Police Legal Advisors—Friend or Foe? Ethical Dilemmas in 42 U.S.C. Section 1983 Litigation

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I. INTRODUCTION

"Probably all laws are useless; for good men do not want laws at all, and bad men are made no better by them."¹ This maxim describes how some attorneys perceive the ethical standards governing their profession. Some lawyers would paraphrase Demonax and say, "Probably all ethical rules are useless; for good attorneys do not need ethical rules, and bad attorneys are made no better by them."

Nevertheless, for today’s attorneys there exists a rather substantial set of ethical laws governing their professional conduct. Additionally, a considerable body of literature is dedicated to the ethics of practicing law. One of the leading texts on professional responsibility² contains over 900 references concerning the ethical issues facing attorneys. Indeed, articles abound on almost every conceivable topic and for almost every legal specialty imaginable. There exists a wealth of excellent articles on the ethical issues facing corporate in-house counsel,³ tax attorneys,⁴ environmental attorneys,⁵ and securities attorneys.⁶ Additionally,

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1. Demonax.
a variety of articles can be found on the unique ethical issues involved in special situations: juveniles,7 the disabled,8 and co-defendants.9 Considerable review also has been given to the ethical standards governing attorneys testifying as witnesses.10 The literature even addresses the ethical considerations generated when lawyers are married or are lovers.11

Unfortunately, little, if any, literature exists addressing the general role or function of police legal advisors.12 This void exists even though in 1980 the American Bar Association specifically acknowledged the need for, and unique services provided by, police legal advisors in its Standards for Criminal Justice ("SCJ").13 In the Commentary to SCJ Standard 1-7.9, "Need For In-House Police Legal Adviser," the ABA noted that "The police, perhaps more than any other governmental agency, consistently need highly skilled full-time legal assistance." Even less literature exists, however, with regard to ethical issues encountered by police legal advisors generally or in specific situations. This Article discusses an ethical situation that has received scant attention in either the literature or the courts — the ethical dilemmas police legal advisors encounter


when engaged in civil litigation under 42 United States Code, Section 1983 ("Section 1983").14

Part II begins with an overview of litigation under Section 1983, focusing on the unique substantive and procedural aspects of the litigation that create ethical dilemmas for police legal advisors. Part II also addresses the fact that police legal advisors are likely to encounter a multitude of parties in Section 1983 litigation and explains how the presence of these parties further complicates the ethical issues faced by police legal advisors.

Part III reviews the judicial decisions, although relatively few, in which the courts have considered ethical dilemmas in Section 1983 litigation and have been called upon to interpret the primary standards governing the ethical conduct of attorneys, the American Bar Association’s Model Rules of Professional Conduct ("Model Rules"),15 and Model Code of Professional Responsibility ("Model Code").16

Part IV assesses litigation under Section 1983 in light of the primary standards governing the ethical conduct of attorneys, the Model Rules and the Model Code. Specifically, Part IV evaluates those provisions of the Model Rules and the Model Code posing the greatest ethical dilemmas for police legal advisors engaged in Section 1983 litigation.

For the purposes of this paper, the term "police legal advisor" refers to a licensed attorney, acting as an advocate and/or advisor, who provides legal services to a police department in the normal course of practicing law. A police legal advisor may be sworn or civilian, full or part time, employed either directly by the police department or by some other agency.17

Regardless of title or relationship to the police department, licensed attorneys providing legal advice to police departments are affected by the ethical considerations raised in this Article.

17. Currently, a variety of employer-employee relationships exist governing police legal advisors. The October 1990 Membership Directory of the International Association of Chiefs of Police (IACP) Legal Officers Section (LOS) lists 294 members and includes sworn officers, civilian employees of police agencies, law firms, individual attorneys in private practice, attorneys from the Office of the Attorney General, attorneys from city law departments, police chiefs, and insurance counsel. Granted, not all LOS members serve as police legal advisors, however, a review of the membership indicates quite a diverse group of attorneys operating under the general job description "police legal advisor."
II. CHARACTERISTICS OF LITIGATION UNDER SECTION 1983: WHY ETHICAL DILEMMAS EXIST

Although any litigation, criminal or civil, raises the specter of ethical dilemmas, police legal advisors involved in litigation under Section 1983 face a virtual "minefield" of ethical problems. In large part, the potential "ethical problems" in Section 1983 cases stems from the unique substantive and procedural aspects of the litigation and the presence of a multitude of parties.

To better understand the ethical dilemmas facing police legal advisors it is first necessary to briefly explore and evaluate Section 1983 and explain why litigation under this statute creates unique ethical problems for police legal advisors. This discussion is by no means an exhaustive analysis or evaluation of Section 1983. Such an evaluation is beyond the scope of this Article. Section II is simply an overview of Section 1983, focusing on those aspects of the litigation that tend to increase the likelihood of ethical dilemmas. 18

What are the aspects of and who are the parties to Section 1983 litigation generating these ethical dilemmas for police legal advisors?

A. Liability, "Good Faith," and Punitive Damages

A number of substantive and procedural matters, unique to Section 1983 litigation, tend to aggravate the ethical situations encountered by police legal advisors in these cases.

1. Liability and "Good Faith."—Subsequent to the decision in Monell v. Department of Social Service, 19 both municipalities and individual officers may be subject to civil liability for the deprivation of constitutional rights. However, the theories of liability for the two categories of defendants are quite different. Generally, municipalities are liable when they have policies, rules, regulations, or customs which cause the deprivation. 20 Liability for individual officers is reviewed strictly as a matter of causation "under color of law." 21

In some situations, the municipality-defendant and the officer-defendant will have no conflict. In other situations, however, municipalities and defendants may have conflicting positions. Municipalities may

allege that they are not liable because it was not their policy that caused the constitutional deprivation, but the actions of the officer taken outside the scope of employment. Officers, on the other hand, may claim they are not liable because they acted in "good faith" in compliance with departmental policy, and that the policy was the real cause of the constitutional deprivation.

Defenses to Section 1983 also vary, depending on the type of defendant. Individual officers may defend themselves under "Qualified Immunity," or what is commonly known as the "Good Faith" defense. First recognized in Pierson v. Ray,22 the "Good Faith" defense is available to individual officers who acted in compliance with the law as they knew it at the time of the violation and who did not violate clearly established legal rights. Several cases in the 1970s and 1980s refined the application of the defense and the Supreme Court, in the case of Anderson v. Creighton,23 provided the parameters of the law which guide police officers today.24 Simply stated, an officer is not liable under Section 1983 for a constitutional violation if the right violated was not well settled, or clearly established, at the time of the violation. In Anderson, the Court asserted that in order for an officer to be liable for the deprivation of a right, the right violated by the officer "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Generally, where an officer complies with the policy of a municipality, and that policy is facially valid, a "Good Faith" defense will lie for the officer. The "Good Faith" defense is not available to municipalities.

Municipalities, however, may avoid liability by proving that their policies were not the cause of the violation and that the officer exceeded the scope of employment. Exceeding the scope of employment may be proven by establishing that the officer violated established municipal and/or departmental policy. Generally, proof that an officer exceeded the scope of employment is also sufficient proof to deprive the officer of the "Good Faith" defense. Thus, evidence supporting the defense of one party may very well be the same evidence establishing liability on behalf of the other party. These varying theories of liability and competing interests in establishing defenses are at the heart of most conflict of interest cases. It is clear that in many Section 1983

22. 386 U.S. 547 (1967).
cases the "best interests" of municipalities, departments, and individual officers will not always be based on the same trial strategy or course of action. Police legal advisors should identify potential conflicts early in the investigation. Normally, police legal advisors will conduct a preliminary investigation to determine the extent to which a conflict between the co-defendants exists or may exist in the future. Even this preliminary investigation poses serious ethical considerations for police legal advisors. Who is the client? Are the communications confidential? If a conflict develops in a later stage of the proceeding how, and when, can police legal advisors "extract" themselves from representing the officer-defendant?

When actual or potential competing and/or conflicting interests are discovered, police legal advisors should proceed with an abundance of caution. Unless and until it is clearly established that the municipality and the officer are not and never will be in conflict, police legal advisors must remain loyal to the clearly identifiable client—the police department.

2. Punitive Damages.—Municipalities are cloaked with immunity from punitive damages.25 However, individual officers are liable for punitive damages.26 Indeed, punitive damages can be assessed against some, but not all, officers in the same case.27 Because municipalities face only compensatory and/or nominal damages, usually minimal amounts in Section 1983 litigation, municipal counsel may be tempted to "cave in" on the issue of liability and settle the case. Settlement, however, may not be in the best interest of the officer-defendants. A settlement awarding even nominal damages against an individual officer-defendant may open the door for the imposition of significant punitive damages against that officer, unless the settlement is carefully drafted.28 Police legal advisors should familiarize themselves with the law in their jurisdiction governing settlements and be especially sensitive to the legal effects settlements have on the various parties.

In addition to its complex substantive and procedural provisions, Section 1983 invariably involves a variety of parties. The presence of numerous "parties" in this litigation also adds to the ethical dilemmas faced by police legal advisors. A review of the characteristics of the

parties is helpful in understanding the ethical dilemmas the presence of these parties create.

B. Multiple Parties

1. Plaintiffs. — Normally, plaintiffs in Section 1983 cases are individuals who have been the victim of a confrontation with the police. Sometimes, plaintiffs are the estate of individuals killed by the police. In virtually every case, plaintiffs will be represented by counsel.

Frequently, plaintiffs face criminal charges stemming from the confrontation with the police. Because of additional legal issues associated with guardianship and juveniles, legal advisors should review Section 1983 litigation carefully to determine whether any plaintiffs are minors or are advancing the interests of minors.

2. Defendants. — To borrow a line from the classic movie “Casablanca,” plaintiffs’ attorneys frequently “round up the usual suspects” when filing an action under Section 1983. Current practice is to name as many defendants as possible from among the following “usual suspects”: the governmental unit, non-police officials heading the governmental unit, the head of the police department, the head of the specific police unit involved, supervisors, and as many individual officers as is reasonably possible.

Both the letter and the spirit of Section 1983 promote the inclusion of as many defendants as possible in the lawsuit. Additionally, plaintiffs’ attorneys, eager to find a “deep pocket” and/or a “politically beneficial” defendant, are all too happy to pursue a militaristic approach of “multiple targeting” to ensure strategic and tactical success. Courts at all levels continue to find liability on the part of myriad defendants often in the same case. “Multiple targeting” of defendants continues to be the rule rather than the exception.

Given current policy, law and trial practice, the probability of having multiple defendants and multiple defense attorneys in Section 1983 cases remains high. Police legal advisors should anticipate multiple defendants and familiarize themselves with the ethical considerations generated by the presence of more than one defendant.

C. Who are the “Normal” Defendants in Section 1983 cases?

Municipalities. Although modern practice universally involves naming as a defendant the governmental unit (municipalities, cities, towns, counties, and comparable governmental entities) employing the police officers, this practice was not always permitted. Historically, Section
1983 suits against municipalities were barred by the holding in the case of *Monroe v. Pape.*\(^{29}\) *Pape* declared that municipalities were not "persons" under the meaning of Section 1983 and were not proper defendants in such cases. However, in *Monell v. Department of Social Services of the City of New York,*\(^{30}\) the Supreme Court overruled *Pape* on this point, holding that municipalities were "persons" for the purpose of Section 1983 and were proper defendants. Accordingly, under *Monell,* municipality-defendants can be just as liable for constitutional deprivations as are individual officer-defendants.

Simply stated, municipal liability occurs when a municipal policy, custom, regulation, or practice is found to be the cause of the constitutional deprivation.\(^{31}\) Recent Supreme Court decisions have expanded municipal liability somewhat and have held municipalities liable under Section 1983 even though the constitutional deprivation was based on a single incident.\(^{32}\) *Monell,* *Dodson,* and *Tuttle* opened the door for plaintiffs to name municipalities as defendants, while *Pembauer* and *Harris* virtually ensured that municipalities would continue to be named as defendants.

Municipalities continue to be targeted by plaintiffs’ attorneys for a variety of reasons. Plaintiffs’ attorneys laud the practice as a form of "civic duty," asserting that municipalities are named as defendants in order to ensure that the widespread police abuse, misconduct, and corruption generating the cause of action are properly brought to the attention of high government authorities. Plaintiffs’ attorneys also cite the need for increased visibility of their cases in the media. In reality, municipalities are frequently named as defendants solely because they are the only "deep pocket" reasonably available from which judgments can be recovered. For whatever reason, the practice of naming municipalities as defendants is supported by Supreme Court precedent, extremely popular, and certainly here to stay.

**Supervisors.** Although the law governing supervisor liability is less well settled than the law governing municipal liability, supervisors historically have been, and will continue to be, named as defendants in Section 1983 cases. It is quite clear that supervisors, and municipalities for that matter, cannot be held liable for the constitutional deprivations

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committed by individual officers under the theory of "Respondeat Superior." 33 However, it is equally clear from these cases that supervisors are liable for constitutional deprivations under Section 1983 in their own right. Therefore, they are legitimate defendants. Unfortunately, the courts have left the standards for determining supervisor liability in limbo.

The circuits have adopted a variety of standards regarding the degree of negligence required on the part of the supervisor for liability to attach. The circuits have adopted such standards as "deliberate indifference," "gross negligence," "reckless indifference," and "callous indifference." Regardless of the word choice, "responsibility" and/or "causation" appear to be the central theme to supervisor liability in the circuits. 34 The circuits also disagree as to what degree the supervisor must be "personally involved" in the incident in order for liability to attach. The standard for establishing supervisor liability appears to rest more on causation than on the degree of personal involvement. 35

Despite the differences between the circuits in determining the depth and breadth of supervisor liability, what remains crystal clear across the circuits is that supervisors remain viable, legitimate defendants in many Section 1983 actions.

Plaintiffs’ attorneys defend the practice of naming supervisors as defendants on the same grounds as for naming municipalities—higher visibility and better likelihood of recovering judgments. Since the Supreme Court has upheld the concept of supervisor liability and considering that a majority of the circuits continue to find supervisory liability under Section 1983 (albeit under a variety of theories and causes of action), it is unlikely that the number of supervisor-defendantsт Sec-


34. See Gutierrez-Rodrigues v. Cartagena, 882 F.2d 553 (1st Cir. 1989); Davidson v. Dixon, 386 F. Supp. 482 (D. Del. 1974), aff'd, 529 F.2d 511 (3d Cir. 1975); Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984), cert. denied, 470 U.S. 1035 (1985); Harris v. Chancellor, 537 F.2d 203 (5th Cir. 1983); Smith v. Heath, 691 F.2d 220 (6th Cir. 1982); Rascon v Hardiman, 803 F.2d 269 (7th Cir. 1986); Howard v. Adkinson, 887 F.2d 134 (8th Cir. 1989); Lewis v. Smith, 855 F.2d 736 (11th Cir. 1988); and Haynesworth v. Miller, 820 F.2d 1245 (D.C. Cir. 1987).

tion 1983 cases will diminish in the near future.\textsuperscript{36}

**Individual Police Officers.** The law governing the liability of individual officers under Section 1983 has been settled for some time. The Supreme Court, although "adjusting" the standards of liability for individual officers and "tinkering" with various procedural matters from time to time, has never wavered in its position—individual police officers, acting under color of law, are liable for damages under section 1983 when they engage in activity causing a deprivation of a clearly established right "secured by the Constitution and the laws."\textsuperscript{37}

Additionally, a number of circuits have expanded the scope of liability of individual officers through the traditional tort theory of "joint liability as joint tortfeasors." The typical situation where an individual officer would be liable as a joint tortfeasor occurs where the identity of the offending officer is unclear, or where evidence of identity is not readily available to the plaintiff. Examples of such situations are group beatings or shootings.\textsuperscript{38}

Several circuits and some federal district courts have gone one step further in expanding liability for individual officers and have held that an officer is liable even though not actually or directly involved in the incident but merely present at the scene where another officer committed the constitutional deprivation.\textsuperscript{39} One court found liability under Section 1983 for police officers present at the scene of a constitutional deprivation, even though the party committing the constitutional deprivation was not a police officer.\textsuperscript{40}

Plaintiffs may seek to increase the number of officers named as defendants by alleging that the deprivation of constitutional rights occurred through some form of conspiracy by police officers or through a


\textsuperscript{38} See Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985), cert. denied, 480 U.S. 916 (1987) (shooting); Dean v. Gladney, 621 F.2d 1331 (5th Cir. 1980) (beating), cert. denied sub nom. Dean v. County of Brazoria, 404 U.S. 983; and Rutherford v. City of Berkeley, 780 F.2d 1444 (9th Cir. 1986) (beating).


\textsuperscript{40} Pellowski v. Burke, 686 F.2d 631 (8th Cir. 1982).
conspiracy of police officers and private individuals. Such conspiracy actions are recognized under both Section 1983 and under 42 U.S.C. Section 1985(3). The number of officer-defendants is likely to increase dramatically when a plaintiff opts to proceed through this conspiratorial cause of action. "Cover-ups" of constitutional deprivations are sometimes recognized by the courts as separate and distinct conspiratorial deprivations of constitutional rights; thus, liability under Section 1983 will be imposed on those officers involved in the "cover-up."

Individual police officers, although not always the first choice of plaintiffs' attorneys, remain a prime and convenient "target of opportunity" in Section 1983 actions. Indeed, courts seem to be expanding the scope of liability for individual police officers to include officers somewhat removed in time and distance from the offending officer or event.

As with municipalities and supervisors, the current practice of naming as many individual officers as possible in Section 1983 litigation is also not likely to diminish or disappear soon.

3. Other Counsel. — In addition to encountering a variety of plaintiffs and defendants, police legal advisors may encounter a host of attorneys in Section 1983 litigation. The presence of numerous counsel in a case usually increases the possibility of an ethical dilemma arising. Who are the other counsel in Section 1983 litigation likely to be encountered by police legal advisors?

Plaintiffs' Counsel. The initial ethical considerations facing police legal advisors with regard to counsel revolve around counsel for the plaintiff(s). It will be extremely rare in a Section 1983 case to have a plaintiff not represented by counsel. Police legal advisors should always be sensitive to the ethical rules governing the relationship with opposing counsel. However, Section 1983 litigation raises additional concerns in that this litigation may attract "high power" plaintiffs' attorneys and/or attorneys affiliated with "high visibility" groups. Police legal advisors should be aware of the notoriety of plaintiffs and/or counsel and be prepared for the "carnival atmosphere" often associated with highly visible "media events," such as is the case in civil rights violations.

Finally, it should be noted that counsel for a plaintiff in the civil Section 1983 litigation may be the same counsel who will represent that individual as a defendant in pending criminal charges. Police legal advi-

42. See generally Webster v. City of Houston, 735 F.2d 838 (5th Cir. 1984); Bumgarner v. Bloodworth, 738 F.2d 966 (9th Cir. 1984); and Dooley v. Reiss, 736 F.2d 1392 (9th Cir. 1984).
sors should also be sensitive to the potential for ethical issues among plaintiffs’ counsel representing a single individual.

**Municipal Counsel.** Whether municipalities or municipal employees are specifically named as defendants in Section 1983 cases, counsel (usually the city attorney or city law department) for the municipality frequently become involved early in any section 1983 litigation. The presence of municipal counsel in a section 1983 case raises additional ethical considerations for police legal advisors. In fact in the reported cases dealing with this subject, it is municipal counsel who are most frequently the subject of allegations of unethical conduct.

In many police departments separate, in-house, police legal advisors are not practical or affordable. For these agencies, municipal counsel routinely serves as the legal advisor for the police department and frequently represents individual officers as well. This “multiple representation” situation should always be viewed with an eye toward potential ethical issues, especially for actual and potential conflicts of interest. Indeed, most of the reported cases concerning ethical violations in Section 1983 litigation involved conflict of interest situations, and all of the reported conflict of interest cases were generated when municipal counsel attempted to represent both the municipality and the individual officers involved in the incident.

**Insurance Counsel.** Municipalities sometimes carry liability insurance policies which may be applicable in a Section 1983 action. Counsel for the insurance company may want a “piece of the action” in any civil action, and are likely to be especially interested in “high stakes” litigation such as Section 1983. Whether a police legal advisor is retained, the presence of insurance counsel in Section 1983 litigation raises additional ethical considerations.

**Retained (Private) Counsel.** Individual officers, both supervisors and line officers, may retain private counsel to represent them in civil actions such as Section 1983 litigation. The presence of retained, private counsel contributes exponentially to the ethical issues facing police legal advisors. Access to evidence, fees, confidentiality, and settlement are but a few of the ethical issues generated by the presence of retained counsel.

**Professional Association Counsel.** Today a significant number of police officers belong to professional associations, such as the Fraternal Order of Police. These professional associations are increasingly seeking more control over the legal assistance provided to their members involved in civil litigation. These professional associations may attempt to insert counsel in Section 1983 cases or to control the assignment of
counsel.

In *Suffolk County Patrolmen's Benev. Ass'n v. County of Suffolk*, a local police professional association with strong interests in the method of selecting counsel for its members sought control over the selection process through litigation. The municipality, sensitive to the conflict of interest issues, provided a panel of three attorneys from which officer-defendants could select individual counsel. The local police professional association challenged this method of assigning counsel, arguing that the process was arbitrary and deprived the officers of due process of law. Although the professional association was eventually unsuccessful in challenging the assignment of counsel, police legal advisors should be aware of the interests of the professional associations and sensitive to the ethical issues generated by interested "outside" organizations.

Again, the net effect of additional counsel in Section 1983 litigation is to increase the likelihood of generating complex ethical issues.

**Prosecutors.** As stated earlier, plaintiffs may face criminal charges stemming from the same incident generating the cause of action for the civil suit. Ethical difficulties may arise if police legal advisors encounter or serve as the local prosecutor. Some police legal advisors may be assigned to or operate out of the prosecutor's office. This situation increases the likelihood of an ethical dilemma. The potential for ethical dilemmas, especially conflicts of interest, exists even though the prosecutor and the police legal advisor are both "on the same side." Police legal advisors should guard against assuming that there will be no ethical issues involving prosecutors either because they are the prosecutor, or when they are associated with the prosecutor's office.

**Other Police Legal Advisors.** The law enforcement community is relying more and more on "task force" operations to combat multi-jurisdictional criminal activity. Drug task forces are the prime example of such a tactic. Frequently, these task forces are composed of police officers from a variety of agencies. Often officers from federal, state, and local agencies are working together during an operation. Where a task force composed of officers from different agencies is involved in a deprivation of rights, plaintiffs will most likely name all agencies and officers as defendants. The presence of other agencies/officers will involve legal advisors from those departments. The addition of counsel, even other police legal advisors, creates the potential for additional eth-

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istical issues. As with prosecutors, it is unwise to assume that just because all police legal officers are "on the same side," there cannot be ethical problems.

As the number of counsel increases, police legal advisors should ask: What is the relationship between these other counsel and police legal advisors? What ethical provisions govern these relationships? How have the courts interpreted similar situations involving ethical dilemmas?

The complex and unique substantive and procedural aspects of Section 1983 actions almost ensure that ethical issues will surface during litigation. The plethora of plaintiffs, defendants, and attorneys magnify the ethical issues encountered by police legal advisors in these cases. Given the high risk of encountering ethical dilemmas, police legal advisors would be well-served to know how the courts have evaluated the rules and standards governing their professional ethical conduct.

Section III addresses judicial interpretation of the ethical rules applicable in most Section 1983 cases. Although there are very few reported cases addressing ethical issues and police legal advisors in Section 1983 actions, it is imperative that police legal advisors know how the subject has been treated by the courts. With relatively few decisions serving as precedent, the importance of each reported case is magnified.

III. JUDICIAL INTERPRETATION OF ETHICAL DILEMMAS

A. Acknowledging the Existence of Ethical Dilemmas

Relatively few decisions exist regarding ethical issues facing police legal advisors in Section 1983 actions.\footnote{44} Despite the dearth of case law relating to ethics in Section 1983 cases, one caveat emerges—all parties to these cases, including the court, should be aware of the potential for ethical dilemmas and especially alert to "the need for sensitivity to the

risk of conflict throughout the course of a lawsuit involving multiple representation."

Indeed, most of the reported cases involve a conflict of interest generated through multiple representation of both the municipality and an individual officer. As one court succinctly stated, "Adverse interests in litigation require adverse legal counsel."

The typical conflict of interest case involves an attorney attempting to represent the interests of both the municipality and the individual officers involved in the incident. In every case cited above, regardless of the outcome of the case, the resolution of the ethical dilemmas was determined by the courts applying the Model Rules and/or the Model Code.

The conflicts in the reported cases were addressed by the courts primarily under Rule 1.7 or comparable provisions of the Model Code. Using either the Model Rules or the Model Code, courts have found that the potential for conflict exists whenever an attorney attempts to represent both a municipality and the individual police officers. The courts have also emphasized that the specific facts of the case are critical to the resolution of the ethical and legal matters.

It is clear that the courts are acknowledging the existence of ethical dilemmas in Section 1983 litigation, especially conflicts of interest. Specific analysis of the ethical dilemmas under the Model Rules and Model Code generally results in a finding that conflicts of interest are clearly possible under either set of rules. Police legal advisors should familiarize themselves with these judicial decisions, especially the decisions in their jurisdiction.

B. "Per Se" Conflicts?

The few courts that have reviewed ethical matters in Section 1983 litigation have generally rejected the "per se" theory of conflict of interest; that is, under the Model Rules and Model Code, multiple representation of the municipality-defendant and an officer-defendant creates an unrefutable, "per se" conflict. The general consensus is that,

46. Van Ooteghem, 628 F.2d at 495.
47. Model Code of Professional Responsibility Canons 5 and 9, DR 1-105, DR 5-101, EC 5-1 and EC 5-16 (1986).
although conflict is likely to be inherent, given the varying theories of liability under Section 1983 and the differing defenses advanced by defendants, courts should determine whether the multiple representation creates an actual conflict governed by Rule 1.7(a) or a potential conflict governed by Rule 1.7(b).  

C. Standing to Object

The courts have vested standing to raise unethical conduct not only in an aggrieved defendant, but also in plaintiffs. Some appellate courts even hold the trial judge accountable for not pursuing the matter. Additionally, the reported cases indicate that ethical matters can be raised at any time during the proceedings. Courts also have found standing to raise ethical matters on appeal, holding that defendants in Section 1983 do not waive the issue by failing to object at trial.

IV. Ethical Standards: What Rules Govern?

A. Background

Today, the professional ethical conduct of attorneys is governed by rules promulgated by the highest court in each state. This has not always been the case.

In the 1800s, the rules of professional ethical conduct for attorneys were prescribed by legal scholars. In 1908 the American Bar Association (ABA) published 32 ethical canons governing attorney conduct. For nearly sixty years these 32 canons served as the primary ethical “regulations” governing the legal community.

The original 32 ABA canons expanded to 47 canons, and the canons remained the primary guidance in ethical matters for attorneys until 1969. In 1969 the ABA developed the Model Code. The Model Code consisted of 9 Canons, 41 Disciplinary Rules, and 139 Ethical Considerations. The Canons were considered “axiomatic norms,” or general philosophical principles. The Disciplinary Rules were mandatory and violations of these “black letter” rules could result in disciplinary action against an attorney. The Ethical Considerations were “aspirational in na-


50. Kevlik, 724 F.2d 844.


52. In re Taylor, supra.

ture” and attempted to provide guidance as to specific courses of action to take. Almost immediately after its development, the Model Code was adopted by nearly every state as the standard governing ethical conduct.54

The Model Code remained the primary source of guidance on ethical matters until 1983 when the ABA promulgated the Model Rules. The Model Rules consist of 53 “black letter” rules, each followed by a section designated as “Comments.” The 53 rules were mandatory and served the same function as the Disciplinary Rules under the Model Code. The Comments to the Model Rules, advisory in nature, are similar to the Model Code’s Ethical Considerations.55

Today, 34 states have adopted the Model Rules as the standards governing the ethical conduct of attorneys. Additionally, four states have adopted a number of critical portions of the Rules even though they retain the Model Code as their primary statutory ethical guidelines. Because of the widespread use of the Model Rules by state disciplinary entities, the Model Rules will be the primary focal point for the following discussion of specific ethical dilemmas under Section 1983. Where applicable, relevant portions of the Model Code are addressed.

B. Relevant Provisions of the Model Rules

Certainly police legal advisors should guard at all times against violating any provision of the Model Rules. However in Section 1983 cases, some of the provisions of the Model Rules are more relevant and present bigger challenges than others. Accordingly, this section will focus on those provisions of the Model Rules most likely to be of concern to police legal advisors in Section 1983 cases.56

Rule 1.7, Conflict of Interest.57 The natural starting point for any

54. Id.
55. Id.
56. For an excellent discussion of the general nuances of the Model Rules and the Model Code, including a thorough review of how the Model Rules and Model Code have been reviewed in a variety of judicial decisions, see JOHN S. DZIEWKOWSKI, SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION (1991).
57. MODERN RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1989).
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client
discussion regarding ethical issues in Section 1983 litigation is the Model Rule governing conflicts of interest. This Model Rule, or its counterparts under the Model Code, is most commonly cited as the specific basis for finding ethical violations in multiple representation cases.

Section (a) of Rule 1.7 addresses instances where actual conflict of interest exists. The standard under 1.7(a) is quite clear: multiple representation is prohibited in situations where actual conflict exists, typically in litigation. It is virtually impossible to conceive of a situation where a police legal advisor would fall under the provisions of Rule 1.7(a) by representing both a plaintiff and a defendant in a Section 1983 case. However, it is not at all difficult to imagine police legal advisors, especially municipal counsel, representing co-defendants in Section 1983 actions. As indicated in Part II, co-defendants in Section 1983 litigation have potentially conflicting positions and/or defenses.

Model Rule 1.7(b) governs situations where conflicts are not actual. Comment [7] specifically mentions situations involving co-defendants. Comment [7], along with subsections (b)(1) and (b)(2), offer guidance for police legal officers contemplating multiple representation in cases with the potential for conflict. These provisions first note that the potential for conflict exists when “there are substantially different possibilities of settlement of the claims or liabilities in question.” Given that a municipality and an individual officer in Section 1983 litigation always have the potential for conflict, especially concerning defenses, and considering that some courts recognize an “inherent conflict” where an attorney attempts to represent both the municipality and the officer(s) involved, police legal advisors considering multiple representation of both municipalities and individual officers should proceed with extreme caution.

As Comment 11 to Model Rule 1.7 notes, “The question [of conflict] is often one of proximity and degree.” This Comment is consistent with the holding by some courts that multiple representation does not create a “per se” conflict of interest, but that multiple representation

or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

58. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), DR 5-105(A), and DR 5-107(B) (1980).
should be considered as a potential ethical dilemma. Thus, each situation should be reviewed based on the facts of the individual case. Even where a conflict of interest is found to exist, Model Rule 1.7(b) and its Comments are consistent with the judicial holdings that a co-defendant could waive the right to separate counsel and agree to multiple representation. Police legal advisors in Section 1983 litigation should ensure that if a waiver is obtained, all provisions of Model Rule 1.7(b)(2) regarding consultation and full explanation have been complied with, and properly documented.

Police legal advisors should strive to ensure all potential conflicts of interest are resolved during the early stages of the investigation, before any complex attorney-client relationship develops with an officer-defendant. It is difficult enough to withdraw from representation early in the litigation, but during later stages withdrawal may be impossible and very well may prove "ethically fatal" for a police legal advisor.

Rule 1.13, Organization as Client. This Model Rule appears

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(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization inspects upon action, or a refusal to act, that is clearly a violation of law and is likely to
drafted with Section 1983 litigation in mind. Does the Rule even apply to police legal advisors? Comment [7] states quite clearly, "The duty defined in this Rule applies to governmental organizations." Comment [8] sets out the parameters of the problem, "There are times when the organization's interest may be or become adverse to those of one or more of its constituents." This is exactly the ethical dilemma noted by the courts in Section 1983 litigation where the interests of the municipality or of the police department either are or become adverse to the interests of the individual officer-defendants.

An additional ethical issue is raised by section (b) of Model Rule 1.13. This section directs attorneys to guard against situations where an employee of an organization intends to violate his/her legal obligations; that violation is likely to be imputed to the organization and the organization is likely to sustain "substantial injury." When this occurs, an attorney is required to act in the best interest of the organization. This section of Rule 1.13 appears to govern situations where police legal advisors become aware of activities of individuals within the police department that are not in the best interest of the agency or the municipality. Clearly, under section (b) an attorney is required to protect the organization/department and a police legal advisor would be obligated to protect the police agency.

Specific courses of action are recommended in subsection (b)(1), (b)(2), and (b)(3). They include asking for reconsideration of the matter, asking for a separate legal opinion, or referring the matter up the chain of command. Ultimately, under section (c), an attorney may resign, but is limited by the provisions of Model Rule 1.16 governing withdrawal of representation. For police legal advisors, "withdrawal" would appear to mean withdrawal as counsel, not resignation from the department. Realistically, police legal advisors trying to accomplish such a reassignment without offending senior administrators or jeopardizing their job as legal

result in substantial injury to the organization, the lawyer may resign in accordance with rule 1.16.

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

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

Section (d) of Model Rule 1.13 should be of particular interest to police legal advisors. It states that when the "organization's interests are adverse to those of the constituents with whom the lawyer is dealing, "an attorney is required to explain to directors, officers, employees, members, shareholders, or other constituents" that it is the organization, not the individuals within the organization, who is the client. Model Rule 1.13(d) appears to require that, during the investigatory stages of a pending case, police legal advisors give individual police officers who are potential defendants in Section 1983 litigation a form of "Miranda warning" outlining the scope of their representation. This notice requirement of Model Rule 1.13(d) is consistent with the requirements under Model Rule 1.7(b)(2) that attorney provide full disclosure and explanation to clients when attempting to provide multiple representation. The disclosure/warning provisions of Model Rule 1.7(d) and Model Rule 1.13 also would appear to govern police legal advisors involved with officer-defendants waiving their right to separate counsel. 60

Rule 1.15, Safekeeping Property. 61 This Model Rule has implica-


(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. If a dispute arises concerning their respective interest, the portion in dispute shall be kept separate by the lawyer until the dispute is resolve.
tions in Section 1983 cases for evidence, reports, and record keeping. Model Rule 1.15 requires attorneys to identify property and to properly safeguard the property of a client. Additionally, an attorney is obligated under Model Rule 1.15 to maintain complete records regarding such property for five years after termination of the representation. Given that most police legal advisors do not personally maintain evidence or records in Section 1983 litigation but rely on other officers or the "Evidence Locker," there appears potential under this Model Rule for an ethical breach should evidence or records disappear. Model Rule 1.15 clearly imposes the duty to safeguard evidence on counsel.

Rule 1.16, Declining or Terminating Representation. Section

62. MODEL RULES FOR PROFESSIONAL CONDUCT Rule 1.16 (1991). Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted
(a)(1) of this Model Rule prohibits attorneys from representing a client when "the representation will result in violation of the rules of professional conduct or other law." This section is especially important for police legal advisors involved in Section 1983 litigation, in light of the court decisions and the provisions of Model Rule 1.7 prohibiting multiple representation in certain circumstances. Police legal advisors should familiarize themselves with the provisions of section (b) outlining circumstances (fraud, crimes, pursuing repugnant objectives, etc.) under which withdrawal as counsel is permitted. Of equal importance are the provisions of this rule governing the mechanics of withdrawing as counsel.

Section (d) governs the relationship of an attorney to a former client when termination does occur. Legal advisors should take note of Comment [10], "Whether or not a lawyer for an organization may under unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules."

Rule 2.1, Advisor.63 This Model Rule mandates that attorneys "shall exercise independent professional judgment and render candid advice." It imposes a duty on attorneys to be forthright in their dealings with clients. Police legal advisors, particularly in-house counsel who are sworn officers, may find themselves somewhat intimidated by a ranking officer, especially when the outlook for a case is "bad." However, Comment [1] indicates that "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." In Section 1983 cases, regardless of how "painful" the advice may be, all clients, including an officer-defendant, are entitled to honest and sincere counseling. Police legal advisors should not be intimidated in their legal practice by irate supervisors or disappointed officer-defendants.

Rule 2.2, Intermediary.64 The guidance and mandates of this

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63. MODEL RULES FOR PROFESSIONAL CONDUCT Rule 2.1 (1991) Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

64. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1991) Intermediary

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common
Model Rule are critical to police legal advisors engaged in Section 1983 litigation. This Model Rule permits an attorney to "establish or adjust a relationship between clients on an amicable and mutually advantageous basis", Comment [3]. Despite the inherent conflicts of interests generated by multiple representation in Section 1983 litigation and recognizing the economic and tactical advantages of representation by a single attorney, co-defendants may opt to have a police legal advisor act as a "go-between" among them to resolve disputes and differences, to determine the potential for conflict, and to explore the possibilities of settlement. Section (a) authorizes a police legal advisor to act as a "go-between," but sets out a variety of requirements including consultation, explanation, and consent. An attorney is required under section (b) to provide all parties to the action sufficient information so as to allow all parties to make "adequately informed decisions." It is imperative that police legal advisors engaged in this type of negotiation develop a "trial strategy" early in the litigation. The trial strategy should assist the police legal advisor in assessing actual and potential conflicts of interest. The trial strategy should also assist police legal advisors in establishing the parameters of their representation and in identifying the point in the litigation in which withdrawal as counsel for an officer-defendant would be required.

Of key importance to police legal advisors serving as intermediaries are the provisions in Comment [6] regarding confidentiality and privileged communication. Simply put, there is no confidentiality or privileged communication should litigation result after negotiation fails. Municipal attorneys engaged in "negotiations" with individual officers representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the conditions relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so request, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.
appear obligated under the provisions of this Model Rule, Model Rule 1.13(d), and Model Rule 2.1 to advise officers that if litigation ensues and multiple representation is not possible their conversations are not privileged. Failure to properly notify all parties of this lack of confidentiality and privilege would appear to be a ethical violation in and of itself.

**Rule 2.3, Evaluation for Use by Third Party.** The provisions in this Rule may be triggered by the ancillary legal and administrative proceedings typically generated by the incident forming the basis for the Section 1983 action. Specifically, civil rights violations have a high potential for generating investigations by the Federal Bureau of Investigation, state civil rights agencies, a department’s internal affairs unit, and/or by local civilian review boards. Additionally, the plaintiff(s) may face criminal charges stemming from the incident, and a grand jury may be involved. These related investigations pose a number of ethical issues for police legal advisors under this Rule.

Police legal advisors should note that third parties may have access to evaluations, but only after the client is consulted and consents to such disclosure. As Comment [3] notes, “it is essential to identify the person by whom the lawyer is retained.” Municipal attorneys who represent and/or advise police departments and who also serve as prosecutors should be especially wary of the potential for ethical violations under this Model Rule.

**Rule 3.1, Meritorious Claims and Contentions.** This Model Rule

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65. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3 (1991) Evaluation for Use by Third Persons

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client; and

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by rule 1.6.


A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in carcera-
imposes an absolute prohibition against defending claims unless counsel believes "there is a basis for doing so that is not frivolous." Police legal advisors should note this requirement and ensure that all defenses in Section 1983 litigation are asserted in good faith, based on existing evidence and consistent with the laws of the jurisdiction. Police legal advisors should note that the circuits are split on many issues in Section 1983 actions, and diligence in researching the law is advised.

**Rule 3.2, Expediting Litigation.** What constitutes a "reasonable effort" in expediting litigation will depend on the facts of each case and will certainly vary from case to case. However, police legal advisors should be aware of the existence of this ethical obligation and guard against procrastination in Section 1983 actions. Because of the complexity of these cases, and in light of the multitude of parties and witnesses, police legal advisors should be diligent in the preparation of such cases and sensitive to the possibilities that evidence may "disappear" or that officer-witnesses may be "lost" due to reassignments or training. The schedules of co-counsel or other participants necessary to the proceedings should be diligently monitored in a professional manner.

**Rule 3.3, Candor Toward the Tribunal.** The provisions of this

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68. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 Expediting Litigation: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

69. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:
   (1) make a false statement of material fact or law to a tribunal;
   (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
   (3) fail to disclose a material fact to a tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
   (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
Model Rule should be of importance to police legal advisors at all times in all cases; however, Section 1983 cases are especially troublesome. Given the sensitive nature of the proceedings; the multitude of plaintiffs, defendants and witnesses; the high monetary judgments involved; and the possibility of cover-ups and the adverse effects of the "Blue Shield" of silence concerning the identification and collection of evidence, candor can be tested in Section 1983 litigation. All statements and evidence should be reviewed thoroughly for accuracy and honesty before permitting the evidence to go forward to a tribunal. Failure to adequately review or monitor the validity of evidence in the case appears to be an ethical violation. Police legal advisors also should note the requirement under section (a)(4) that "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." Disclosure of the discovery to the tribunal would certainly be appropriate in such cases.

Rule 3.4, Fairness to Opposing Party and Counsel. Police legal advisors should always be sensitive to the provisions of this Model Rule, but in Section 1983 actions fairness in dealing with plaintiffs is sometimes difficult. As previously indicated, plaintiffs frequently face criminal charges as a result of the same incident generating the civil suit. These pending criminal charges often posture plaintiffs as undesirable.

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70. MODEL RULES FOR PROFESSIONAL CONDUCT Rule 3.4 (1991) Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

1. the person is a relative or an employee or other agent of a client; and

2. the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
or unpopular characters with the police. Care should be taken to treat plaintiffs, as well as plaintiffs’ counsel, in Section 1983 litigation with all the courtesy dictated by the Rules.

Police legal advisors are further cautioned regarding the provisions of section (a) concerning access to evidence. This section prohibits an attorney from obstructing access to evidence. It also prohibits an attorney from counseling or assisting another to obstruct access. Care should be given that officers, especially supervisors, do not interfere with a plaintiffs’ right to access evidence. Access may be a problem where plaintiffs’ counsel seeks evidence in the possession of individual officers being held by the department or wishes to interview an officer-witness. Model Rule 3.4 appears to impose a special obligation on police legal advisors to assist a plaintiff’s lawyer should such a request be made. Care should be taken not to merely “pass the buck” by directing plaintiffs’ counsel to contact another officer, such as a supervisor. Failure to take affirmative steps to assist plaintiffs’ counsel with evidence would appear to be a violation of this Rule.

Rule 3.5, Impartiality and Decorum of the Tribunal. Section (b) prohibits counsel from engaging in the ex parte communication with a judge, juror, prospective juror, or other official about a case. As a general matter of policy, police legal advisors should guard against discussing pending litigation. In jurisdictions where a single judge presides over all matters within the jurisdiction, police legal advisors may face situations where the pending Section 1983 litigation is mentioned in conjunction with other issues or cases, related and unrelated to the litigation. “Off the record” comments about pending Section 1983 matters should not be made during other proceedings.

Rule 3.6, Trial Publicity. Section 1983 litigation is frequently the

71. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5 (1991) Impartiality and Decorum of the Tribunal
   A lawyer shall not:
   (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
   (b) communicate ex parte with such a person except as permitted by law; or
   (c) engage in conduct intended to disrupt a tribunal.

72. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1991) Trial Publicity
   (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
   (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceed-
“lead story” in both newspapers and television. Police legal advisors should familiarize themselves with the provisions of this Model Rule governing what can and cannot be said to the media.

Section (a) dictates the basic premise governing statements to the media; lawyers are prohibited from making extrajudicial statements “that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should

ing that could result in incarceration, and the statement relates to:

1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person’s refusal or failure to make a statement;

3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraph (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

1) the general nature of the claim or defense;

2) the information contained in a public record;

3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

4) the scheduling or result of any step in litigation;

5) a request for assistance in obtaining evidence and information necessary thereto;

6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

7) in a criminal case:

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” Section (b) goes on to give specific examples of statements which would be prohibited under section (a). Section (c) provides guidance and examples of statements which would be permitted under section (a).

Generally, police legal advisors should let the "departmental mouthpiece," the public affairs officer, speak for the agency regarding the pending litigation. Moreover, police legal advisors should consult with the public affairs officer as well as the police chief or other city officials about the contents of the various press releases. Along these lines, police legal advisors should be aware of the provisions of Model Rule 5.3 regarding the responsibilities of lawyers over nonlawyer assistants. Under certain circumstances, section (c) holds lawyers accountable for the unethical conduct of nonlawyers. A violation of Model Rule 5.3 occurs if a lawyer "ratifies" the unethical conduct of another. Police legal advisors should take care not to authorize or permit others to release statements which are in violation of the standards in their jurisdiction governing statements to the media.73

**Rule 3.7, Lawyer as Witness.**74 In short under Rule 3.7, a lawyer cannot act as an advocate in any proceeding in which it is likely that the lawyer will be called as a witness. Police legal advisors should proceed with caution during the initial investigation of incidents with potential for litigation. Care should be taken that police legal advisors not engage in any evidence collection or interrogation of witnesses which would require the legal advisor to testify during the trial. Occasionally, police legal advisors are called upon to respond to incidents and act as on-scene commanders or to provide legal advice to the on-scene commander. Police legal advisors should guard against positioning themselves in incidents where it will become necessary to later testify, if they intend to act as trial counsel.

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73. See Rule 5.3, Responsibilities Regarding Nonlawyer Assistants.
74. **MODEL RULES OF PROFESSIONAL CONDUCT** Rule 3.7 (1991) *Lawyer as Witness*

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

1. the testimony relates to an uncontested issue;
2. the testimony relates to the nature and value of legal services rendered in the case; or
3. disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.
Rule 3.9, Advocate in Nonadjudicative Proceedings.\textsuperscript{75} Rule 3.9 governs the conduct of lawyers representing clients in situations other than court. Just as Model Rule 3.3 dictates candor with a tribunal, Model Rule 3.9 mandates candor with non-judicial tribunals. Under Model Rule 3.3, police legal advisors have an affirmative duty to disclose that they are appearing on behalf of the agency or municipality, not on behalf of individual officers. The provisions of Model Rule 3.3 appear to govern appearances before internal affairs proceedings, disciplinary proceedings, and review boards.\textsuperscript{76}

Rule 4.1, Truthfulness in Statements to Others.\textsuperscript{77} Rule 4.1 imposes an affirmative duty on lawyers to be truthful at all times. In Section 1983 litigation the plaintiff may be “unpopular” and/or facing criminal charges. Despite the “unsavory” nature of the plaintiff(s), police legal advisors should still endeavor to engage in professional, honest exchanges with all parties to the litigation, lest a violation of Model Rule 4.1 occur. Additionally, police legal advisors are cautioned that statements made to other officers, the media, and the public are governed by this Model Rule and must be factual.

Rule 4.2, Communication With Persons Represented by Counsel.\textsuperscript{78} This Model Rule mandates that all communications with persons represented by counsel be through and with that person’s attorney. Model Rule 4.2 clearly governs communications in Section 1983 cases between police legal advisors and plaintiffs represented by counsel. Ad-

\textsuperscript{75} MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.9 (1991) Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

\textsuperscript{76} See Thurm, supra, n.67.

\textsuperscript{77} MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1991) Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

\textsuperscript{78} MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 Communication With Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
ditionally, where individual officers retain counsel, police legal advisors are required to operate under the provisions of this rule. Comment [2] notes that, "If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent of that counsel to a communication will be sufficient for purposes of this Rule." Model Rule 4.2 places an enormous ethical burden on police legal advisors. A literal reading of this rule creates a host of ethical issues. Must a police legal advisor contact counsel for an agency, such as the FBI or EEOC, when dealing with employees of that agency? What ethical problems are created for a police legal advisor when nonlawyer police officers contact a represented witness without first contacting counsel? What are the ethical implications of contacting family members of a deceased individual?

Rule 4.3, Dealing with Unrepresented Person.  The heart of this

Rule 4.4, Respect for Rights of Third Persons.  The heart of this

79. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.3 (1991) Dealing With Unrepresented Person

Model Rule is the prohibition against attorneys embarrassing or burdening third parties in the course of zealous representation of their client. Model Rule 4.4 has implications for police legal advisors engaged in the collection of evidence or preparation of a Section 1983 case. Again, plaintiffs may be the less reputable characters in the community. Police legal advisors are cautioned against “turning up dirt” on the plaintiff from any and all sources, ostensibly in the pursuit of the defense of the case, but realistically for no legitimate evidentiary reason. Special precautions should be taken to ensure that other officers in the department do not become too “zealous” in their attempt to find damaging evidence from plaintiffs’ friends and/or family or from protected and/or privileged sources. Police legal advisors should ensure that all evidence with the potential to embarrass a witness or plaintiff is procured with a legitimate evidentiary purpose.

**Rule 5.1, Responsibility of Partner or Supervisory Lawyer.** Model Rule 5.1 outlines the responsibilities of supervising lawyers and describes the liabilities that supervisory police legal advisors may encounter for the unethical conduct of their subordinate attorneys. Comment [1] quite clearly indicates that the rule applies to lawyers “who have supervisory authority over the professional work of a firm or legal department of a government agency.” Police legal advisors who supervise other attorneys are clearly responsible under this rule for the conduct of their subordinate staff.

Section (a) requires that a supervisor conduct some type of training

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In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

81. **Model Rules of Professional Conduct** Rule 5.1 (1991) **Responsibilities of a Partner or Supervisory Lawyer**

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the rules of professional conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
or continuing legal education for all attorneys to ensure their familiarity with the appropriate standards governing ethical conduct. Section (b) requires supervising attorneys to make "reasonable efforts" to ensure that subordinate attorneys conform to the applicable rules of professional conduct, and section (c) imposes liability for the actions of subordinates under certain situations. Additionally, section (c)(2) requires supervising attorneys to correct mistakes made by subordinates, if possible. In short, police legal advisors who supervise other attorneys should monitor the ethical behavior of the legal office in a responsible manner and guard against unethical behavior, both intentional and inadvertent, from subordinate attorneys.

Rule 5.2, Responsibilities of a Subordinate Lawyer. This is the "flip side" of Model Rule 5.1, it governs the responsibilities and liabilities of subordinate attorneys. Section (a) imposes the responsibility for ethical behavior squarely on the shoulders of individual attorneys. Model Rule 5.2 prohibits the "Nuremberg" or "I was just following orders!" defense against charges of unethical conduct. It should be noted that Model Rule 5.2 discusses an attorney's conduct in terms of following the directions "of another person." The wording of Model Rule 5.2 seems to prevent a police legal advisor from defending a charge of unethical conduct on the grounds that the chief of police or some other superior directed the legal advisor to engage in the unethical practice.

Rule 5.3, Responsibilities Regarding Nonlawyer Assistants.

82. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.2 (1991) Responsibilities of a Subordinate Lawyer
   (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
   (b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

83. DAVID W. EWING, DO IT MY WAY OR YOU'RE FIRED (1983).

84. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1991) Responsibilities Regarding Nonlawyer Assistants
   With respect to a nonlawyer employed or retained by or associated with a lawyer:
   (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
   (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
   (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
Model Rule 5.3 sets out a number of ethical considerations, each with the potential for generating a host of ethical issues for police legal advisors. Almost every police legal advisor operates with clerks, secretaries, investigators, sworn officers, and a host of personnel who are not lawyers. This Model Rule sets out the parameters of responsibility for these co-workers. Section (a) requires a police legal advisor to make reasonable efforts to ensure that some sort of training is conducted for the nonlawyers on the topic of professional responsibility. Section (b) requires a police legal advisor to make reasonable efforts to ensure that nonlawyer assistants comply with the applicable standards governing ethical conduct. Section (c) imposes responsibility on a police legal advisor for the conduct of nonlawyer assistants. Because of the complexity of litigation in Section 1983 cases, police legal advisors may lose track of who is doing what, when. Model Rule 5.3 dictates that, for the most part, a police legal advisor bears the ultimate responsibility for the ethical conduct of his/her staff.

**Rule 5.4, Professional Independence of a Lawyer.**

Section (c) of

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.


(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable
Rule 5.4 mandates that a lawyer exercise independent, professional judgment at all times. The client cannot be permitted to exercise such control over a lawyer so as to adversely affect a lawyer’s judgment. For police legal advisors it appears clear, a supervisor may not dictate or direct the legal decision-making aspects of an employer-attorney relationship.

**Rule 8.3, Reporting Professional Misconduct.** This Model Rule is, in effect, a "squeal" provision, requiring lawyers to "police" other lawyers and report violations of the Model Rules. Model Rule 8.3 contains a "loophole" and requires that only "substantial" ethical violations be reported. There is nothing in Model Rule 8.3 that is unique to Section 1983 litigation. However, because of the serious implications of Model Rule 8.3, police legal advisors would benefit from knowing the existence of and the duties imposed by this Model Rule.

**Rule 8.4, Misconduct.** Model Rule 8.4 is simply a "laundry list" setting out a number of specific instances of unethical conduct. Police time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

**86. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1991) Reporting Professional Misconduct**

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

**87. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1991) Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or
legal advisors should familiarize themselves with this list and know the parameters of ethical responsibility in various settings. There is nothing intrinsically unique about this Model Rule and Section 1983 litigation. But, as with Rule 8.3, it would be beneficial for police legal advisors to be aware of the provisions and applications of Rule 8.4.

V. CONCLUSION

Police legal advisors walk an "ethical tightrope" in the normal course of practicing their unique brand of law. The ethical dilemmas they encounter are certainly as demanding as those faced by their peers in private practice.

Unfortunately, unlike their corporate counterparts, police legal advisors have very little guidance from the courts and/or the literature to assist them in pursuing an ethical course of conduct. Litigation under Section 1983 poses unique ethical dilemmas for police legal advisors and presents them with an ethically challenging forum.

Given the complex nature of Section 1983 litigation and considering that the ethical dilemmas are usually governed by the sometimes confusing Model Rules and/or the equally ambiguous Model Code, it is no wonder that police legal advisors face a variety of challenging ethical situations in this litigation.

Courts have not hesitated to acknowledge that unethical conduct, especially conflict of interest, is not only possible in Section 1983 litigation, but probable. Courts also have not hesitated to grant judicial relief to parties prejudiced by unethical conduct and to admonish the offending attorneys. Unless police legal advisors exercise an abundance of caution in Section 1983 cases, the ethical issues could quickly overshadow the substantive litigation.

Although the standards governing the professional ethical conduct of attorneys, the Model Rules and the Model Code, can be vague, ambiguous, and of little assistance at times, they are the "only game in town." Police legal advisors should familiarize themselves with the provisions of the applicable standards in their jurisdictions and strive to keep current on this ever-changing topic. Eternal professional vigilance may very well be the price of "ethical liberty."

Police legal advisors should ensure they proceed on a course of action that encourages the zealous representation of their client while,

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Id.
at the same time, guards against ethics being swept aside.

Police legal advisors are reminded that the secret to ethical success in Section 1983 litigation may very well be this simple recipe "An ounce of prevention is worth a pound of cure."