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**CAMA ANNUAL MEETING & SEMINAR**  
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**Municipal Liability Under Section 1983**

**Presentation by**

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## INTRODUCTION

**A NUMBER OF ISSUES MUST BE IMMEDIATELY ADDRESSED WHEN A NOTICE OF CLAIM OR LEGAL ACTION IS FILED ALLEGING A VIOLATION OF CIVIL RIGHTS.**

**ALTHOUGH I AM GOING TO FOCUS ON THE IMMEDIATE NEEDS, SUCH AS WHAT VENUE AND WHO REPRESENTS, I HAVE PROVIDED SOME BASIC GUIDELINES FOR YOU TO CONSIDER.**

### I. FIRST STEPS

1. Initial determination of whether to defend the claim or suit. The department of the City or Town should immediately be notified of the action.
2. Conflict of interest determination. (Sometimes on the face of the complaint you can determine if this is necessary.)
3. Whether there is liability and/or excess coverage available based upon allegations.
4. Conflict of issues determinations; that is, will the municipality or town take an opposite legal position in defending or is it prosecuting other litigation involving the same issues.
5. Was the employee's conduct within the scope of his/her duties in accordance with the legal standards requiring that legal defense be provided?
6. Is there a limited defense in which the employee should be notified in writing that his/her conduct may be outside the scope of duty and that during or after the proceedings the municipality may not pay any judgment for compensatory, punitive or exemplary damages? This notification letter must include

language that the employee is encouraged to seek counsel at his/her own expense. (Note: This may be reimbursable to the employee at a later time pursuant to Connecticut General Statute §7-101a).

7. Must be a choice of special counsel if actual or potential conflicts have been identified. (Note: Statute requires reasonable fees, therefore, it is always wise to communicate with outside/special counsel to agree, if possible, upon hourly rate.)

At this point initial decisions are made as to representation, which I will discuss below, but also there must be an immediate review of the preliminary proceedings, some initial investigation into the claims including record gathering and meetings with involved individuals or employees (NOTE: If there is a question as to conflict or representation, it may be advisable not to meet with employees for ethical reasons)

## II. REPRESENTATION – COSTS OF DEFENSE (WHO PAYS)

There are actually two areas of consideration in the question of who should I represent. The first is whether to represent because of the particular claims (i.e willful and wanton). The second is whether there is a conflict with representing multiple defendants (i.e. City and employee).

Thereafter and part of this decision is the cost of the defense including the indemnification or costs of providing multiple outside/special counsel. Municipal counsel need to address this concern on a case by case basis keeping in mind that a large punitive award may be requested that the municipality will not reimburse or the expense of multiple counsel will be reimbursed by the municipality.

## State Law

- A. Town or municipality has an obligation to indemnify (2 statutes control):
1. Connecticut General Statute §7-465 Entitled “Assumption of Liability for Damage Caused by Employees . . .”
  2. Connecticut General Statute §7-101a Entitled “Protection of Municipal Officers and Full-Time Municipal Employees From Damage Suite. Reimbursement of Defense Expenses. Liability Insurance.”

Each of these statutes apply differently (although many plaintiff’s counsel will plead both when actually §7-101a is not applicable to a plaintiff claiming a civil rights violation).

- B. Applicability of Connecticut General Statute §7-465

This statute reads in pertinent part:

“(a) Any town, city or borough, notwithstanding any inconsistent provision of law, general, special or local, shall pay on behalf of any employee of such municipality, except firemen covered under the provisions of section 7-308, and on behalf of any member from such municipality of a local emergency planning district, appointed pursuant to section 22a-601, all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person’s civil rights or for physical damages to person or property, except as hereinafter set forth, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment, and if such occurrence, accident, physical injury or damage was not the result of any willful or wanton act of such employee in the discharge of such duty. . .

This section shall not apply to libel or slander proceedings brought against any such employee and, in such case, there is no assumption of liability by any town, city or borough. Any employee of such municipality, although excused from official duty at the time, for the purpose of this section shall be deemed to be acting in the discharge of duty when engaged in the immediate and actual performance of a public duty imposed by law. . . . In any such action the municipality and the employee may be represented by the same attorney if the municipality, at the time such attorney enters his appearance, files a statement with the court, which shall not become part of the pleadings or judgment file, that it will pay any verdict rendered in such action against such employee.”

However, the key to this section is whether the conduct of the employee is such that it is “wanton,” “reckless,” “callous” or “willful.” If the civil rights action involves substantial claims of willful or wanton conduct, the City or Town must evaluate whether it should decline to represent and pay any sums by reason of the particular liability. City of West Haven v. Hartford Ins. Co., 602 A.2d 988, 221 Conn. 149 (1992).

This statute makes it clear that the municipality is not liable to indemnify an employee acting in a willful or wanton manner. City of West Haven.

C. Applicability of Connecticut General Statute Section 7-101a

Connecticut General Statutes §Connecticut General Statute §7-101a provides protection from financial loss in the event of a legal action directly to the employee. In other words, this statute requires the City or Town to pay to the employee in the event of a finding of liability (not punitive) which may include fees for legal representation.

However, Connecticut General Statute §7-101a holds that in the event of a finding that the employee acted in a willful or wanton manner the employee “must reimburse the municipality

for the costs of the defense and it is not liable for indemnification of any financial loss resulting from such malicious, willful or wanton act.

#### D. Who Should I Represent

The pressing questions facing the municipality/town from the onset are given the allegations in the complaint should I represent the employee and if not what are the legal responsibilities. In this regard consider the following:

- 1) Should you provide legal representation with no caveat as to representation;
- 2) Should you provide legal representation with a letter advising of the municipality/town's position that they will represent but will not pay any punitive award;
- 3) Should you refuse to provide legal representation because of the allegations in the complaint or outside factors that would affect liability (i.e. discipline, criminal actions etc.)
- 4) Should you pay for outside/special counsel during the litigation and, if so, what is the responsibility and is there a potential for reimbursement.

The issue of representation arises whether the action names solely the employee or both the employee and the town or municipality. Municipal counsel are always aware of such a conflict because the damages requested may be largely punitive in nature and, therefore, the municipality will not reimburse.

A municipality may refuse to indemnify for punitive damages. However, it is obvious that the municipal counsel cannot defend the officer through to a jury verdict and then refuse to pay punitive damages. This is a concern of both plaintiff's and defendant's counsel. Obviously, the plaintiff does not want to complete a trial and have a successful verdict only to have the deep pockets of the municipality refuse to pay. Also, the

employee who, in many instances, is not given a choice of counsel but must accept municipal attorneys, do not want to go through trial with this appointed counsel only to be told to pay out of their own pockets at the end of a trial.

When and how does counsel for the municipality determine that there is a conflict of interest?

The Second Circuit had established some criteria to support a motion to disqualify. In Dunton v. County of Suffolk, 729 F. 2d 903 (2d Cir. 1989), the court reviewed for error a case which involved a police officer who challenged the judgment because he was not effectively represented by counsel for the municipality. The police officer in Dunton happened upon his wife and co-worker in an intimate moment in a car. The officer dragged the co-worker out of the car and beat him. Subsequently, the co-worker sued the officer and the County under 42 U.S.C. 1983. At trial, both the police officer and the County were represented by the County Attorney. The officer in the case argued that there was a conflict of interest because the municipality and the officer had different interest. The interest of the municipality was to avoid liability pursuant to Monell. In fact, in this case, the argument of the County Attorney as to the police officer was that it was obvious that the officer "was acting as an irate husband." (at 108) The Second Circuit found an inherent conflict.

This type of representation presented a clear conflict. However, in cases that have followed, without proper evidentiary support, the court is not willing to find an inherent conflict of interest.

The District Court of Connecticut has supported the proposition that if there are co-defendants in a Section 1983 action represented by the same counsel, the court is obligated to ascertain that notice of any potential conflict of interest is provided to affected litigants. Rodick v. City of Schenectady, 1 F. 3d 1341 (2d Cir. 1993)

This notice to the litigants protects not only defense counsel, but also plaintiff's counsel. In a Connecticut state action, the plaintiff can request a letter from the municipality which confirms the fact that they will indemnify for any judgment entered against the employees. C.G.S. 7-465.

In the Second Circuit, the court looks to the facts of each individual case at hand to determine if there is a conflict. In Rodick, the Second Circuit denied the claim of conflict raise by the police officers because they could not point to specific facts to support the claim for inherent conflict.

Municipal attorneys, when given a legal action which names as defendants, employees and the City must carefully determine if they can competently represent all parties without the concern of leaving one party in a position of pointing the finger at the other. Some blatant examples of situations which clearly create a conflict in a situation are where the acts of the employees are directly contrary to the training which they are given or an instance in which the employee has been disciplined or brought up on charges by the municipality as a result of the incident alleged in the complaint. These types of cases create a situation where the municipality will be arguing it is not our fault we don't train that way or we disciplined the employee. On the other hand, the employee will argue that this is precisely the technique I was taught and is used on a constant basis in the department. Absent blatant types of circumstances, conflicts must be proven. This is so even with a complaint that contains allegations of a willful, malicious act and a request for punitive damages.

Counsel for defendants should be careful not to become involved in representing all defendants if there is such a threat because the City could ultimately become liable for all amounts in the event there is a judgment or, worse yet, the attorney will be subjected to a claim of malpractice or ethics violations. In

this regard you should review some aspects of the code of professional responsibility.

## **Code of Professional Responsibility – ABA Canon 5**

### **Ethical Consideration 5-1**

Neither a lawyer's personal interest, the interest of other clients nor the desires of third persons should be permitted to dilute his loyalty to his client.

### **Ethical Consideration 5-15**

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weight carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.

### **Ethical Consideration 5-16**

Before a lawyer may represent clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent.

## III. RECEIPT OF A CIVIL ACTION ALLEGING CIVIL RIGHTS VIOLATIONS

### 1. **Initial Review**

Once you have addressed the questions of who you represent and whether wholly or partially outside/special counsel will be involved a review of the legal sufficiency and the venue of the case should be undertaken. In addition to the normal legal review of statute of

limitations and proper service upon receipt you must immediately determine whether the venue is State Court vs. Federal Courts

The statute of limitations for a claim pursuant to Section 1983 is actually based upon the State statute of limitation. Wilson v. Garcia, 471 U.S. 261 (1985). This case held that the federal district courts should borrow the state's statute of limitation for personal injury actions. Thereafter, the court clarified the law which was to apply for the purpose of the limitations would be the general statute for personal injury actions as opposed to utilizing periods of a tort such as intentional torts. Owens v. Okure, 109 S. Ct. 573 (1989) In this District the judges have held the applicable statute of limitations for a Section 1983 actions is the three year statute. Weber v. Amendola, 635 F. Supp. 1527 (D. Conn. 1985). DiVerniero v. Murphy, 635 F. Supp. 1531 (D. Conn. 1986) (Burns, J.). The Second Circuit resolved the issue in favor of the longer, three year state of limitations in Lounsbury v. Jeffries, 25 F. 3d 131, 133 (2d Cir. 1994). This may have some bearing in the decision of which court to pursue for the action (federal or state) especially if there has already been a lapse of three years.

An interesting issue to review closely when determining if the three year statute has been satisfied is the method of service and the tolling of the statute for a laundry list of reasons. For example, if the individual is a pro se prisoner the statute may be satisfied once delivered to prison officials for transmittal to the court and not the date received in the court. Covington v. City of New York, 171 F.3d 117, 120 (2d Cir. 1999). In some circumstances the accrual date for a claim for false arrest would be after the criminal proceeding has terminated. Woods v. Candela, 47 F. 3d 545, 546 (2d Cir. 1995).

Therefore a close review of the action and the events prior to the filing of the action are necessary to determine whether there is a statute of limitations concern.

## 2. Service of the Complaint

If the action has been filed in the district court the federal rules provide for a less expensive method to serve, that is, by mail. Federal Rule of Civil Procedure 4 (d). Oftentimes this method is misconstrued by individuals who are not familiar with the federal court and they do not respond and will thereafter be responsible for costs incurred in effecting service on the defendant and this cost will also include a reasonable attorney fee for any motion required to collect the costs of service. (A sample of the Waiver of Service Forms has been attached.)

## IV. REMOVAL

If the action was not filed in the federal court and instead was filed in the Connecticut State Court, an important and effective procedure that should be done automatically is removal. The procedure is relatively simple yet it involves a few confusing and time sensitive motions. It involves the filing with the Federal District Court for the District where the action is pending, a notice of removal pursuant to 28 U. S. C Section 1441 et seq. Upon the filing of the notice with the State Court, the State Court is prohibited from proceeding with the case. (See attached forms.)

### **IMPORTANT NOTE:**

The notice of removal must be done within 30 days after the defendant receives the complaint. This means that you cannot, by stipulation or otherwise extend the time for removal. If you do not file within 30 days, you cannot do it. This is why it is important to determine the issues of representation and conflicts immediately so that counsel can act quickly.

FEE is \$150.00 to Remove

**What are some of the reasons and rationale for removing to Federal Court:**

1. Case is assigned to one judge therefore consistency and familiarity with the case.
2. No additional fee for jury trial.
3. Jury selection is not individual voir dire and is completed within one day.
4. Familiarity with federal law concerning federal civil rights including defenses and immunities.
5. Case is controlled for discovery and expert disclosures and therefore no last minute flurry of preparation. In this regard counsel is prepared and well aware of plaintiffs allegations and proof as well as documents for defense.
6. More availability of the court for discovery disputes and issues and motions to have resolved quickly.
7. Jury pool is wider and therefore selection includes greater geographical area.
8. Because of the restricted time and more efficient and controlled procedures, hopefully there is a financial savings to the town.
9. Not restricted in interrogatories and production as in State Court (Limit of 25 interrogatories but can request more in initial 26 (f) scheduling order.
10. Up to date e-filing system. All cases subject to e-filing.

## **Why remain in State Court**

1. No Restriction in time for discovery.
2. Travel may be anywhere in the State if federal.
3. Have individual voir dire for jury selection.
4. Restricted interrogatory requests and court oversight for additional discovery interrogatories or production.

## **Starting Out in Federal Court**

1. The first motion I file is for a surety bond pursuant to Rule 83.3 (See Attached)
2. The federal court has very strict and comprehensive discovery.

Initial Disclosure is required without the need for discovery requests of the parties:

### **INITIAL DISCLOSURE WITHIN 14 DAYS AFTER A 26 (F) REPORT**

This initial disclosure unless waived by the parties includes: 1) the name and if known the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment identifying the subjects of the information, 2) A copy of all documents in the possession that the party may use to support its claims or defenses, 3) A computation of all damages and making available all documents not privileged, 4) Insurance agreements or insurance business that is to satisfy part or all of the judgment.

## **THE SCHEDULING ORDER OR WHAT IS KNOWN AS THE 26(f) REPORT**

All parties must communicate and develop what is termed a 26 (F) report that specifically sets the deadlines for all aspects of the civil action from the filing of initial motions or pleadings through the discovery including expert disclosure, the filing of any dispositive motions and the Trial memorandum which includes jury voir doire questions, Proposed jury charge. In a simple action the court will have all the necessary preparation for trial completed in 18 months. (See Sample Attached.)