
E-82-9 C/I: Municipal attorney representing police officers

Question 1

May a municipal attorney represent both the municipality and municipal police officers in personal injury action commenced against both the municipality and its police officers claiming punitive damages arising out of the officers' alleged use of excessive force or the officers' actions outside the scope of their employment?

Answer

No, if the municipality and municipal police officers have different interests.

Supreme Court Rule 20.23(3)(b) states in pertinent part as follows:

A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he or she would be justified in representing in litigation multiple clients with potentially differing interests.

Supreme Court Rule 20.23(3)(e) states in pertinent part:

A lawyer employed or retained by a corporation or similar entity owes his or her allegiance to the entity and not to a stockholder, director, officer, employee, representative or other person connected with the entity.

Therefore, if, in a personal injury action against both the municipality and municipal police officers, arising out of the officers' alleged conduct, the municipality and the officers have or may have differing interests, such as where the conduct in question involves or could involve criminal charges or disciplinary action by the municipality against the officers, it would be improper for the municipal attorney to represent the officers in addition to representing the municipality. In such event, the municipal attorney should represent the municipality to which under Supreme Court Rule 20.23(3)(e) the municipal attorney owes his or her allegiance, and the officers should be represented by independent, outside counsel.

If the municipal attorney represents the municipality in any such personal injury action, then he or she should not interview or solicit information from the officers concerning the action unless he or she also represents them or obtains the prior consent of their counsel or is authorized by law to do so. SCR 20.38(1).

Question 2

May a private attorney represent police officers of a municipality in the type of actions referred to in Question 1, if the attorney either serves on a panel of attorneys selected by the governing body of the municipality to act as counsel for municipal police officers in such actions or individually accepts a retainer from a municipality for the express purpose of representing municipal police officers in such actions?

Answer

Yes, unless the ability of the attorney, whether or not a member of such a panel, to represent the officers would, or there is a reasonable probability it would, be adversely affected by his or her being compensated by the municipality.

Any private attorney, whether or not a member of a panel of attorneys, retained and compensated by a municipality may properly represent municipal police officers in a personal injury action against the municipality and the officers arising out of the officers' alleged use of excessive force or actions outside the scope of their employment, provided pursuant to Supreme Court Rule 20.30(1)(a) he or she first obtained the officers' consent after full disclosure *unless* his or her ability to represent the officers would, or there is a reasonable probability it would, be adversely affected by his or her personal interests including, but not limited to, his or her being retained and compensated by the municipality for services rendered in connection with such representation. SCR 20.23(2)(a). In this regard, Supreme Court Rule 20.23(1) states that a lawyer's professional judgment should be exercised, within the bounds of the law, solely for the benefit of his or her clients and free of any compromising influences and loyalties.

To reduce the possibility that the private attorney's ability to represent the officers would be adversely affected by his or her being retained and compen-

sated by the municipality for such representation, the municipality may wish to consider an arrangement whereby the officers would be required to engage independent, outside counsel and would be entitled to receive reimbursement for their legal expenses in the event of a successful defense in the action.

In rendering this opinion, the committee is aware of Sections 62.115 and 895.46(1)(a), Wis. Stats. The former provision provides that a common council may authorize the city attorney to defend actions brought against any city officer or employee arising from any acts *done in the course of his employment* with certain exceptions.

While this provision may permit the council to authorize the municipal attorney to defend an officer in an action brought solely against the officer, it provides discretionary authority for the council and does not override the previously quoted Supreme Court Rules. Section 895.46(1)(a), Wis. Stats., does not authorize a municipality to employ counsel for a public officer or employee, but provides that if a jury or court finds that the defendant officer or employee was *acting within the scope of his employment*, the judgment in excess of insurance is to be paid by the municipality, and further provides that the municipality is to pay reasonable attorney fees and the cost of defending the action, *unless it is found that the officer or employee did not act within the scope of his or her employment*. Neither statutory provision expressly or impliedly permits an attorney to act in violation of SCR 20.23(3)(b) or (e).

In addition to requesting an opinion with respect to the foregoing questions, the Ethics Committee was also asked for its views with respect to the decision in *Perillo v. Advisory Committee on Professional Ethics*, 83 N.J. 366, 416 A.2d 801 (1980), wherein, on petition for review of an opinion of the Supreme Court Advisory Committee on Professional Ethics, the New Jersey Supreme Court held that it would be unethical for a municipal attorney to represent municipal interests against a municipal police officer.

Only in situations where there is an adequate basis for a belief on the part of members of the public reasonably familiar with municipal affairs that municipal police officers and municipal attorneys have worked together so closely and regularly that they could not be drawn into adversarial positions in later administrative and judicial proceedings without fostering the appearance of a conflict of interest. 83 N.J. 366, 416 A.2d at 807.

The Court's holding was "based substantially upon the appearance of ethical impropriety" arising, according to the Court, from the reasonable belief by the public "that an attorney in such a position would be subject to and hindered by a professional conflict of interest." 83 N.J. 366, 416 A.2d at 803.

With respect to "non-police" employees, the Court also recognized that there should be a general prohibition against a municipal attorney representing the municipality in an adversarial proceeding at the local level, or in any subsequent administrative and judicial appeals, directed against a municipal employee who is not engaged in law enforcement. Such representation would only be unethical where there is an actual conflict of interest or the strong appearance of such a conflict in a particular case, 83 N.J. 366, 416 A.2d at 808.

Supreme Court Rule 20.48(6) states that, among other things, a lawyer has a duty "to strive to avoid not only professional impropriety but also the appearance of impropriety." The committee believes that the need to avoid the appearance of impropriety becomes even more compelling when the lawyer, such as a municipal attorney, represents the public interest. *See, e.g.,* Committee Formal Opinion E-77-11.

Accordingly, the views of the committee with respect to the propriety of a municipal attorney representing the municipality in disciplinary actions against municipal police officers or firemen are the same as the view expressed by the New Jersey Supreme Court in *Perillo v. Advisory Committee on Professional Ethics, supra*. In those cases in which the municipal attorney would be disqualified from representing the municipality on ethical grounds, the municipality could retain independent, outside counsel to represent interests.