Government lawyers are often asked to provide legal advice to more than one elected official serving the governmental entity they represent. That representation has the potential to raise difficult conflict questions when the relationships between elected officials are not harmonious. How should government lawyers analyze those questions?

The Model Rules of Professional Conduct provide the guidelines to start that analysis. Rule 1.7 provides:

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

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;

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LETTER FROM THE CHAIR

Summer is rapidly approaching and many of us turn our attention to summer vacations and time spent away from the office. The Government Law Committee continues to work to complete its summer activities and looks forward to the new TIPS year ahead.

Last April, the Government Law Committee met during the TIPS Spring Meeting held in Washington, DC and many great ideas were discussed and shared. In addition to the committee business meeting, there was a leadership and membership training held as well as an animal health clinic which the committee co-sponsored.

This edition of the Government Law Committee newsletter covers a variety of topics relevant to the government law practice. I hope that you find this newsletter both interesting and useful to your practice.

I hope that you can make plans to attend the 2013 ABA Annual Meeting to be held in San Francisco. Our Government Law Committee business meeting will be held on Saturday, August 10th at the Westin St. Francis Hotel at 2:30 pm to 3:30 pm. If you are planning to the ABA Annual Meeting, please include our committee business meeting in your plans. We would love to see you there.

Debra Gee, Chair

The Government Law Committee is now Linked-in and on Facebook!
The Committee hopes to use social media to increase our membership base and to keep members informed of the latest Committee news, events, and updates. Please visit our Linked-in page, and like us on Facebook!

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COP SHOOTS DOG EQUALS CONSTITUTIONAL CLAIM AND POSSIBLE CRUELTY CHARGE

By: Ledy VanKavage, Sr. Legislative Attorney for Best Friends Animal Society and Anna Morrison-Ricordati, AMR Law Group, LLC

In 2002 the Chicago Daily Law Bulletin ran a headline that read, “Dog is slain by police officer; woman wins civil rights claim.” The woman’s pet was fatally shot when it lunged at a Chicago police officer, and she ultimately was awarded $120,000 for the loss of her dog. Lucyna Mitchell v. City of Chicago, et. al., No. 01 C 458 (February 25, 2002, N.D. Ill.).

Many attorneys don’t think of applying 42 U.S.C. Section 1983 when a cop shoots a pet, but the most frequent animal-based 1983 cases occur against police and assert a Fourth Amendment violation of unreasonable seizure. Indeed some mishandled dogs live in areas protected by their owners’ rights to privacy, so a Fourth Amendment unreasonable search claim can also arise. See Kay v. County of Cook, Illinois, 2006 WL 2509721, *1-4 (Aug. 29, 2006, N.D. Ill.) (precluding dismissal of Fourth Amendment claim where police officer entered residence to perform a well-being check on whoever was inside).

While dog shooting cases have come a long way from early decisions requiring the Courts to determine that a non-fatal shooting amounted to a Fourth Amendment seizure, they are almost always met with the same defenses. Police frequently argue that the dog’s actions forced a “split-second” decision or that the officer was in “fear for his safety.” See e.g., Brandon v. Maywood, 157 F. Supp.2d 917 (2001). However, and even without the incriminating video evidence available in many new cases, where the police officer’s “state of mind,” “intent” or “motive” is in question, these defenses are best left to the jury. See Hardin v. Pitney Bowes, Inc., 451 U.S. 1008, 1008-1009 (1981) cert. denied, dissent of J. Rehnquist (“it has long been established that it is inappropriate to resolve issues of credibility, motive, and intent on a motion for summary judgment”). Qualified immunity, when applicable, shields police officers from liability for federal constitutional claims. To pass constitutional muster, that is to allow qualified immunity, the officer’s actions must have been reasonable. See e.g., Andrews v. City of West Branch Iowa, 454 F.3d 914, 917-918 (8th Cir. 2006) (denying qualified immunity where plain meaning of police ordinance and police animal control policy did not authorize shooting dog that was not at large). Shooting a dog – even one that is off the owner’s property – is unreasonable where the dog poses no threat. According to the Seventh Circuit case of Viola v. Eyre, 547 F. 3d 707, 710 (7th Cir. 2008), “the use of deadly force against a household pet is reasonable only if the pet poses an immediate danger and the use of force is unavoidable” (emphasis added).

Still, the payout from the Lucyna case was modest in comparison to that of the infamous Hell’s Angels case, and let’s face it- a Hell’s Angel might not be a sympathetic plaintiff, but their dogs are. People love their pets and consider them family members.

In San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose, 402 F. 3d. 962 (9th Cir. 2005), the court stated, “The emotional attachment to a family’s dog is not comparable to a possessory interest in furniture” (emphasis added). The Ninth Circuit affirmed denial of qualified immunity to the officers who executed dogs guarding Hell’s Angels members’ homes. The court further stated, “A reasonable officer should have known that to create a plan to enter the perimeter of a person’s property, knowing all the while about the presence of dogs on the property, without considering a method for subduing the dogs besides killing them, would violate the Fourth Amendment.” The grand total for the Hell’s Angels cased reached nearly $1.8 million and involved three different local governmental police departments.

Oddly, and although there are an estimated 77.5 million owned dogs in the United States, a vast number of police officers claim to have little or no training in how to gauge a dog’s behavior. See, “The Problem of Dog-Related Incidents and Encounters” US DOJ (August 2011). Such claims for “failure to train,” among other failures of municipal or county police employers, give rise to Monell liability, the cost of which is ultimately borne by the taxpayers. Monell

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SCHOOL DISTRICT NOT LIABLE IN STUDENT BULLYING, APPEALS COURT RULES

By: Debra Gee

Bullying In schools continues to be a problem that many school districts face each year. The federal, state and local governments have made efforts to addressing bullying through the establishment of anti-bullying websites like StopBullying.gov and enacting state anti-bullying laws. Currently, 49 states have some form of anti-bullying laws, except the State of Montana. These state laws vary in many respects, but generally they define bullying (including cyberbullying) as prohibited conduct; require local educational agencies to develop and implement anti-bullying policies, including a procedure to investigate and respond to bullying; and require training for all school district staff.

In a recent decision, the U.S. Court of Appeals for the 3rd Circuit ruled that a Pennsylvania school district cannot be held liable for the bullying of a high school student by one of her peers, even though school officials allowed the perpetrator to return to school after being adjudicated delinquent and the perpetrator continued to bully the victim. The court held that the school district did not have a “special relationship” with its students that would give rise to a duty to protect them from harm from other students. The court held that the school district did not have a “special relationship” with its students that would give rise to a duty to protect them from harm from other students.

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In a recent decision, the U.S. Court of Appeals for the 3rd Circuit ruled that a Pennsylvania school district cannot be held liable for the bullying of a high school student by one of her peers, even though school officials allowed the perpetrator to return to school after being adjudicated delinquent and the perpetrator continued to bully the victim. The court held that the school district did not have a “special relationship” with its students that would give rise to a duty to protect them from harm from other students. The court held that the school district did not have a “special relationship” with its students that would give rise to a duty to protect them from harm from other students.

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In the fall of 2008, the perpetrator allegedly boarded the same school bus as Brittany and threatened her. When Brittany’s parents brought these incidents to the attention of the school district, the Morrows alleged that school officials suggested that the Morrows consider another school for Brittany and her sister. (Brittany’s sister, Emily, had also faced bullying.) The parents removed their daughters from Blackhawk High School in October 2008. They later sued the Blackhawk school district and an assistant principal for violations of the 14th Amendment substantive due process rights by not protecting Brittany and Emily and sought unspecified damages.

The federal district court dismissed the Morrows’ suit based on the 1992 3rd Circuit precedent in D.R. v Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3rd Cir. 1992) (en banc), which held that there is no special relationship between public schools and their students. The district court also rejected the state-created danger theory.

Chief Circuit Judge Theodore A. McKee, writing for the majority, noted that the 1992 decision was based on the 1989 U.S. Supreme Court decision in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 197 (1989), which held that “[a]s a general matter ... a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.” Chief Judge McKee also wrote that the Supreme Court clarified that the DeShaney principle applies in the public school context, in dicta, in its 1995 decision in Vernonia School District 47J v. Acton, 515 U.S. 646 (1995). That case upheld random drug testing of student athletes.

The 3rd Circuit Court expressed great sympathy with the Morrow’s plight. However, in the end, it ruled that the “Constitution does not provide judicial remedies for every social . . . ill.”
CONFLICTS OF INTEREST... Continued from page 1

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Elected officials each operate in their own spheres, and it is not common that their interests are directly adverse. Often those spheres of authority are laid out in constitution, statutes, and caselaw. In many situations the interests of elected officials are aligned. For example, elected officials may be in agreement on the need for a new building for the operations of an elected official, which will require voter approval for a tax increase. Where there is no conflict the rule allows government attorneys to represent multiple officials.

However, in many cases the potential for conflict does exist. Although the safest course would be to recommend outside counsel in every case where there is potential for conflict, that is not really a practical solution, and it is not required by the rules. When elected officials are not in complete agreement, frequently the government attorney can be helpful in identifying the common interests of the officials and suggesting mutually acceptable solutions. The government lawyer should also be familiar with the scope of authority each official is granted, in order to clarify the issues. The government attorney understands the perspectives of each party, and has credibility with each party. In those cases, a government lawyer may reasonably believe he or she will be able to provide competent and diligent representation to each affected client.

Using the example of the need for a new building, the Board has responsibility to place the issue before the voters, and the elected official has to be able to perform the duties imposed on him or her by law. The parties may be in complete agreement. But what happens when the Board believes that the issue should be put off for an election cycle for political reasons, and the elected official believes the need for space is urgent? The analysis of whether both sides can be represented by the government attorney is more difficult. At a minimum, the government attorney should advise both sides of the potential for conflict, as required by the rule, and get written consent to representation from each official. The attorney needs to decide whether he or she will be able to provide competent and diligent representation to each affected client, without significant risk of representation of either party being materially limited. The comment to the rule provides:

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

In the new building example, there is common ground, since both sides want the voters to approve the tax increase. The differences between the parties are tactical, rather than fundamental. The Board may be able to persuade the elected official that a delay will ensure a good outcome. The elected official may persuade the Board that the voters can be educated about the urgency of the need. Both sides may want the government lawyer to continue to provide advice. A government attorney facilitating that process could be more effective than having both sides obtain conflicts counsel at the outset, with positions potentially hardening as a result. If extraneous factors, such as personality conflicts, are affecting the party’s ability to resolve their differences, a government attorney may be able to focus the discussion on the legal and practical issues.

Other rules help define whether the lawyer’s judgment will materially interfere with the lawyer’s judgment. The comments to Rule 1.3 (Diligence) provide that, while a lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf, a lawyer is not bound to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect. Another factor to consider is the lawyer’s relationship to the organization. Rule 1.13 (Organization As Client) provides that “a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” So, there is a place for the attorney to frame an issue in terms of what is best for the city, or county, or district.
Two areas where conflicts are most common are budget disputes, and litigation or potential litigation where the elected officials have differing views and/or interests. Budget conflicts arise when an elected official believes that budgetary decisions are impacting his or her ability to manage their office and the entity with budgetary authority is trying to weigh multiple priorities when making budget decisions. In my experience, elected officials are sensitive to budget constraints and are therefore willing to accept budget limitations as long as the decisions are reasonable. But these matters do occasionally end in litigation, so the government lawyer must be sensitive to the potential for conflict. In my jurisdiction, Colorado, Boards of County Commissioners have broad discretion in budget matters, by virtue of statutory amendments that were prompted by budget disputes in the 1980’s. To the extent that review is available, as long as a budgetary decision is reasonable, it will be upheld.

Conflicts in litigation arise when the parties have different goals for resolution of a lawsuit. For example, where there is a claim for use of excessive force, the elected official with budgetary responsibility may favor a quick and cheap settlement, but the elected official with law enforcement responsibility may feel that, for the sake of the officer involved and to preserve the reputation of the department, the case must be litigated and a defense verdict obtained. Or, an elected official may be engaging in conduct that could result in liability for the governmental entity, which will be paid out of the general fund, and the officials with budgetary responsibility will want to weigh in on the consequences of the course of action the elected official is taking, particularly if they feel that official is acting outside the scope of his or her official duties.

The excessive force case is an example of a situation where the potential for conflict exists, but a government lawyer may feel he or she can represent both sides. In that case, the best long term solution for both parties may well be drawing a line in the sand. Both sides have an interest in protecting employees and preventing nuisance litigation. The likelihood that the potential conflict will turn into a direct conflict is fairly low.

In situations where there is a significant potential for the parties to be adverse, particularly where litigation is likely, the government attorney needs to face the situation squarely at the earliest opportunity. The best solution in those cases may be to identify the problem at the outset, so the government attorney may represent one party and recommend obtaining conflict counsel for the other elected official. The trick is to get enough information about the issues to make a good decision, without putting oneself in the situation of getting confidential information from both sides. Usually, recommending an investigation by a third party will be necessary, as will letting the elected official who may not be represented know that, because of the potential for conflict, you may not ultimately be his or her attorney in the matter, and you are therefore not in a position to be giving advice or receiving client confidences. See, Rule 4.3 Dealing With Unrepresented Person. In any case where an elected official is acting outside the scope of his official authority, the budgetary officials can and should inform that official of their concerns, the need for conflicts counsel, and the potential for the elected official to be ultimately responsible for the costs of his or her defense and any resulting judgment. In cases where the official is acting within the scope of their authority, the budgetary elected officials need to weigh the risks of an adverse outcome, the costs of conflicts counsel, and the political impact of not supporting the official in his or her decisions. If the budgetary officials decide to indemnify the elected official for his or her actions, regardless of the outcome of litigation, because they believe the actions taken were appropriate, the potential conflict in litigation is eliminated.

If the government attorney fails to be sensitive to the potential for conflict, the result may be that the government attorney has to withdraw when the conflict becomes obvious, and both sides will need conflicts counsel. See, Rule 1.9 (Duties to Former Clients) and Rule 1.16 (Declining or Terminating Representation). This is an expensive and frustrating resolution.

Conflicts questions require difficult judgment calls. Familiarity with the rules, early assessment of the issues and facts, and clear communication with clients are necessary in order to make those calls, and deal ethically with conflicts and potential conflicts between elected officials.
v. City of New York Department of Social Services, 436 U.S. 658 (1978). That said, Monell claims can complicate issues, add increased costs to discovery and are not always necessary. For example, in the Russell v. City of Chicago, et. al., No. 10 C 525 (August 18, 2011, N.D. Ill.) case, the City of Chicago was on the hook for respondent superior liability, wherein Chicago police officers raided a south side home and shot a black Laborador dog named Lady. Although the police found no criminal activity in his residence, Russell had cooperated with them. 1 Russell’s hands were in the air and he had asked only that he be allowed to lock up his dog, Lady, to ensure she was not harmed. Instead, the officers shot and killed Lady, a dog that had done nothing more than enter the room with her tail wagging. The jury awarded Plaintiffs over $330,000.

Tragically, there is a pending case in Colorado against a Commerce City Police Officer for the killing of Chloe, a short-haired muscular mutt, allegedly a “pit bull terrier” adopted to be a therapy dog. Police responded to a call about a free-roaming dog in a residential neighborhood. Two police officers along with an animal control officer cornered Chloe in a garage. As graphic video footage shows, Chloe sat in the garage apprehensive of the officers. They could have shut the garage door. Instead, one police officer tased Chloe not once, but twice, leaving her momentarily incapacitated lying on her side. Chloe tried to flee when the animal control officer placed a catch pole noose around her neck, at which point the same officer shot her five times, almost hitting the animal control officer. http://www.youtube.com/watch?v=XMKqwQm4L9Y

After a thorough independent investigation, the Adams County District Attorney’s Office charged the officer in Chloe’s case with Aggravated Cruelty to Animals pursuant to C.R.S. §18-9-202(1.5)(b).2 These same actions in Illinois would be a crime under the Illinois Humane Care for Animals Act, which does not exempt police, and further gives rise to additional state law civil claims. 510 ILCS 70/3.02, 3.03, 16.3.

1 Chicago Tribune Article, “Family gets $333,000 for 2009 raid in which cops killed dog.” David Heinzmann (August 19, 2011).
Indeed, most 42 U.S.C. Section 1983 dog shooting cases include state law claims, such as conversion, trespass and intentional infliction of emotional distress. See Kay v. County of Cook, Illinois, 2006 WL 2509721, *7 (Aug. 29, 2006, N.D. Ill.); Russell, et al., 10-CV-00525 (August 19, 2011, N.D. Ill.). While these claims require “willful and wanton” conduct due to the special protections afforded police officers under the Illinois Tort Immunity Act (745 ILCS 10/1–210; 745 ILCS 10/2-202), an officer acting with disregard for the safety of the Plaintiff or his property is not immunized and can be subject to punitive damages. See e.g., IPI 14.04; 7th Cir. JI 7.04. Allowed under both constitutional and state tort claims, punitive damages are intended for the offending officer(s). See e.g., IPI 35.00; 7th Cir. JI 7.24. A municipality can only cover the plaintiff’s compensatory damages and is prohibited from paying punitives on behalf of its officers. 745 ILCS 10/2-102.

The emotional impact of a pet shooting devastates not only the pet’s human family, but also the community at large. For these reasons, government bodies employing police should take care to train officers in proper responses to dogs and other animals. This relatively small investment in training could avoid costly lawsuits and public mistrust.

This article was previously published in the ISBA April Animal Law Newsletter Volume 4, Number 4.
2013-2014 TIPS CALENDAR

August 2013
8-11  ABA Annual Meeting  San Francisco Marriott
Contact: Felisha A. Stewart – 312/988-5672  San Francisco, CA
Speaker Contact: Donald Quarles – 312/988-5708

October 2013
8-13  TIPS Fall Leadership Meeting  Minneapolis Marriott Hotel
Contact: Felisha A. Stewart – 312/988-5672  Minneapolis, MN
Speaker Contact: Donald Quarles – 312/988-5708

17-18  Aviation Litigation Fall Meeting  Ritz-Carlton, Washington, DC
Speaker Contact: Donald Quarles – 312/988-5708  Washington, DC

November 2013
6-8  Fidelity & Surety Committee Fall Meeting  The Fairmont Copley Plaza
Contact: Donald Quarles – 312/988-5708  Boston, MA

January 2014
21-25  Fidelity & Surety Committee Mid-Winter Meeting  Waldorf-Astoria Hotel
Contact: Felisha A. Stewart – 312/988-5672  New York, NY
Speaker Contact: Donald Quarles – 312/988-5708

February 2014
5-11  ABA Midyear Meeting  Hyatt Regency Chicago
Contact: Felisha A. Stewart – 312/988-5672  Chicago, IL
Speaker Contact: Donald Quarles – 312/988-5708

April 2014
3-4  Emerging Issues in Motor Vehicle Product Liability Litigation National Program  Arizona Biltmore Resort & Spa
Contact: Donald Quarles – 312/988-5708  Phoenix, AZ