons” under § 1983.²⁶ As one example, even as the Court in *Monroe* dismissed the § 1983 complaint against the City of Chicago because the City was not a “person,” it reversed the lower court’s dismissal of the complaint against the individual city officials.²⁷

For the most part, the elements of a § 1983 claim against a municipality are identical to the elements of such a claim against an individual municipal official. Against both types of defendants, plaintiffs must prove (1) that the deprivation of a federally protected right occurred, (2) that a particular person’s (or persons’) conduct caused the deprivation, and (3) that the conduct was

19. 42 U.S.C. § 1983 (2006).

20. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified at 42 U.S.C. § 1983).

21. See *Dunton*, 729 F.2d at 907.

22. 365 U.S. 167 (1961).

23. Suits against municipal officials in their official capacity are treated as suits against the municipality, and damages are awarded from the municipality’s funds. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

24. 436 U.S. 658 (1978).

25. For the remainder of this Note, when I refer to suits against municipal officials, I am referring to § 1983 suits for damages against municipal officials in their individual capacity, unless otherwise indicated.

26. See, e.g., *Ybarra v. Los Altos Hills*, 503 F.2d 250, 253 (9th Cir. 1974).

27. 365 U.S. at 192.

committed “under color of law.”²⁸ I will refer to these requirements as the “deprivation” requirement, the “causation” requirement, and the “under color of law” requirement, respectively.

There is one additional element of a § 1983 claim against a municipality not required for a claim against a municipal official. When suing a municipality, the plaintiff must additionally prove the deprivation of his federal right occurred as a result of the enforcement of a municipal policy or custom,²⁹ which I will refer to as the “policy or custom” requirement.³⁰ This requirement finds its genesis in the Supreme Court’s holding that municipalities, unlike private employers,³¹ cannot be held liable for their employees’ actions within the scope of employment under a theory of respondeat superior.³² Instead, municipal liability attaches under § 1983 only if deliberate³³ action attributable to the municipality itself³⁴ is the “moving force”³⁵ behind deprivation of the plaintiff’s federal rights.³⁶

The municipality will most plainly be liable when an established municipal policy harmed the plaintiff. Policies embodied in a “policy statement, ordinance, regulation, or decision officially adopted and promulgated” by the municipality’s main lawmaking body obviously qualify.³⁷ Yet many other things can constitute municipal policies under § 1983. To comprise a municipal policy, “a deliberate choice to follow a course of action [must be] made from among various alternatives by the official or officials responsible [under state

28. See MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES: 2007-1 SUPPLEMENT, § 1.04[A], at 1-17 to -18 (4th ed. 1997); SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 4 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3d ed. 2006) [hereinafter SWORD AND SHIELD]. Most Supreme Court cases list only two main elements of a § 1983 claim because they group multiple elements together. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

29. *Monell*, 436 U.S. at 694.

30. The “policy or custom” requirement has met significant criticism. See, e.g., *City of Okla. City v. Tuttle*, 471 U.S. 808, 834-42 (1985) (Stevens, J., dissenting); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 254-55, 259-63; Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753 (1989).

31. See RESTATEMENT (THIRD) OF AGENCY § 2.04 & cmt. b (2006); RESTATEMENT (SECOND) OF TORTS § 895E cmt. c(2) (2006).

32. *Monell*, 436 U.S. at 663 n.7, 691.

33. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion).

34. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Monell*, 436 U.S. at 692.

35. *Monell*, 436 U.S. at 694.

36. *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 400 (1997).

37. *Monell*, 436 U.S. at 690.

law] for establishing final policy with respect to the subject matter in question.”³⁸ Officials who possess final policymaking authority with respect to the subject matter of their position include some local sheriffs and police chiefs,³⁹ some city councils,⁴⁰ some mayors,⁴¹ some heads of agencies,⁴² and some other high-ranking local government officials. Additionally, in some cases, higher-ranking officials may delegate final policymaking authority to lower-ranking officials to take certain actions,⁴³ or may ratify lower-ranking officials’ actions after the fact,⁴⁴ rendering those actions as “policies.” Only for officials with final policymaking authority can a single edict or act constitute a municipal policy under § 1983.⁴⁵

Liability can also attach when a municipal custom deprives the plaintiff of rights. To constitute a “custom,” a practice need not have received formal approval through any governmental body’s official decisionmaking channels,⁴⁶ and it may contradict local law or regulations,⁴⁷ though it must be “permanent and well settled.”⁴⁸ “Whether a practice is sufficiently persistent to constitute a custom [will] depend on such factors as how longstanding the practice is, the number and percentage of officials engaged in the practice, and the gravity of the conduct.”⁴⁹ A policymaker must have actual or constructive knowledge of the unconstitutional practice and must acquiesce in its continuance for it to constitute a “custom” under § 1983.⁵⁰

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38. *Pembaur*, 475 U.S. at 483-84; see *City of Okla. City v. Tuttle*, 471 U.S. 808, 823 (1985).
 39. *E.g.*, *Cooper v. Dillon*, 403 F.3d 1208, 1223 (11th Cir. 2005); *Turner v. Upton County*, 915 F.2d 133, 137 (5th Cir. 1990).
 40. *E.g.*, *Church v. City of Huntsville*, 30 F.3d 1332, 1343 (11th Cir. 1994).
 41. *E.g.*, *Patterson v. City of Utica*, 370 F.3d 322, 331 (2d Cir. 2004); *DePiero v. City of Macedonia*, 180 F.3d 770 (6th Cir. 1999).
 42. *E.g.*, *Altman v. City of Chicago*, No. 99 C 6496, 2000 U.S. Dist. LEXIS 16632, at *7 (N.D. Ill. Oct. 24, 2000).
 43. See *Pembaur*, 475 U.S. at 483; *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987).
 44. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).
 45. *Praprotnik*, 485 U.S. at 123; *Pembaur*, 475 U.S. 469.
 46. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690-91 (1978).
 47. *Praprotnik*, 485 U.S. at 130-31; *e.g.*, *Wright v. Newsome*, 795 F.2d 964 (11th Cir. 1986); *Anela v. City of Wildwood*, 790 F.2d 1063, 1067, 1069 (3d Cir. 1986).
 48. *Monell*, 436 U.S. at 691.
 49. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 7.16, at 79 (2003).
 50. *E.g.*, *Am. Postal Workers Union, Local 96 v. City of Memphis*, 361 F.3d 898, 902 (6th Cir. 2004); *McNabola v. Chi. Transit Auth.*, 10 F.3d 501, 511 (7th Cir. 1993).

The Supreme Court has further recognized an alternative route to proving § 1983 municipal liability: the plaintiff can demonstrate that the municipality's inadequate training policies caused the deprivation of his protected rights.⁵¹ To proceed in this manner, the plaintiff must show that the municipality's failure to train reflects deliberate indifference to its inhabitants' rights, and that the failure to train actually caused the deprivation at issue in the case.⁵²

The plaintiff must identify a specific deficiency in the municipality's training program.⁵³ Because of the policy or custom requirement, a municipality—unlike an individual official—may defend a § 1983 action by claiming that no such policy or custom existed. This is the first difference between the standards for § 1983 liability of municipalities and those for their officials that gives rise to a high likelihood of conflicts of interest in dual representation.

The second important difference in liability standards for municipality defendants and municipal official defendants is the defense of qualified immunity. Supreme Court precedent has clearly established that municipal officials, but not municipalities, may assert the qualified immunity defense.⁵⁴ The current standard to determine whether an official may plead qualified immunity against a § 1983 claim for civil damages is whether he was “performing [a] discretionary function[.]” and his “conduct d[id] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁵⁵ Qualified immunity is presently available to officials only for actions taken within the scope of their official duties.⁵⁶

The last relevant difference between the § 1983 liability of municipalities and their officials regards the availability of punitive damages. Simply put, juries can award punitive damages against municipal officials,⁵⁷ but not against municipalities.⁵⁸ An official may be liable for punitive damages when his conduct “is outrageous, because of [his] evil motive or his reckless indifference to the rights of others. . . . [P]unitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness,

51. *City of Canton v. Harris*, 489 U.S. 378 (1989).

52. *Id.* at 388, 391-92.

53. *Id.* at 391.

54. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

55. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

56. *Id.* at 819 n.34; *e.g.*, *Hogan v. Twp. of Haddon*, 278 F. App'x 98, 104 (3d Cir. 2008); *Dunn v. City of Elgin*, 347 F.3d 641 (7th Cir. 2003).

57. *See Smith v. Wade*, 461 U.S. 30 (1983).

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

serious indifference to or disregard for the rights of others, or even gross negligence.”⁵⁹

B. The Conflicts of Interest in Municipal Dual Representation

This Section describes how the different defenses available to municipalities and to their officials identified in Section I.A. may be incompatible, and thus how they give rise to conflicts of interest. It also describes some of the difficulties associated with rectifying these conflicts of interest once they arise.

1. Model Rule 1.7(a) and Concurrent Conflicts of Interest

When a municipal attorney simultaneously defends both a municipality and an official in a suit involving § 1983 claims against them based on the same set of facts, there is real potential for a concurrent conflict of interest as defined by Rule 1.7 of the Model Rules of Professional Conduct and its state equivalents.⁶⁰ Model Rule 1.7(a), which defines a “concurrent conflict of interest,” reads as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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59. *Smith*, 461 U.S. at 46-48 (emphasis omitted) (internal quotation marks and citation omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1979)).
60. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2008). As of April 2009, Model Rule 1.7 had been adopted almost verbatim or reproduced in substantially similar form by the vast majority of states (forty-five states) and the District of Columbia. *E.g.*, D.C. RULES OF PROF'L CONDUCT R. 1.7 (2007); ILL. SUPREME COURT RULES OF PROF'L CONDUCT R. 1.7 (2009); MASS. RULES OF PROF'L CONDUCT R. 1.7 (2009). “Substantially similar form” means that the slight differences between the state’s rule and Model Rule 1.7 are irrelevant for the purposes of this Note. New Jersey’s rule is almost identical except that it precludes municipalities from consenting to concurrent conflicts of interest. N.J. RULES OF PROF'L CONDUCT R. 1.7 (2009). New York’s rule is similar to Model Rule 1.7 but it prohibits the attorney from representing multiple clients without written informed consent if “the representation will involve the lawyer in representing *differing interests*.” N.Y. RULES OF PROF'L CONDUCT R. 1.7 (2009) (emphasis added). California forbids lawyers from representing clients whose interests “potentially conflict” or “actually conflict” without written informed consent. CAL. RULES OF PROF'L CONDUCT R. 3-310(C) (2009). Note that for § 1983 suits in federal court, the rules of the state in which the federal district court is located generally will apply. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000).

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.⁶¹

Dual representation of municipalities and their officials does not usually produce situations in which the clients' interests are "directly adverse" within the meaning of Rule 1.7. Direct adversity in civil litigation generally implies either that one client is a plaintiff while another is a defendant in a single lawsuit,⁶² or that one client is a witness against another,⁶³ and neither generally occurs in municipal dual representation.

Instead, municipal dual representation frequently fits the description of a concurrent conflict of interest contained in Model Rule 1.7(a)(2)—that is, there is often a significant risk that the conflict will materially limit the lawyer's ability to serve both clients. As Comment 23 to Rule 1.7 clarifies,

[S]imultaneous representation of parties whose interests in litigation may conflict, such as . . . codefendants, is governed by paragraph (a)(2). A 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.⁶⁴

While the possibility exists for substantial discrepancy in testimony or different possibilities of settlement, the primary potential for a "material limitation" conflict in municipal dual representation lies in the high likelihood of "incompatibility in positions," as courts have begun to recognize.

2. *The Incompatible Defenses*

As Section I.A. discussed, the two most important differences in the defenses available to municipalities and their officials are as follows: (1) a municipality, but not an official, can defeat § 1983 liability by disproving the existence of a municipal policy or custom that caused the deprivation of the

61. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2008).

62. 1 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIT, *THE LAW OF LAWYERING* § 11.8, at 11-22 (3d ed. Supp. 2004).

63. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2008).

64. *Id.* R. 1.7 cmt. 23 (emphasis added).

plaintiff's rights; and (2) an official, but not a municipality, can defeat § 1983 liability by asserting qualified immunity. These defenses ultimately may prove incompatible in a few ways.

First, an official's attempt to establish qualified immunity will usually require that the official show that he was acting within the scope of his official duties,⁶⁵ but the evidence introduced on this front may help to show that he was acting pursuant to a municipal policy or custom. Meanwhile, just as the official has incentive to show that he was acting within the scope of his duties, the municipality has incentive to show that the official was acting *outside* the scope of his official duties, in order to support its claim that no municipal policy or custom existed to give rise to § 1983 liability.⁶⁶ The Second Circuit succinctly explained this incompatibility in *Dunton v. County of Suffolk*:

A municipality may avoid liability by showing that the employee was not acting within the scope of his official duties, because his unofficial actions would not be pursuant to municipal policy. The employee, by contrast, may partially or completely avoid liability by showing that he was acting within the scope of his official duties. If he can show that his actions were pursuant to an official policy, he can at least shift part of his liability to the municipality. If he is successful in asserting a [qualified] immunity defense, the municipality may be wholly liable because it cannot assert the [qualified] immunity of its employees as a defense to a section 1983 action.⁶⁷

There are several ways that the question of whether a municipal official was acting within or outside the scope of his duties may relate to the question of whether a municipal policy or custom existed. For example, a municipal official who acts outside the scope of his duties is less likely to have final policymaking authority with respect to his actions because his actions can more easily be characterized as "purely personal" rather than occurring in areas over which state law has given him final policymaking authority.⁶⁸ If he lacks final policymaking authority with respect to his actions, then his isolated acts cannot

65. See *supra* note 56 and accompanying text.

66. See *Manganella v. Keyes*, 613 F. Supp. 795, 797 n.1 (D. Conn. 1985).

67. *Dunton v. County of Suffolk*, 729 F.2d 903, 907 (2d Cir. 1984). Courts discussing conflicts of interest in municipal dual representation often quote *Dunton's* influential passage. *E.g.*, *Patterson v. Balsamico*, 440 F.3d 104, 114 (2d Cir. 2006); *Coleman v. Smith*, 814 F.2d 1142, 1147 (7th Cir. 1987).

68. *Roe v. City of Waterbury*, 542 F.3d 31, 41 (2d Cir. 2008); see, e.g., *id.* at 37; *Bennett v. Pippin*, 74 F.3d 578, 581, 586 (5th Cir. 1996).

be characterized as a policy or custom.⁶⁹ As another example, the municipality may use facts that show that the official acted outside the scope of his duties in order to demonstrate that municipal policy or custom did not cause or was otherwise not the “moving force” behind the deprivation of the plaintiff’s rights.⁷⁰

To be sure, asserting that the municipal official was off-duty or acting beyond the scope of his duties may also support a defense that both municipalities and their officials can assert: that the official was not acting under color of law.⁷¹ Yet this defense is often unsuccessful because courts frequently hold that even off-duty officials or those who act beyond the scope of their duties are acting under color of law if other indicia are present—for example, if the official were wearing his badge at the time or using municipal equipment or his official position to deprive the plaintiff of rights.⁷² Nevertheless, municipalities may be more willing than their officials to assert the defense on the chance that it might be successful because municipalities do not face the main risk of this defense⁷³—losing eligibility for qualified immunity—that municipal officials do.⁷⁴ Thus conflicts can occur in the many cases in which an official would be better off asserting that he was acting within the scope of his duties.

The second potential incompatibility between the municipality’s desire to assert a “policy or custom” defense and the official’s desire for qualified immunity arises from the potential for the municipal official to claim that he was “just following orders.” At least seven circuits have decided that while “following orders” does not automatically excuse a municipal official from liability—particularly if he violates an unambiguously established right—plausible instructions from a superior official, or sometimes even from a fellow

69. See *supra* notes 38, 45 and accompanying text.

70. E.g., *Roe*, 542 F.3d at 38; *Batiste v. City of Beaumont*, No. 1:05-CV-109, 2006 U.S. Dist. LEXIS 21865, at *12 (E.D. Tex. Mar. 10, 2006).

71. See *Burris v. Thorpe*, 166 F. App’x 799, 802 (6th Cir. 2006); see, e.g., *Latuszkin v. City of Chicago*, 250 F.3d 502 (7th Cir. 2001); *Barna v. City of Perth Amboy*, 42 F.3d 809 (3d Cir. 1994); *Dunton*, 729 F.2d at 906-07.

72. E.g., *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995); *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991); *Cassady v. Tackett*, 938 F.2d 693, 695 (6th Cir. 1991).

73. See *Dunton*, 729 F.2d at 907; see, e.g., *Medina v. City of Osawatomie*, 992 F. Supp. 1269, 1272 (D. Kan. 1998).

74. See *Rambo v. Daley*, 68 F.3d 203, 205 (7th Cir. 1995).

official, can support qualified immunity.⁷⁵ Thus, an individual official has reason to claim he was just following orders given by his superior.⁷⁶

Yet if the official asserts such a claim, the plaintiff can often use the evidence supporting it to show that the municipality had a policy or custom that caused the deprivation. Indeed, if the superior who gave the order possessed final policymaking authority with respect to the subject matter at stake, his orders may constitute a municipal policy because they may reflect “a deliberate choice to follow a course of action . . . made from among various alternatives.”⁷⁷ If the orders given by the official with final policymaking authority were sufficiently broad, they might constitute a delegation of final policymaking authority to the subordinate official. Under such circumstances, even the subordinate official’s isolated actions in effectuating the orders could constitute policies on behalf of the municipality.⁷⁸ Finally, the claim that the official was following orders on this occasion could help to establish that other officials followed these orders on multiple occasions; a court could consequently characterize the official’s conduct as consistent with a custom under § 1983.

Similar kinds of conflicts can occur if the official claims qualified immunity because a municipal law or policy permitted or required his conduct, or because the municipality inadequately trained him for the particular circumstance. Such claims can assist the official by helping to demonstrate the objective legal reasonableness of his actions.⁷⁹ But the contention that such a policy or

75. See *Harvey v. Plains Twp. Police Dep’t*, 421 F.3d 185 (3d Cir. 2005); *Brent v. Ashley*, 247 F.3d 1294, 1306 (11th Cir. 2001); *Jacobs v. W. Feliciana Sheriff’s Dep’t*, 228 F.3d 388 (5th Cir. 2000); *Lauro v. Charles*, 219 F.3d 202, 216 n.10 (2d Cir. 2000); *Bilida v. McCleod*, 211 F.3d 166, 174 (1st Cir. 2000); *Villanueva v. George*, 659 F.2d 851, 855 (8th Cir. 1981); *Busche v. Burkee*, 649 F.2d 509 (7th Cir. 1981).

76. See Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 870 n.102 (2001); Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 60 (1980); see also Dina Mishra, Comment, *Municipal Interpretation of State Law as “Conscious Choice”: Municipal Liability in State Law Enforcement*, 27 YALE L. & POL’Y REV. 249 (2008) (discussing the circumstances under which municipalities should be held liable for damages for unconstitutional acts when they are “just following orders” — specifically, when they are required to enforce state law).

77. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion); see, e.g., *Konits v. Valley Stream Cent. High Sch. Dist.*, No. 01-CV-6763, 2006 U.S. Dist. LEXIS 5610 (E.D.N.Y. Jan. 28, 2006); *Hubbard v. City of Middletown*, 782 F. Supp. 1573 (S.D. Ohio 1990); see *supra* note 38 and accompanying text.

78. E.g., *Diamond v. Chulay*, 811 F. Supp. 1321, 1327-28 (N.D. Ill. 1993); see *supra* notes 43, 45, and accompanying text.

79. See *Roska v. Peterson*, 328 F.3d 1230, 1251-52 (10th Cir. 2003); Karen M. Blum, *Qualified Immunity: Discretionary Function, Extraordinary Circumstances, and Other Nuances*, 23 TOURO

inadequate training existed would seriously undermine the municipality's interests.⁸⁰

These incompatibilities illustrate why dual representation of municipalities and their officials is likely to produce conflicts of interest. But the incompatibilities are essentially moot when the municipality bears the cost of the municipal official's liability—that is, when the municipality completely indemnifies the municipal official for all damages assessed under § 1983.⁸¹ In such cases, the individual capacity suit against the official becomes indistinguishable—from a conflicts of interest perspective—from a lawsuit against the municipal official in his official capacity. This is because complete indemnification causes the municipality to bear the official's costs of liability as well as its own. The municipality, therefore, has no reason to assert defenses that would shift liability off of itself and onto the municipal official, just as the official has little reason to assert defenses that would shift liability onto the municipality: either way, the municipality will pay.⁸²

These indemnification arrangements are fairly common. At least twenty-two states' codes require municipalities to indemnify their officials for liability under certain conditions.⁸³ At least eight others explicitly permit such

L. REV. 57, 65-81 (2007); Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 HASTINGS L.J. 499, 508-09 (1993).

80. See *Atchinson v. District of Columbia*, 73 F.3d 418, 427 (D.C. Cir. 1996).

81. See *Manganella v. Keyes*, 613 F. Supp. 795, 799 (D. Conn. 1985).

82. Of course, even with indemnification, municipal officials may face nonpecuniary costs of liability that municipalities do not, because the officials may lose their jobs and face social stigma or fewer outside employment opportunities as a result of being found liable under § 1983. And municipalities may face public legitimacy costs of liability that officials do not face. But simply having a different amount or type of stake in the action does not automatically give rise to a conflict, so long as the attorney has incentive to present the case in a way that would represent both of his clients' interests. See MODEL RULES OF PROF'L CONDUCT R. 1.7 & cmt. 23 (2008). Furthermore, the nonpecuniary costs may not be tied to liability as much as to the mere accusation of the official's alleged wrongdoing, in which case any approach to resolving conflicts of interest in representation might be too late and irrelevant to diminish those costs.

83. CAL. GOV'T CODE § 825 (West 1995); CONN. GEN. STAT. ANN. § 7-465(a) (West 2008); IDAHO CODE ANN. § 6-903(b)(i) (2004); IND. CODE ANN. § 34-13-3-5 (West 2008); IOWA CODE ANN. § 669.21 (West 1998); KAN. STAT. ANN. § 75-6109 (1997); KY. REV. STAT. ANN. § 65.2005 (LexisNexis 2004); MINN. STAT. ANN. § 466.07 (West 2008); MISS. CODE ANN. § 11-46-7 (LexisNexis 2002); MONT. CODE ANN. § 2-9-305 (2007); NEB. REV. STAT. § 13-1801 (2007); NEV. REV. STAT. ANN. § 41.0349 (LexisNexis 2006); N.H. REV. STAT. ANN. § 29-A:2 (LexisNexis 2008); N.M. STAT. ANN. § 41-4-4 (LexisNexis 2004); N.Y. PUB. OFF. LAW § 18 (McKinney 2008); N.D. CENT. CODE § 32-12.1-04 (1996); OKLA. STAT. ANN. tit. 51, § 162 (West 2008); OR. REV. STAT. § 30.285 (2007); 42 PA. CONS. STAT. § 8548(a) (West 2007); W. VA. CODE ANN. § 29-12A-11 (LexisNexis 2008); WIS. STAT. ANN. § 895.46 (West 1983); WYO. STAT. ANN. § 1-39-104 (2009).

indemnification.⁸⁴ But permissive indemnification does not fully align the interests of the municipality and its officials: the municipality may still assert its own defenses, shift liability to the official, and avoid paying the liability by ultimately opting not to indemnify. Of course, the individual municipality separately may be required to indemnify officials pursuant to a municipal ordinance,⁸⁵ or by contractual or labor agreements⁸⁶ with officials or their unions.

Even if indemnification of municipal officials is available from a number of municipalities, however, it generally is not complete.⁸⁷ At least four states explicitly prohibit municipalities from indemnifying for punitive damages.⁸⁸ Moreover, at least sixteen states preclude indemnification for *any* damages—compensatory or punitive—if the conduct giving rise to the liability for those damages meets a particular standard of egregiousness—for example, if it is “willful,” “wanton,” “reckless,” or “malicious.”⁸⁹

Particularly since juries cannot award punitive damages directly against municipalities,⁹⁰ when municipalities do not indemnify for punitive damages, they have little incentive to vigorously defend officials against such damages,⁹¹ other than the desire to maintain the officials’ morale or to sustain the

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84. GA. CODE ANN. § 45-9-22 (2002); 745 ILL. COMP. STAT. ANN. 10/2-302 (West 2002); ME. REV. STAT. ANN. tit. 14, § 8112 (2003); MASS. GEN. LAWS ANN. ch. 258, § 9 (West 2004); N.J. STAT. ANN. § 59:10-4 (West 2006); S.D. CODIFIED LAWS § 3-19-1 (2008); TENN. CODE ANN. § 29-20-310(d) (2000); TEX. CIV. PRAC. & REM. CODE ANN. § 102.002(a) (Vernon 2005).
85. See, e.g., URBANA, ILL., CODE OF ORDINANCES art. IX, §§ 2-171 to -176 (2008), available at http://www.city.urbana.il.us/urbana/city_code/10209000.htm; NEWTON, MASS., REV. ORDINANCES § 2-116 (2007), available at <http://www.ci.newton.ma.us/Legal/Ordinance/Chapter-2.pdf>; JERSEY CITY, N.J., MUNICIPAL CODE § 27-7 (2008), available at <http://www.municode.com/Resources/gateway.asp?pid=16093&sid=30>.
86. See, e.g., *Hudson v. Coleman*, 347 F.3d 138, 140-41 (6th Cir. 2003).
87. See *Hassan v. Fraccola*, 851 F.2d 602 (2d Cir. 1988); *Doolittle v. Ruffo*, No. 88-CV-1175, 1996 U.S. Dist. LEXIS 4706 (N.D.N.Y. Apr. 11, 1996).
88. 745 ILL. COMP. STAT. ANN. 10/2-302 (West 2002); KAN. STAT. ANN. § 75-6109 (1997); N.Y. PUB. OFF. LAW § 18 (McKinney 2008); OKLA. STAT. ANN. tit. 51, § 162 (West 2008).
89. CONN. GEN. STAT. ANN. § 7-465(a) (West 2008); IDAHO CODE ANN. § 6-903(c) (2004); IOWA CODE ANN. § 669.21 (West 1998); KY. REV. STAT. ANN. § 65.2005 (LexisNexis 2004); ME. REV. STAT. ANN. tit. 14, § 8112(1)-(2)(A) (2003); MASS. GEN. LAWS ANN. ch. 258, § 9 (West 2004); MINN. STAT. ANN. § 466.07 (West 2008); MONT. CODE ANN. § 2-9-305(6)(a) (2007); NEV. REV. STAT. ANN. § 41.0349 (LexisNexis 2006); N.H. REV. STAT. ANN. § 29-A:2 (LexisNexis 2008); N.M. STAT. ANN. § 41-4-4E (LexisNexis 2004); N.Y. PUB. OFF. LAW § 18 (McKinney 2008); OKLA. STAT. ANN. tit. 51, § 162 (West 2008); OR. REV. STAT. § 30.285 (2007); 42 PA. CONS. STAT. ANN. § 8550 (West 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 102.002(c) (Vernon 2005).
90. See *supra* note 58 and accompanying text.
91. See *Ill. Mun. League Risk Mgmt. Ass’n v. Seibert*, 585 N.E.2d 1130, 1139 (Ill. App. Ct. 1992).

municipality's ability to recruit officials in the future.⁹² Worse, if a municipality believes it can shift liability from itself to the individual official, and that such liability would primarily take the form of punitive damages rather than compensatory damages, which is often plausible,⁹³ it may have incentive to argue in ways that *favor* a finding of unusually egregious behavior on the part of the individual official.⁹⁴ This tactic is particularly tempting for municipalities, and particularly detrimental for individual officials, because many municipalities are relieved from the obligation to indemnify the official for *any* damages if the court finds that the official acted recklessly, willfully, or wantonly⁹⁵—the same type of finding that would justify imposing punitive damages on the individual official.⁹⁶

Similarly, many states' laws forbid municipalities from indemnifying their officials for liability attributable to their actions outside the scope of their employment.⁹⁷ Importantly, many facts that would support a finding that an official was outside the scope of his employment also would support a finding that he was outside the scope of his official duties, and vice versa.⁹⁸ As a result, municipalities experience a triple benefit from presenting evidence that an individual official was acting outside the scope of his duties and employment: First, they may undermine the plaintiff's assertion that the official was acting under the color of law. Second, they may undermine a finding that the official's actions constituted or were pursuant to a municipal policy or custom. Third, they may escape the obligation to indemnify the official for damages. Unfortunately for the official, when the municipality pursues such arguments, it deals the official a double blow: First, he may lose his chance at qualified immunity. Second, he may lose the guarantee of indemnification.

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92. See *Mell v. New Castle County*, No. 20003-NC, 2003 Del. Ch. LEXIS 40, at *17 (Del. Ch. Apr. 11, 2003).
93. E.g., *Amato v. City of Saratoga Springs*, 170 F.3d 311, 313 & n.2 (2d Cir. 1999); see *Alexander v. Riga*, 208 F.3d 419, 430 (3d Cir. 2000); *Seibert*, 585 N.E.2d at 1139. Of course, in most cases punitive damages against an official are associated with a large compensatory award against the municipality, so absent special circumstances municipalities might avoid arguing in ways that would increase the official's punitive damages.
94. See *Seibert*, 585 N.E.2d at 1138-39.
95. See *id.*; *supra* note 89 and accompanying text.
96. See *Smith v. Wade*, 461 U.S. 30, 51 (1983); *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1263 (10th Cir. 1995).
97. E.g., CONN. GEN. STAT. ANN. § 7-465(a) (West 2008); 745 ILL. COMP. STAT. ANN. 10/2-302 (West 2002); MD. CODE ANN., CTS. & JUD. PROC. § 5-302 (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 258, § 9 (West 2004); N.Y. PUB. OFF. LAW § 18 (McKinney 2008); TEX. CIV. PRAC. & REM. CODE ANN. § 102.002(a) (Vernon 2005).
98. See, e.g., *Hibma v. Odegaard*, 769 F.2d 1147, 1151-52 (7th Cir. 1985).

This discussion illustrates that municipal indemnification may not fully align the sometimes-incompatible defenses of denying the existence of a policy or custom (on behalf of the municipality) and claiming qualified immunity (on behalf of the individual official). It further illustrates that indemnification standards may provide municipalities with additional incentives to advocate positions detrimental to municipal officials. In many cases, therefore, these incompatibilities create a significant risk that the municipal attorney's ability to effectively represent his clients will be materially limited.⁹⁹ The appropriate course of action for each defendant if considered individually would be to assert all available and plausible defenses. But if the attorney dually representing those defendants asserts all defenses, he risks undercutting one or both of his clients' chances of success; the evidence provided to support one client's defense would contradict the evidence provided to support the other client's defense. Indeed, this "conflict in effect forecloses alternatives that would otherwise be available to the client"¹⁰⁰—namely, specific defenses or the potential success thereof.

Ultimately, there is a real likelihood that conflicting interests will arise in municipal dual representation. As discussed above, many jurisdictions limit indemnification in ways that cause the municipality's interests to conflict with the interests of its officials. In addition, the incompatible defenses discussed above are central to § 1983 liability. The question of whether a policy or custom caused the deprivation of the plaintiff's rights is crucial to establishing a required element of the plaintiff's case for municipal liability and so must come up in any plausible § 1983 municipal liability suit. The defense of qualified immunity is frequently asserted and frequently serves as the basis for a successful individual capacity defense.¹⁰¹ All this explains why courts have declared that conflicts of interest are "inherent" to municipal dual representation in § 1983 suits.¹⁰²

3. Problems Associated with Rectifying a Concurrent Conflict of Interest

The problems associated with a concurrent conflict of interest in municipal dual representation are exacerbated if the conflict is permitted to persist. If a conflict is discovered after representation has been undertaken and it cannot be cured or waived, the attorney "ordinarily must withdraw from the

99. See MODEL RULES OF PROF'L CONDUCT R.1.7 cmt. 8 (2008).

100. *Id.*

101. See SWORD AND SHIELD, *supra* note 28, at 46.

102. See *supra* note 8 and accompanying text.

representation.”¹⁰³ Under such circumstances, a municipal attorney usually withdraws from representing the official and continues to represent the municipality, since he is employed by the municipality for its purposes.¹⁰⁴ But “tremendous hardship [is] imposed on the court and all parties alike [when] separate counsel [has] to be retained in the middle of litigation.”¹⁰⁵ If the municipality does not pay for outside counsel, the official is seriously burdened, because he may not be able to afford his own attorney, and may have lost the opportunity to settle the claim or to prepare to represent himself *pro se*. Even if the municipality pays, the individual official still must rush to obtain new counsel and familiarize the counsel with the litigation.

Additionally, when an attorney withdraws after a conflict is discovered, the withdrawal creates problems relating to confidences previously shared with the attorney. When an attorney has learned information from a former client, he may not thereafter reveal or use information relating to the representation to disadvantage the former client unless the information has become generally known or the rules of ethics otherwise require or permit the disclosure.¹⁰⁶ Instead, he “must continue to protect the confidences of the client from whose representation the [attorney] has withdrawn.”¹⁰⁷ But following this command is particularly difficult when litigation revolves around the former client’s conduct, as is usually the case in municipal § 1983 litigation.¹⁰⁸ These difficulties are compounded as the litigation advances and discovery is conducted, because the likelihood increases that large quantities of confidential information have been shared.¹⁰⁹

In some states, municipal attorneys will have additional difficulty protecting the confidences of former-client officials because of the “joint client” or “common interest” exception to attorney-client privilege.¹¹⁰ This exception – which provides that “[w]here two or more clients have retained or

103. See MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 4 (2008).

104. See, e.g., NAPA, CAL., MUNICIPAL CODE § 2.24.050 (2008), available at <http://www.cityofnapa.org/images/cityclerk/MunicipalCode/Title2/Sections/24/050.pdf>; see also *infra* Section I.C.

105. *Shadid v. Jackson*, 521 F. Supp. 87, 89 (E.D. Tex. 1981).

106. MODEL RULES OF PROF’L CONDUCT R. 1.9(c) (2008).

107. *Id.* R. 1.7 cmt. 5.

108. See *Shadid*, 521 F. Supp. at 89; Tell, *supra* note 18, at 2860.

109. See *Atchinson v. District of Columbia*, 73 F.3d 418, 427 (D.C. Cir. 1996); see, e.g., *Miller v. Alagna*, 138 F. Supp. 2d 1252, 1257 (C.D. Cal. 2000).

110. See Robert B. Cummings, *Get Your Own Lawyer! An Analysis of In-House Counsel Advising Across the Corporate Structure After Teleglobe*, 21 GEO. J. LEGAL ETHICS 683, 689-91 (2008); Nicole Garsombke, Note, *A Tragedy of the Common: The Common Interest Rule, Its Common Misuses, and an Uncommon Solution*, 40 GA. L. REV. 615 (2006).

consulted a lawyer upon a matter of common interest, none of them . . . may claim a privilege” against the other¹¹¹ – may apply to communications made by the individual official to the attorney in the course of dual representation.¹¹² Thus, the attorney may not be able to protect the individual official’s confidential communications if he is subpoenaed to testify about facts relating to the individual’s conduct for the purposes of an indemnification proceeding, for example.

These problems ultimately may require more than the disqualification of the municipal attorney from representing the municipal official after a conflict arises. Indeed, the municipality also may need to reassign the attorney so that he no longer represents the municipality in the § 1983 suit relating to which he obtained the individual official’s confidences. While the risk of a conflict that might necessitate the attorney’s withdrawal from representing the official poses potential problems once the litigation begins that compound as the litigation progresses, the risk may also contribute to broader public policy problems even before any litigation arises. Specifically, uncertainty about conflicts of interest and attorney withdrawal may reduce officials’ likelihood of taking necessary risks on the job.¹¹³ Because individual officials tend to be risk-averse and may overestimate the probability of being sued *ex ante*,¹¹⁴ they may react to additional uncertainty about potential conflicts of interest and attorney withdrawal by behaving in ways that minimize their risk of being sued at the expense of the social benefits that their positions were designed to provide.¹¹⁵

C. Municipal Attorneys’ Temptations and Pressures To Favor Municipalities over Municipal Officials

There are a few reasons why municipal attorneys may favor their municipality clients over their municipal official clients when the clients’ interests conflict. First, law seemingly requires many municipal attorneys to treat the municipality as their primary client.¹¹⁶ As a result, municipal attorneys

111. *Zador Corp. N.V. v. Kwan*, 37 Cal. Rptr. 2d 754, 759 (Cal. Ct. App. 1995) (internal quotation marks and citation omitted).

112. See *Miller*, 138 F. Supp. 2d at 1256; Bassett, *supra* note 18, at 434-35 & n.204.

113. SCHUCK, *supra* note 18, at 68-77.

114. *Id.* at 69-70.

115. *Id.* at 70-73.

116. See, e.g., L.A., CAL., CITY CHARTER, art. II, § 272 (2008), available at <http://www.amlegal.com/library/ca/losangeles.shtml>; *Montgomery County v. Walsh*, 336 A.2d 97, 113 (Md. 1975); *Rinaldi v. Mongiello*, 71 A.2d 398, 401 (N.J. Super. Ct. Law Div.

may feel obligated to prioritize the municipality's interests. Furthermore, they may select defenses to assert based on the notion that disloyalty to the municipality poses greater personal legal risk (risks of violating ethics rules *and* acting contrary to state or municipal law) than does disloyalty to the municipal official (risk only of violating ethics rules).

Additionally, some courts have decided that in conversations between municipal officials and municipal attorneys, the municipality is presumed to be the client for the purposes of attorney-client privilege unless the individual official *clearly* claims he is seeking legal advice in his individual capacity.¹¹⁷ Such holdings may prompt some municipal attorneys to compromise ethical rules about keeping the confidences of officials who approach them for advice regarding § 1983 claims: the municipal attorney may claim that she shared the confidential information with the municipality because the official did not clearly indicate that he was seeking legal advice for himself rather than on behalf of the municipality.

Second, municipal attorneys are employed directly by the municipality and are likely to represent the municipality again in the future. The municipal attorney's salary and career advancement depend on his ability to please his superiors, who represent the municipality, not the individual official. The municipal attorney therefore has "a previously established relationship with one client, the anticipation of future business from one client, . . . greater personal identification with one client, . . . [and] the desire to impress one client on a personal or professional level."¹¹⁸ In addition, the municipal attorney may feel an allegiance to his colleagues and their work-related goals; those goals usually will be aligned with the municipality's goals, rather than the goals of any particular official. In a sense then, the municipal attorney may feel greater "personal feelings of friendship"¹¹⁹ with the municipality, despite the fact that, ultimately, that client is a governmental entity rather than a person.

Of course, most municipal attorneys will be inclined to defend both of their clients to the best of their ability, based on conscience, a sense of obligation, or a feeling of professional pride in succeeding in any client's defense. Also,

1949); *see also* Herrera Memorandum, *supra* note 6, at 1 ("In general, the City Attorney has a single client—the City and County of San Francisco . . .").

117. *See, e.g.*, *Ross v. City of Memphis*, 423 F.3d 596, 605 (6th Cir. 2005).

118. Bassett, *supra* note 18, at 450; *cf.* *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487, 491-92 (Cal. 1994) (describing how corporate in-house counsel's "inevitably close professional identification with the fortunes and objectives of the corporate employer" can subject the in-house attorney to "unusual pressures to conform to organizational goals" that may irresistibly tempt her to bend ethical norms).

119. Bassett, *supra* note 18, at 450.

because the municipality itself has incentives to provide effective representation to its officials—for example, to maintain officials’ good will in ongoing working relationships, and to maintain its ability to recruit, hire, and retain other municipal officials¹²⁰—those incentives are likely to motivate municipal attorneys to some extent.

Even so, competing motivations can operate both consciously and unconsciously on an attorney to favor the municipality. Psychological studies suggest that self-serving bias can operate to influence even a professionally trained expert’s decisions in favor of his primary client, so long as there is sufficient ambiguity about the correct choice.¹²¹ Given the elaborate legal doctrine surrounding the incompatible defenses available to municipalities and their officials in § 1983 suits and the complex sets of facts often involved in these cases, there frequently will be ambiguity about which evidence to present and when, or how to frame the story of what happened. Similarly, researchers have found that repeated and close interactions with a client can promote bias toward that client.¹²² Municipal attorneys clearly have repeated contact with the municipality and its representatives, but not much with any particular municipal official.

Ultimately, however, it is of little importance which type of defendant is more likely to be harmed. What matters is that municipal dual representation likely harms the interests of at least one client. Indeed, the underlying problem with such conflicts of interest is not just that they may cloud municipal attorneys’ judgment and lead them to favor one client over the other. Rather, it is that the conflicts set up these attorneys for failure: attorneys must either pursue only one of the incompatible defenses, or must instead present both and risk turning the jury against both defendants because of the inconsistent story being presented by the defendants’ single attorney or set of attorneys. “The rule against representing conflicting interests is designed not only to prevent the dishonest lawyer from fraudulent conduct, but also to prevent the honest lawyer from having to choose between conflicting duties, rather than to enforce to their full extent the legal rights of each client.”¹²³

120. See *supra* note 92 and accompanying text.

121. See, e.g., Max H. Bazerman, Kimberly P. Morgan & George F. Loewenstein, *The Impossibility of Auditor Independence*, SLOAN MGMT. REV., Summer 1997, at 89.

122. See *id.*

123. *Miller v. Alagna*, 138 F. Supp. 2d 1252, 1255-56 (C.D. Cal. 2000) (internal quotation marks omitted) (quoting *In re Jaeger*, 213 B.R. 578, 584 (C.D. Cal. 1997)).

II. EXISTING APPROACHES TO ADDRESS THE CONFLICTS OF INTEREST

This Part describes and evaluates the main approaches taken by state ethics rules, state and municipal laws, and federal and state courts to address the conflicts of interest that arise from municipal dual representation.

A. Description of Existing Approaches

Under Model Rule 1.7 and its state equivalents, determining that a conflict of interest exists is only the first step in ultimately deciding whether an attorney must be barred from dual representation. Indeed, the rule provides that a lawyer may continue to represent two clients, despite a conflict, if particular conditions are met.¹²⁴ Specifically, Model Rule 1.7(b) permits municipal attorneys to dually represent municipalities and their officials so long as they obtain written informed consent from all clients and reasonably believe they can provide competent and diligent representation to all clients.¹²⁵ It is unclear, however, whether the inherent nature of the conflict in such dual representation makes it unreasonable for an attorney to believe he can serve both of his clients adequately.

Several state statutes and municipal ordinances prescribe additional procedures for municipal attorneys to follow when dealing with conflicts of interest. Because many municipalities are legally obligated to provide for the defense of their employees under certain conditions, many jurisdictions provide for the hiring of outside counsel for the individual official, at the municipality's expense, if a conflict of interest would prevent the municipal attorney from representing the employee.¹²⁶ A few laws prohibit indemnification when the official's defense would create a conflict of interest between the municipality and the official.¹²⁷

In light of these state and municipal rules, at least thirteen different courts, including at least four federal appellate courts, have considered the potential

124. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2008).

125. *Id.*

126. *E.g.*, GA. CODE ANN. § 45-9-21(a), (c)(2) (2002); ME. REV. STAT. ANN. tit.14, § 8112 (2003); N.Y. PUB. OFF. LAW § 18(3)(a), (b) (McKinney 2008); URBANA, ILL., CODE OF ORDINANCES art. IX §§ 2-173(a), (b) (1998), *available at* http://www.city.urbana.il.us/urbana/city_code/10209000.htm; PLANDOME HEIGHTS, N.Y., VILLAGE CODE § 19-3(A), (B) (2008), *available at* <http://www.plandomeheights-ny.gov/Codes/Defense and Indemnification.htm>.

127. *E.g.*, WALDWICK, N.J., MUNICIPAL CODE § 16-4(C) (2004), *available at* <http://www.waldwickpd.org/code/Chapter%2016.pdf>.

conflicts of interest that can arise from municipal dual representation in § 1983 suits.¹²⁸ Numerous other cases have noted the potential for such conflicts.¹²⁹

Generally, courts have adopted or recommended one of three approaches to address these conflicts of interest. A few have imposed a per se ban on dual representation in § 1983 claims for damages. At the other extreme, most courts avoid intervening at all when the conflict is merely potential; these courts instead “wait and see” whether an actual conflict will materialize, at which time they permit the representation to continue only if the attorney meets Model Rule 1.7(b)’s requirements. Finally, a few courts have adopted an intermediate approach: they permit the attorney to represent both defendants, but require him to take steps to align their potentially conflicting interests. I will refer to these three approaches as the “per se ban” approach, the “wait and see” approach, and the “align the interests” approach, respectively. Also in the mix is the fact that some courts, mostly those that use the align the interests approach, have additionally required that the attorney obtain consent from both the municipality and its official at the beginning of the dual representation after informing them of the potential for the specific conflicts of interest prevalent in this area.

1. *The Per Se Ban Approach*

The per se ban approach is most clearly exemplified by the Eastern District of Texas decision in *Shadid v. Jackson*¹³⁰ and by *Opinion 552* of the New Jersey

128. *E.g.*, *Wilson v. Morgan*, 477 F.3d 326, 344-46 (6th Cir. 2007); *Patterson v. Balsamico*, 440 F.3d 104, 114-16 (2d Cir. 2006); *Galindo v. Town of Silver City*, 127 F. App’x 459, 467-68 (10th Cir. 2005); *Hutcherson v. Smith*, 908 F.2d 243, 245-46 (7th Cir. 1990); *Almonte v. City of Long Beach*, No. CV 04-4192, 2007 U.S. Dist. LEXIS 21782, at *7-13 (E.D.N.Y. Mar. 27, 2007); *Bonneville v. Kitsap County*, No. Co6-5228RJB, 2006 U.S. Dist. LEXIS 40200, at *4-7 (W.D. Wash. June 14, 2006); *Arthur v. City of Galena*, No. 04-2022, 2004 U.S. Dist. LEXIS 20148, at *3-11 (D. Kan. June 2, 2004); *Kounitz v. Slaatten*, 901 F. Supp. 650, 658-59 (S.D.N.Y. 1995); *Smith v. Daggett County Bd. of Educ.*, 650 F. Supp. 44, 46-48 (D. Utah 1986); *Manganella v. Keyes*, 613 F. Supp. 795 (D. Conn. 1985); *Clay v. Doherty*, 608 F. Supp. 295, 300-05 (N.D. Ill. 1985); *Shadid v. Jackson*, 521 F. Supp. 87 (E.D. Tex. 1981); *In re Petition for Review of Opinion 552 of the Advisory Comm. on Prof’l Ethics*, 507 A.2d 233 (N.J. 1986).

129. *E.g.*, *Chavez v. New Mexico*, 397 F.3d 826, 839-40 (10th Cir. 2005); *Bennett v. Pippin*, 74 F.3d 578, 581-83 (5th Cir. 1996); *Atchinson v. District of Columbia*, 73 F.3d 418, 427 (D.C. Cir. 1996); *Mercurio v. City of New York*, 758 F.2d 862, 864-65 (2d Cir. 1985); *Richmond Hilton Assocs. v. City of Richmond*, 690 F.2d 1086, 1088-90 (4th Cir. 1982); *Van Ooteghem v. Gray*, 628 F.2d 488, 495 n.7 (5th Cir. 1980).

130. 521 F. Supp. 87 (E.D. Tex. 1981).

Supreme Court Advisory Committee on Professional Ethics,¹³¹ which was later substantially modified by the New Jersey Supreme Court.¹³² A few scholars have recommended broader adoption of the per se ban approach.¹³³

In *Shadid*, the court found that the facts of the case created an “obvious” and “serious” potential for a conflict of interest between a city and a city police officer.¹³⁴ As a result of the conflicting defenses available, “an attorney seeking to represent both of these defendants with utmost zeal might find himself in an untenable position” and might “find it difficult to protect the confidences of his individual client while serving the interests of the city.”¹³⁵ The court further explained that tremendous hardship would be imposed on both it and the parties if an actual conflict were to materialize and necessitate separate counsel later in the litigation. As a result, the court required separate counsel before trial.¹³⁶ In addition, it declared that “[t]he potential for abuse is far too serious to permit joint representation to continue, even in the face of an apparent waiver signed by both of these defendants.”¹³⁷ The court lamented that its decision would prevent the individual litigant from retaining the attorney of his choice, but it emphasized its obligation to take measures against unethical conduct in its courtroom and its belief that a waiver could not “cure the unfairness inherent in the multiple representation of clients with potentially adverse interests.”¹³⁸

The decision in *Shadid* remains unique. *Shadid* has never been overturned, but as a district court decision, it lacks precedential value. Additionally, the decision was based upon the then-current conflict of interest rule in Texas that has since changed somewhat in phrasing, if not in substance.¹³⁹ Notably, *Shadid* failed to inspire other courts to adopt the per se ban approach; courts most often cite the case nowadays when they explicitly decline to adopt a per se ban.¹⁴⁰

131. 115 N.J.L.J. 96 (1985).

132. See *In re* Petition for Review of Opinion 552 of the Advisory Comm. on Prof'l Ethics, 507 A.2d 233.

133. Bassett, *supra* note 18; Tell, *supra* note 18.

134. 521 F. Supp. at 88-89.

135. *Id.* at 89.

136. *Id.* at 89-90.

137. *Id.* at 90.

138. *Id.*

139. See TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06 (2008).

140. See, e.g., Johnson v. Bd. of County Comm'rs, 85 F.3d 489, 493 (10th Cir. 1996) (citing *Shadid*, 521 F. Supp. at 90).

In *Opinion 552*, the New Jersey Supreme Court's Advisory Committee on Professional Ethics ruled "that it is never proper for an attorney simultaneously to represent a governmental entity and any of its officials or employees when they are co-defendants in [a § 1983] action."¹⁴¹ The Committee wrote that an attorney who undertakes such dual representation faces a potential conflict of interest, and indeed, it believed that such conflicts are "almost invariably present" in such situations.¹⁴² Consequently, it absolutely prohibited such multiple representations, deciding that "an *ad hoc* avoidance of conflicts of interest on an individual, case-by-case basis was too uncertain and inconsistent to be the basis for a satisfactory and workable rule."¹⁴³

Just one year later, however, the New Jersey Supreme Court decided to modify *Opinion 552*'s ban.¹⁴⁴ The court first stated that *Opinion 552* was overbroad in barring multiple-client representation in nearly all § 1983 civil rights actions, and explained that no conflict of interest is likely when representation of the governmental official is in his official capacity, when only injunctive relief is sought, or when only compensatory damages are claimed and the government must indemnify.¹⁴⁵ The court acknowledged significant potential for conflicts of interest, however, "whenever the claims asserted could subject the individual defendant to personal liability for which indemnification is unavailable"—for example, when the plaintiff seeks punitive damages, or compensatory damages in cases for which municipality need not indemnify.¹⁴⁶

The court mentioned several other reasons to retreat from the dual representation ban. First, it declared that multiple representation is a fact-bound issue best addressed by the individual attorney handling the case. Second, it noted that the ban imposes "severe financial strains" on local governments and individual employees who are forced to obtain independent counsel, and that separate representation imposes an "increased litigational burden" on courts and the parties.¹⁴⁷ Third, it explained that the ban gives opportunistic plaintiffs the chance to improve their bargaining position with the government defendant by adding many individual defendants to the lawsuit who would each need to obtain separate counsel (potentially at the government's expense). In lieu of a *per se* ban, the New Jersey Supreme Court

141. *In re* Petition for Review of Opinion 552 of the Advisory Comm. on Prof'l Ethics, 507 A.2d 233, 234 (N.J. 1986).

142. *Id.* at 235.

143. *Id.*

144. *Id.*

145. *Id.* at 235-36.

146. *Id.* at 236-37 & n.1.

147. *Id.* at 239-40.

adopted an approach that is difficult to characterize, as it seems to have features of the wait and see and align the interests approaches.¹⁴⁸

2. *The Wait and See Approach*

Most federal appellate cases on municipal dual representation have advanced the wait and see approach.¹⁴⁹ The approach is popular among federal district courts as well,¹⁵⁰ and at least one state ethics commission has endorsed it.¹⁵¹

Under the wait and see approach, courts wait until an actual conflict has arisen before intervening to require the attorney either to meet the standards of Model Rule 1.7(b) (or its state equivalent) or to provide separate representation. While these courts recognize potential conflicts of interest in dual representation, they conclude that such potential falls short of constituting an actual conflict that triggers Model Rule 1.7(b).¹⁵² They sometimes reach this

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148. Some language in the New Jersey Supreme Court's decision overturning *Opinion 552* suggests the court adopted a wait and see approach. *See id.* at 239. But because the New Jersey Rules of Professional Conduct bar governmental entities from consenting to conflicts of interest in representation, *see* N.J. RULES OF PROF'L CONDUCT R.1.7(b)(2) (2009); *In re Petition for Review of Opinion 552*, 507 A.2d at 238, the approach differs from a wait and see approach when a conflict of interest arises because a conflict waiver is not permitted. Rather than ban all dual representation in that event, however, the court indicated that a municipality can provide dual representation if it aligns the interests of the municipality and its official. 507 A.2d at 240.
149. *See, e.g.,* *Wilson v. Morgan*, 477 F.3d 326, 345-46 (6th Cir. 2007); *Patterson v. Balsamico*, 440 F.3d 104, 114-16 (2d Cir. 2006); *Galindo v. Town of Silver City*, 127 F. App'x 459, 467-68 (10th Cir. 2005); *Moskowitz v. Coscette*, 51 F. App'x 37, 39 (2d Cir. 2002); *Rodick v. City of Schenectady*, 1 F.3d 1341, 1350 (2d Cir. 1993); *Coleman v. Smith*, 814 F.2d 1142, 1147-48 (7th Cir. 1987).
150. *See, e.g.,* *Almonte v. City of Long Beach*, No. CV 04-4192, 2007 U.S. Dist. LEXIS 21782, at *18-19 (E.D.N.Y. Mar. 27, 2007); *Noyce v. City of Iola*, No. 89-4092-R, 1990 U.S. Dist. LEXIS 3771, at *2-5 (D. Kan. Mar. 28, 1990); *Coleman v. Frierson*, 607 F. Supp. 1566, 1572-74 (N.D. Ill. 1985); *Clay v. Doherty*, 608 F. Supp. 295, 303-04 (N.D. Ill. 1985); *Sherrod v. Berry*, 589 F. Supp. 433, 437-38 (N.D. Ill. 1984).
151. *See* MASS. STATE ETHICS COMM'N, COMMISSION ADVISORY NO. 84-03: MUNICIPAL LAWYERS REPRESENTING BOTH A MUNICIPAL EMPLOYEE AND A MUNICIPALITY IN THE SAME SUIT (Sept. 25, 1984), available at <http://www.mass.gov/ethics/adv8403.htm>.
152. *See, e.g.,* *Coleman v. Smith*, 814 F.2d at 1148; *Gordon v. Norman*, 788 F.2d 1194, 1198-99 (6th Cir. 1986); *Clay*, 608 F. Supp. at 303. There is an exception: the California state rule regarding conflicts of interest in litigation prohibits representing clients whose interests only "potentially" conflict. *See* CAL. RULES OF PROF'L CONDUCT R. 3-310(c)(1) (2008). Consequently, at least one court has decided that "[t]he duty to avoid conflicts arises at the beginning of the representation" such that the disclosure of the conflict and informed consent or separate representation must be effected immediately, rather than upon the

conclusion even when such conflicts of interest seem to fit the definition of a concurrent conflict of interest under Model Rule 1.7(a)(2)—that is, when the potential conflict seems to create “a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.”¹⁵³

For example, in *Clay v. Doherty*, a case often cited by courts adopting the wait and see approach,¹⁵⁴ the Northern District of Illinois stated that “it is for defendants to choose their own theory of their case, and until it reasonably appears their choice gives rise to actual and *unreasonable* conflicts, their choice of counsel should not be disturbed.”¹⁵⁵ *Clay* and other cases suggest that it is not until the defendants have settled upon their ultimate theory of their case, where their theory clearly includes the assertion of incompatible defenses, that the potential conflict becomes actual.

As justification for this approach, some courts emphasize that disqualification of an attorney to represent a particular client is a drastic measure that should be imposed only when absolutely necessary,¹⁵⁶ and highlight the importance of respecting “an individual’s right to the counsel of her choice.”¹⁵⁷ Additionally, they claim that courts are a poor forum for adjudicating alleged ethical lapses, and that instead federal and state bar authorities should administer that task.¹⁵⁸ They also cite cases in which attorneys dually representing municipalities and municipal officials have vigorously asserted all defenses available to the individual officials despite the potential conflict, suggesting that it is unlikely that an individual defendant will actually be prejudiced by any conflict.¹⁵⁹ Through these arguments, the courts contend that they need not intervene to disqualify an attorney or require action until an actual conflict, constituted by the defendants’ decisions to assert incompatible defenses, has materialized.

ultimate decision by the defendants as to what defenses to assert. See *Miller v. Alagna*, 138 F. Supp. 2d 1252, 1256 (C.D. Cal. 2000).

153. See MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2008).

154. See, e.g., *Gordon*, 788 F.2d at 1197-98; *Coleman v. Frierson*, 607 F. Supp. at 1572.

155. 608 F. Supp. at 303-04.

156. See, e.g., *Noyce v. City of Iola*, No. 89-4092-R, 1990 U.S. Dist. LEXIS 3771, at *4 (D. Kan. Mar. 28, 1990); *Clay*, 608 F. Supp. at 303.

157. See, e.g., *Almonte v. City of Long Beach*, No. CV 04-4192, 2007 U.S. Dist. LEXIS 21782, at *9 (E.D.N.Y. Mar. 27, 2007).

158. See *Gordon*, 788 F.2d at 1199 n.5 (“The bar should be aware of potential ethical violations and possible malpractice claims.”); *Almonte*, 2007 U.S. Dist. LEXIS 21782, at *9.

159. See, e.g., *Patterson v. Balsamico*, 440 F.3d 104, 115 (2d Cir. 2006); *Rodick v. City of Schenectady*, 1 F.3d 1341, 1350 (2d Cir. 1993).

3. *The Align the Interests Approach*

A few courts have declared or suggested that municipal dual representation may be permitted so long as the municipality takes affirmative steps to align the interests of the defendants.¹⁶⁰ At least two of these courts have declared that if a municipality “chooses to reduce its legal costs by providing joint representation,” it is necessary that it “take steps to reduce or eliminate” any potential conflicts of interest.¹⁶¹ Some of these courts require the municipality to completely indemnify the municipal official, such that the municipal attorney’s temptation to favor one defendant over the other is eliminated because the municipality bears the full cost of either defendant’s liability.¹⁶² Alternatively, some require the municipality to stipulate to the truth of certain facts that would eliminate the incompatibility in the defenses—for example, that the official was acting within the scope of his duties.¹⁶³ When these conditions have not been met by the time the court considers the potential conflict, the court generally requires that they be met within a short time period thereafter and attested to by formally filed waivers and affidavits; otherwise, it will grant the motion to disqualify defense counsel from the dual representation.¹⁶⁴ In all of these cases, the municipality and its official could choose instead to employ separate representation. The courts that impose these conditions for dual representation justify the imposition by stating that the conditions are necessary to prevent potential conflicts of interest from actualizing.¹⁶⁵

160. See *Kounitz v. Slaatten*, 901 F. Supp. 650, 659 (S.D.N.Y. 1995); *Manganella v. Keyes*, 613 F. Supp. 795, 798 (D. Conn. 1985); *Smith v. City of New York*, 611 F. Supp. 1080 (S.D.N.Y. 1985); *In re Petition for Review of Opinion 552 of the Advisory Comm. on Prof'l Ethics*, 507 A.2d 233, 240 (N.J. 1986).

161. *Manganella*, 613 F. Supp. at 798; *In re Petition for Review of Opinion 552*, 507 A.2d at 240.

162. See *Manganella*, 613 F. Supp. at 799; *In re Petition for Review of Opinion 552*, 507 A.2d at 240.

163. See *Kounitz*, 901 F. Supp. at 659; *Manganella*, 613 F. Supp. at 797 n.1; *Smith v. City of New York*, 611 F. Supp. at 1088. In *Kounitz*, however, the court provided the county attorney with the option to file the affidavit stating that the individual defendants were acting within the scope of their employment and duties or to file ex ante specific waivers of the potential conflicts signed by the individual defendants after being provided with information about the nature of the potential conflicts. 901 F. Supp. at 659.

164. See *Kounitz*, 901 F. Supp. at 659; *Manganella*, 613 F. Supp. at 797.

165. See, e.g., *Manganella*, 613 F. Supp. at 798.

4. *Ex Ante Specific Waivers*

Some courts, particularly those that require municipalities to align the interests of dual representation defendants, have additionally required that any joint defense attorney obtain an ex ante waiver of the potential conflict early in the representation, well before the defendants have decided which defenses to assert.¹⁶⁶ Based on the application of this requirement by a decision in the Southern District of New York,¹⁶⁷ some courts have called this the “Second Circuit’s procedure,”¹⁶⁸ although it has not consistently been applied in recent Second Circuit cases.¹⁶⁹

Courts that require an ex ante waiver generally require the attorney to notify the district court and defendants of the potential conflict.¹⁷⁰ Additionally, such courts demand that the affected clients be “fully informed of possible adverse consequences of joint representation,”¹⁷¹ which requires that the attorney explain to the defendants the “nature of the conflict,”¹⁷² including the inherency of the potential conflict¹⁷³ and the specific incompatible defenses.¹⁷⁴ The courts also generally require the attorney to inform the defendant official that “it is advisable that he or she obtain independent counsel on the individual capacity claim.”¹⁷⁵ The affidavit filed with the court to document the official’s waiver of the potential conflict must indicate to the court that the defendant has received adequate notice of and “fully

166. See *Johnson v. Bd. of County Comm’rs*, 85 F.3d 489, 494 (10th Cir. 1996); *Ra v. Rossi*, No. 1:04CV2108, 2005 U.S. Dist. LEXIS 9463, at *2-3 (N.D. Ohio May 11, 2005); *Arthur v. City of Galena*, No. 04-2022-KHV-DJW, 2004 U.S. Dist. LEXIS 20148, at *9-10 (D. Kan. June 2, 2004); *Kounitz*, 901 F. Supp. 650; *Ricciuti v. N.Y. City Transit Auth.*, 796 F. Supp. 84 (S.D.N.Y. 1992); *Manganella*, 613 F. Supp. 795.

167. *Kounitz*, 901 F. Supp. at 659.

168. *Johnson*, 85 F.3d at 494; *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *9.

169. See, e.g., *Patterson v. Balsamico*, 440 F.3d 104, 115 (2d Cir. 2006); *Moskowitz v. Coscette*, 51 F. App’x 37 (2d Cir. 2002).

170. See, e.g., *Manganella*, 613 F. Supp. at 797.

171. *Id.* at 799.

172. *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *10; *Kounitz*, 901 F. Supp. at 659.

173. *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *10-11; *Kounitz*, 901 F. Supp. at 659; *Manganella*, 613 F. Supp. at 799.

174. See *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *8.

175. *Johnson v. Bd. of County Comm’rs*, 85 F.3d 489, 494 (10th Cir. 1996); see *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *9; *Manganella*, 613 F. Supp. at 799.

understands” the potential conflict,¹⁷⁶ and that he “has chosen to continue to retain the municipality’s attorney as his counsel.”¹⁷⁷

Courts requiring ex ante specific waivers emphasize the importance of adequately informing the individual defendant so that he can make a wise choice about whether to accept dual representation.¹⁷⁸ They point to the explanation in *Dunton* that an individual defendant, as a layperson, cannot be expected to understand which defenses he needs to prove or that his counsel may take positions contrary to his interests, unless informed of these facts.¹⁷⁹ But courts also note that ex ante specific waivers permit the individual official to choose his own counsel, which is less invasive and more respectful of the official’s preferences.¹⁸⁰

B. Weaknesses in Existing Approaches

There are several weaknesses in existing approaches to addressing conflicts of interest in municipal dual representation. The per se ban approach has two primary weaknesses: it is expensive and inefficient, and it undermines the litigants’ ability to choose their own counsel.

Requiring a per se ban is expensive and inefficient because two different sets of attorneys must be paid to defend claims predicated on an identical set of facts and many similar elements.¹⁸¹ Many § 1983 claims are frivolous or easily disposed of on a motion to dismiss or for summary judgment.¹⁸² Not all such dispositions would implicate the incompatible defenses: an attorney could defend both the municipality and its official by claiming that the plaintiff was not deprived of rights, that the official’s conduct did not cause the deprivation, or that the conduct alleged never occurred, for example. Additionally, a per se ban imposes significant costs on taxpayers and, in many cases, on the

176. *Johnson*, 85 F.3d at 494; *Kounitz*, 901 F. Supp. at 659; see *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *10; *Manganella*, 613 F. Supp. at 799.

177. *Manganella*, 613 F. Supp. at 799; see *Ra v. Rossi*, No. 1:04CV2108, 2005 U.S. Dist. LEXIS 9463, at *2-3 (N.D. Ohio May 11, 2005); *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *10-11; *Kounitz*, 901 F. Supp. at 659.

178. See, e.g., *Arthur*, 2004 U.S. Dist. LEXIS 20148, at *8.

179. *Dunton v. County of Suffolk*, 729 F.2d 903, 907-08 (2d Cir. 1984); e.g., *Manganella*, 613 F. Supp. at 799.

180. See, e.g., *Manganella*, 613 F. Supp. at 799.

181. See *In re* Petition for Review of Opinion 552 of the Advisory Comm. on Prof’l Ethics, 507 A.2d 233, 240 (N.J. 1986).

182. See *Fisher v. City of Detroit*, No. 92-1759, 1993 U.S. App. LEXIS 23277, at *16 (6th Cir. Sept. 9, 1993).

individual officials the ban seeks to protect. Where municipalities are bound to provide for the official's defense, the cost of hiring outside counsel is significant, and it is paid on top of the cost of hiring a municipal attorney to defend the city.¹⁸³ If the municipality is not bound to pay for outside counsel, the official must pay for counsel himself. In many cases, he will not be able to afford to do so, and thus he may be faced with the difficult choice between trying to settle the claim for an amount that he can afford, regardless of the merits of the underlying lawsuit, or attempting to defend himself pro se.¹⁸⁴

Given these unattractive alternatives, many municipal officials might prefer to be defended by a municipal attorney, despite the potential for conflict. A municipal attorney may be more experienced and familiar with § 1983 defense, or may be more talented than the local private sector alternatives.¹⁸⁵ A municipal attorney is a particularly attractive alternative when the potential for conflict is low in light of the facts of the case. Yet the per se ban approach would deny officials the opportunity to select municipal representation. The per se ban, therefore, might produce worse outcomes for individual officials, rather than better ones. Furthermore, the ban's denial of the official's choice disrespects his autonomy. Given that the official bears such a large stake in the suit's outcome, he should be able to choose who will represent him.

The wait and see approach has serious weaknesses as well. When municipal attorneys are not required to warn individual officials upfront about the high potential for conflicts, there is no guarantee that officials will get the information they need to make wise choices about their representation.¹⁸⁶ Indeed, unless required to explain the potential conflict, many municipal attorneys may decline to do so, fearing that such explanation could take significant time and could undermine the individual defendant's trust in the lawyer-client relationship. Additionally, some municipal attorneys might be overconfident about their ability to balance incompatible defenses and obtain an optimal outcome for both defendants, or about their ability to overcome the self-serving biases that might cloud their professional judgment.¹⁸⁷ There is

183. See *In re Petition for Review of Opinion 552*, 507 A.2d at 239-40; Richard C. Solomon, *Wearing Many Hats: Confidentiality and Conflicts of Interest Issues for the California Public Lawyer*, 25 SW. U. L. REV. 265, 316, 327, 329 (1996).

184. See *Johnson v. Bd. of County Comm'rs*, 85 F.3d 489, 491 (10th Cir. 1996).

185. See Goode-Trufant Interview, *supra* note 5 (noting that the New York City Law Department's Special Federal Litigation Division specializes in § 1983 defense of law enforcement officers).

186. See *Atchinson v. District of Columbia*, 73 F.3d 418, 427 (D.C. Cir. 1996).

187. Cf. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1091-95 (2000) (describing generally the phenomena of psychological overconfidence and self-serving

also a risk that unless individual officials receive sufficient advance information about potential conflicts, they may share confidences with the municipal attorney that the attorney might later use to their detriment.¹⁸⁸ In fact, if such information is disclosed, attorneys may be *required* to share this information with representatives of the municipality so that those representatives can make informed choices about settlement and similar decisions.¹⁸⁹

The wait and see approach problematically depends on a private party or an attorney to bring an actual conflict to the court's attention. Without informing the municipal official in advance about the potential for conflict and the defenses that he might wish to assert, the official may not even know if his attorney has determined not to assert a particular defense on his behalf, or has decided not to support such a defense with appropriate evidence that the defendant knows to be available.¹⁹⁰ To be sure, the plaintiff might still raise the issue with the court,¹⁹¹ particularly if he has a strategic reason to seek disqualification of the municipal attorney.¹⁹² Some municipal attorneys might responsibly raise the issue with the court if they think each of the incompatible defenses is plausible, such that their incompatibility poses an actual conflict. Yet the individual official, if properly informed, would be far better situated to police his own interests. His judgment, unlike that of the municipal attorney, is not clouded by the conflict. Also, he may have access to more evidence that supports his defense than does the plaintiff, and so would better know whether his defenses are being shortchanged.

Even after an actual conflict arises, and the municipality and official decide they wish to assert separate defenses, the wait and see approach continues to impose costs on the defendants. The defendants must go through the painful separation process, requiring the court to spend time approving and monitoring the attorney's withdrawal, allowing the official to obtain new counsel, and permitting or requiring the municipality to assign new counsel to itself if shared confidences necessitate such action. Even when an individual official gives informed consent to the conflict, it is questionable whether one

biases, and their prevalence in various contexts); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1182-84 (1997) (same).

188. See *supra* notes 106-112 and accompanying text.

189. See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2008).

190. See *Dunton v. County of Suffolk*, 729 F.2d 903, 907-08 (2d Cir. 1984).

191. E.g., *Galindo v. Town of Silver City*, 127 F. App'x 459, 467-68 (10th Cir. 2005); *Chavez v. New Mexico*, 397 F.3d 826, 839-40 (10th Cir. 2005); *Kounitz v. Slaatten*, 901 F. Supp. 650, 658-60 (S.D.N.Y. 1995).

192. See *In re* Petition for Review of Opinion 552 of the Advisory Comm. on Prof'l Ethics, 507 A.2d 233, 240 (N.J. 1986).

could reasonably believe that the actual conflict will not be problematic; even if the attorney's judgment is not affected, it may be impossible for him to assert effectively both defenses.

As for the align the interests approach, requiring a municipality to make major commitments at the start of every dual representation is excessive. Requiring complete indemnification in all cases would impose extremely significant costs on taxpayers for some actions that are egregious, willful, or malicious, and ultimately the individual defendant's fault alone. In addition, it could create moral hazard problems wherein some municipal officials might see less reason to avoid conduct that deprives a citizen of protected rights. Even worse, a few municipal officials with bad intentions might be willing to commit even more egregious actions than they would otherwise, because the municipality would be bound to indemnify them.¹⁹³

Similarly, if the municipality must stipulate early in the litigation to facts that would obviate the incompatibility in the defenses, it cannot make a choice adequately informed by the evidence. Early on, the municipality may have only partial information about whether the official was acting within the scope of his duties. The full evidence is not revealed until discovery begins, particularly because the official may have misrepresented what occurred. Requiring the municipality to stipulate to facts that ultimately might be false is not in the interests of the court, which seeks to determine the truth of what occurred. And from a broader social perspective, resolving cases on ultimately untrue stipulations is problematic because doing so makes it difficult for voters to know whether deprivations of federal rights were caused by widespread or high-level policies or customs of the municipality, or whether they were instead caused by a rogue official. Providing accurate information to the electorate in these § 1983 cases serves the statute's tort function of deterring violations of constitutional and federally protected rights,¹⁹⁴ by permitting the voters to hold the proper authorities accountable.

The ex ante specific waiver, in contrast, seems to be a particularly useful tool. By informing the individual defendant of the potential conflict, the waiver permits him to monitor his representation to ensure it is appropriately advancing defenses and evidence available to him. Ex ante specific waivers cost

193. See Seth J. Chandler, *The Interaction of the Tort System and Liability Insurance Regulation: Understanding Moral Hazard*, 2 CONN. INS. L.J. 91 (1996) (discussing generally the problem of moral hazard when tortfeasors are indemnified for their liability, including liability for gross negligence).

194. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 495 (1986) (Powell, J., dissenting); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

relatively little¹⁹⁵ and are easy to administer once developed. They preserve the litigants' rights to choose their counsel and simultaneously ensure better choices of counsel.

Nonetheless, such waivers cannot make incompatible defenses compatible. Thus, there are situations in which individual defendants might agree to an ex ante waiver, and even to an ex post waiver once an actual conflict exists, but the conflict of interest may still be irreconcilable, with the result that it undermines the proper determination of liability. There are broader social interests in avoiding litigation when an attorney operates under a concurrent conflict of interest that inevitably compromises his representation of one or both clients: first, an interest in determining the truth, so that remedial actions can be taken to address the actual cause of the deprivation of rights, thereby preventing future violations;¹⁹⁶ and second, an interest in using the adversarial system as the best means to determine that truth, rather than relying on an individual attorney's own balancing of conflicting interests among his clients in the absence of (and prior to) the plaintiff's presentation of the facts before a court.¹⁹⁷ In some cases, then, an ex ante waiver is insufficient.

III. PROPOSED APPROACH

The following proposal seeks to take the best features of the existing approaches while avoiding some of their most fundamental weaknesses.

The proposal first recommends requiring ex ante specific waivers, accomplished after an explicit upfront inquiry and information session by the municipal attorney. At the session, the attorney should determine the likelihood that defenses will conflict in the particular case, and should communicate that likelihood—along with information about the nature of potential conflicts of interest—both to the individual official and to the municipality.

A similar inquiry occurs already on the federal level, when federal government attorneys handle a *Bivens* claim filed against an individual federal official that is predicated on similar facts as a Federal Tort Claims Act claim

195. See *Miller v. Alagna*, 138 F. Supp. 2d 1252, 1256 (C.D. Cal. 2000).

196. See *supra* note 194.

197. See *Alderman v. United States*, 394 U.S. 165, 184 (1969); 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 27 (2d ed. 1923) (describing cross-examination's role in our system and stating that it "is beyond any doubt the greatest legal engine ever invented for the discovery of truth"); Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57 (1998) (discussing the benefits of adversary-based fact presentation).

simultaneously proceeding against the federal government. Federal regulations explicitly require that, upon receiving an official's request for representation, "the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States."¹⁹⁸ The Department of Justice (DOJ) takes very seriously the determination of whether representation of an individual employee meets the "scope and interests" inquiry.¹⁹⁹ Generally, the employing agency will forward all available factual information to the DOJ along with a recommendation as to whether the representation meets the "scope and interests" inquiry.²⁰⁰ Federal government attorneys, who are bound by the same state rules of ethics that bind municipal government attorneys,²⁰¹ often use the initial "scope and interests" inquiry to determine not only whether federal attorneys' representation of the individual official is consistent with the *United States's* interests, but also whether such representation is likely to produce conflicts that harm the individual employee's interests.²⁰² The government can still withdraw from representation later if it determines that representing the official is not in fact within the interests of the United States,²⁰³ but the initial required inquiry into the interests of the two clients makes later withdrawal far less likely to occur.

Many municipalities implement a similar initial inquiry for the purpose of determining whether representation may or must be offered under state or municipal law. For example, New York City attorneys must initially determine whether the individual defendant "was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred" in order to decide whether to represent him.²⁰⁴ This inquiry helps to reduce the likelihood that facts will later come to light that might encourage the City to vigorously argue that the individual employee was acting outside the scope of his duties. But the City's approach does relatively little to answer

198. 28 C.F.R. § 50.15(a)(2) (2008).

199. Telephone Interview with Zachary Richter, Att'y, Constitutional Torts Staff, Torts Section, Civil Div., Dep't of Justice (Dec. 12, 2008) [hereinafter Richter Interview].

200. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 4-5.412(C)(1) (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/5mciv.htm#4-5.412; see Richter Interview, *supra* note 199.

201. See 28 U.S.C. § 530B(a) (2006).

202. See Richter Interview, *supra* note 199.

203. See *id.*

204. N.Y. GEN. MUN. LAW § 50-k(2) (McKinney 2007).

questions about potential conflicts stemming from disputes about whether the individual was following orders or acting on the basis of a city policy, custom, or inadequate training. As a result, attorneys for municipalities like New York City should be required to take a broader view in their initial inquiry, inquiring generally into the question of whether it is in the interests of both clients for the municipal attorney to represent the individual rather than hiring outside counsel. In addition, that inquiry should focus on whether there is significant likelihood that the conflicts discussed above will materialize.

The federal government's prompt information requirement provides a good starting point for my proposal about providing advance information to individual defendants about the potential conflict. Upon determining that the federal attorney will represent the official, federal regulations explicitly require the attorney to promptly inform the official of several important features and limitations of the representation: (1) that the DOJ must represent the United States and the official and that the attorney will assert all appropriate and legal defenses on behalf of the United States and the official;²⁰⁵ (2) that the attorney will *not* assert any defenses on behalf of the official that are not in the United States's interests;²⁰⁶ and (3) that while no conflict yet seems to exist, if such conflict should arise the attorney will promptly advise the official and take specific steps to resolve it.²⁰⁷ This upfront information is extremely helpful to the individual defendant, as it makes him aware of the risks associated with government representation.

A few large municipalities have developed *ex ante* form waivers that must be executed by individual officials upon the outset of their representation by the municipal attorney. These waivers provide similar information to that required at the federal level. For example, the New York City form waiver states that "[t]he Corporation Counsel's Office functions primarily as the City's lawyer, and its principal obligation is to represent the City's interests."²⁰⁸ It also mentions generally the potential for conflicts of interest and the steps

205. 28 C.F.R. § 50.15(a)(8)(i) (2008).

206. *Id.* § 50.15(a)(8)(ii).

207. *Id.* § 50.15(a)(8)(v). The attorney must explain the specific steps that are taken in the event of a conflict of interest, which are outlined elsewhere in the regulations. *See id.* § 50.15(a)(6), (9), (10); *id.* § 50.16.

208. Letter from Gary Shaffer, Ass't Corporate Counsel, Tort Div., N.Y. City Law Dep't, to Anne Pejovich 1 (Sept. 23, 2002), available at <http://www.parentadvocates.org/nicemedia/documents/contract.pdf> [hereinafter Pejovich Waiver].

that would be taken to resolve them.²⁰⁹ In addition, it discusses the terms of indemnification, including the exception for intentional wrongdoing.²¹⁰

Even so, it appears that the New York City waivers for representation offered to employees in § 1983 suits do not discuss the specific nature of the conflicts of interest that are most likely to arise, including the specific incompatible defenses available to the City and to the officials.²¹¹ Nor do they mention that the City will not advance defenses contrary to its interest.²¹² This Note proposes to require municipalities to inform their individual clients about the primacy of the government client, the government attorney's inability to assert defenses contrary to the government's interest, the general potential for conflicts of interest, and steps that would be taken to resolve such conflicts. Yet that is not all it would mandate. More stringently, it advises that courts require municipal attorneys to obtain *ex ante specific* waivers in which they inform individual officials of the nature and likelihood of the specific available defenses that may be incompatible, and to obtain a written affidavit from each official indicating that he fully understands and wishes to be represented by the municipal attorney regardless.²¹³

209. *Id.*

210. *Id.* at 1-2.

211. See, e.g., *id.* (neglecting to mention the potential conflicts between the City's policy or custom defense and the individual employee's qualified immunity defense); see also *Combiar v. Biegelson*, No. 03 CV 10304, 2005 U.S. Dist. LEXIS 3056, at *1-2 (S.D.N.Y. Feb. 25, 2005) (confirming that the case in which this individual city employee was represented involved § 1983 claims against him in his individual capacity and against the City of New York); Elizabeth Betsy Combiar, *Advocacy Comes with a Steep Price—Maybe Too Steep*, PARENTADVOCATES.ORG, <http://www.parentadvocates.org/index.cfm?fuseaction=article&articleID=3727> (last visited Sept. 6, 2009) (providing further information about the case from the plaintiff's perspective).

212. Pejovich Waiver, *supra* note 208.

213. *Ex ante* waivers could have limited effectiveness if municipal officials lack knowledge of, or ability to understand, the legal content of such waivers, see Bassett, *supra* note 18, at 437 n.215, or if they feel pressure to sign the waivers to retain their municipal employment. Still, such waivers, rather than *per se* bans on dual representation, preserve litigant choice and permit cost-efficient dual representation in cases where conflicts are unlikely to arise. Furthermore, requiring *specific ex ante* waivers—through which officials are informed of the particular incompatible defenses available to them and the municipality—improves the likelihood that their consent to dual representation will be fully informed. While individual officials are far from the most sophisticated of legal clients, they at least may have more experience with the law than the average citizen, because those who tend to be sued under § 1983 are generally involved in applying one or more areas of the law on a daily basis. See Lewis A. Kornhauser, *A World Apart? An Essay on the Autonomy of the Law*, 78 B.U. L. REV. 747, 750 (1998) (explaining that administrative officials like police officers and social workers often must apply the law). Thus they likely are more capable of understanding the nature of their legal defenses and the content of an *ex ante* waiver if both are explained by

If such an ex ante specific waiver is signed, this Note proposes that dual representation should be permitted even if there is a “significant risk” that the defendants would reasonably wish to assert conflicting defenses. If the individual defendant refuses to sign the waiver, however, dual representation should not continue and the individual defendant must obtain separate counsel. In that event, when the municipality is required by law to provide outside counsel to the official in the event of a conflict, and the likelihood that the defendants would reasonably wish to assert incompatible defenses given the information available constitutes a “significant risk,”²¹⁴ the court should treat the situation as a concurrent conflict of interest and require the municipality to choose between two options: (1) provide outside counsel, or (2) take affirmative steps to eliminate the possibility of the incompatible defenses by “aligning the interests” of the defendants, as the previous Part discussed. When the likelihood that the defendants will reasonably wish to assert incompatible defenses is low, however, the court should decide that the municipality need not provide outside counsel because no conflict of interest yet exists, with the result that the individual must pay for his own counsel if he chooses separate representation.²¹⁵ If the official chooses dual representation,

the attorney. Cf. Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97, 134-35 (2009) (discussing sophisticated clients and advance waivers of conflicts). As for the possibility of employment pressure that may induce the waiver, at a minimum, this Note’s proposal protects officials when a municipality and an official choose to assert directly conflicting defenses, because it requires separate representation or alignment of interests (and does not permit a conflict waiver) under those circumstances. And prior to that point, the often greater risk of personal liability produced by municipal dual representation may outweigh the slighter pressure the official faces to select municipal representation in order to please the municipal employer.

214. MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2008).

215. One could argue that cities should be obligated from the start of the litigation to pay for outside counsel for an official who prefers it, so that no uncertainty about eligibility for continued municipal representation or payment of legal expenses would exist to undermine the quality of officials’ day-to-day policy decisions. See *supra* notes 113-115 and accompanying text. Yet most state and municipal laws governing the municipal obligation to pay for outside counsel impose that obligation only in the event of a conflict of interest, see *supra* note 126 and accompanying text, and a conflict of interest exists in this context only if there is a “significant risk” that the attorney’s representation of either client will be materially limited, MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2008). Such a “significant risk” may not arise until later in the litigation, because at the outset it may be probable that the dual representation could rely solely on a defense consistent with both the municipality’s and its official’s interests (for example, the defense that no constitutional violation occurred). Thus, it seems inappropriate for a state or federal court to require the municipality to pay for outside counsel before the “significant risk” arises, although it might be wise policy to revise state or municipal law to require municipalities to offer the official the option of outside counsel at the municipality’s expense regardless of whether a conflict of interest has arisen.

from that point on the court should adopt a wait and see approach, remaining vigilant to the possibility that the potential for the conflicting defenses to be asserted could become a “significant risk.”

This proposal for handling the potential for conflicts of interest at the outset takes the best of the *ex ante* specific waiver, wait and see, and align the interests approaches. The proposal preserves litigant choice by permitting the individual defendant to consent to a conflict that may never materialize. It avoids the significant expense associated with requiring separate representation in all § 1983 cases in which both a municipality and its official are defendants. It also avoids requiring alignment of interests too early in the litigation, when a municipality might commit to costly and overbroad indemnification that could cause moral hazard, or might stipulate to facts that bear a significant likelihood of being untrue. By only requiring alignment when a significant risk of conflict has emerged, this proposal makes it more likely that the municipality’s choice of how to align, and whether to align (rather than opt for separate representation), will be informed by additional fact development. Indeed, under this proposal, a “significant risk” of conflicting defenses generally would not exist unless facts were available to suggest it. Furthermore, the proposal protects individual defendants by informing them at the outset of the specific conflicting defenses, which enables them to be vigilant in monitoring their representation by the municipal attorney. It also protects such defendants by ensuring that if conflicting defenses are sufficiently likely to be asserted, action will be taken either to preclude those conflicting defenses (stipulating as to facts) or to dissipate their potential harm (committing to complete indemnification).

However, if at any time it becomes apparent that the defendants definitely intend to assert incompatible defenses, the calculus changes. Under such circumstances, whether they arise early or late in the litigation, courts should decide that it is unreasonable to believe that the attorney can provide competent and diligent representation to both clients within the meaning of Model Rule 1.7(b)(1).²¹⁶ An attorney cannot be expected to capably advocate for two opposing findings on a single factual question, and hence cannot be expected to successfully advance two clients’ interests when they have decided to assert incompatible defenses. If the likelihood of conflicting defenses reaches that point of complete certainty, the defendants should not be permitted to waive the conflict by giving informed consent. Instead the court should give the municipality the same choice it would have in the event of a “significant risk” that incompatible defenses would be asserted, with the exclusion of the option to obtain a conflict waiver: the municipality should choose between (1)

216. MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(1) (2008).

providing outside counsel if required by law (or permitting separate counsel paid for by the official, if the municipality is not obligated by law to pay); or (2) curing the conflict by aligning the interests of the defendants (assuming that state and municipal law would permit the required alignment).²¹⁷

This proposal, therefore, carefully balances interests to determine when individual officials should be permitted to consent to conflicts of interest. Litigant choice should be preserved, and is to the extent possible by this proposal. But other interests are at stake as well. As described above, the court and broader society have reasons not to permit an attorney to advance directly conflicting defenses. The court has an interest in establishing the truth of what occurred, and in establishing it through an adversarial proceeding in which the adversity and determination of truth occurs *between* the attorneys before the court, not within one.²¹⁸ As a result, this proposal optimally permits litigants to have their choice of counsel when the risk that defendants will wish to assert conflicting defenses is merely significant, but does not permit the individual municipal official defendant to consent to the certain simultaneous assertion of two directly conflicting defenses.²¹⁹

CONCLUSION

This Note discusses the issue of conflicts of interest in municipal attorneys' dual representation of municipalities and their officials in § 1983 suits for damages. The Note explains the potentially severe consequences of this problem, particularly for individual defendants, and the broader implications it has for public accountability and consequently for the prevention of rights deprivations. Yet the problem has been largely ignored thus far. Only a handful of cases address the issue, but the frequency of § 1983 litigation involving

217. For two reasons, it is not enough to apply an approach whereby different attorneys within a municipality's legal department would represent the official and the municipality in the face of a clear conflict in intended defenses, with an ethical wall erected between the attorneys so that neither is privy to information about the other's client. First, many smaller municipalities' legal departments employ no more than a handful of attorneys, making it difficult to isolate each attorney and his client's information. Second, because most municipal attorneys are frequently engaged in litigating on behalf of the municipality, and because their continued employment depends on the municipality's satisfaction with their work, a municipal attorney representing a municipal official may face difficulty setting aside his allegiance to the municipality in order to represent the official's interests when the two directly conflict. *See supra* Section I.C.

218. *See supra* notes 196-197 and accompanying text.

219. Only one court's approach resembles my hybrid approach. The Southern District of New York, in *Kounitz v. Slaatten*, 901 F. Supp. 650, 659 (S.D.N.Y. 1995), permitted the municipality to *either* align the interests *or* obtain an *ex ante* specific waiver.

municipal defendants and the difficulty of determining whether an individual official's defenses have been shortchanged suggest that many more cases have been affected.

Municipal attorneys may be permitted to proceed despite significant potential conflicts of interest for many reasons. Because taxpayers bear the costs of § 1983 judgments against cities and counties and information about many of the largest such judgments is salient, the public may react quickly and angrily when a municipal attorney loses a § 1983 suit on behalf of the municipality. But the public may be less concerned about the importance of a vigorous defense for the municipal official, who as an individual may be easier to vilify for his conduct. While there are broad social benefits to providing a strong defense for a municipal official, these benefits are delayed and less salient, which may account for the public's lack of concern on the issue. For example, the long-term and subtle benefits to providing a strong defense include maintaining the good will and morale of current municipal officials, the ability to recruit officials who otherwise would fear liability or the stigma of losing a § 1983 claim, and the likelihood that the ultimate court decision will reflect underlying realities and hold proper authorities responsible for rights deprivations. These benefits operate through complex mechanisms that are easily overlooked by members of the public.

Consequently, one scholar writes that "government lawyers [are] accorded significantly more latitude to continue to represent clients in the face of alleged concurrent and former client conflicts than is the case with regard to private practitioners."²²⁰ But this is simply not appropriate. Municipal attorneys, as government actors, should be held to higher standards, not lower ones, than private sector attorneys, because of their duty to serve the general public interest.²²¹

This Note, therefore, offers a proposal to balance the many interests at stake in this question. Courts should ensure that municipal attorneys communicate upfront the potential for the specific conflicts of interest in dual representation of municipalities and their officials in § 1983 suits for damages. Courts should also require individual officials to indicate their understanding of these potential conflicts and their desire to be represented by municipal counsel before dual representation can begin. Officials should have the option

220. Steven K. Berenson, *The Duty Defined: Specific Obligations That Follow from Civil Government Lawyers' General Duty To Serve the Public Interest*, 42 BRANDEIS L.J. 13, 47 (2003).

221. See *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 351 (Cal. 1985); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1421 (1981).

to consent to a “significant risk” that incompatible defenses will or should be asserted, in order to preserve their choice of counsel. But if they decline to consent, separate counsel or the municipality’s actions taken to align the interests and cure the conflict are necessary to ensure that individual officials can assert all defenses to which they are entitled. Finally, if the defendants ultimately reach an impasse in that each wishes to assert his or its own incompatible defense, courts should not permit waiver of that actual conflict. Municipal attorneys should not advocate fundamentally inconsistent positions in the same litigation, because permitting them to do so would undermine the forum of the court and its ability to properly determine truth and assign liability.