

## AVOIDING CONFLICTS: LEGAL PROTECTION PLAN ATTORNEYS AND THE DUTY OF LOYALTY

By Matthew A. Peluso, Esq.



All law enforcement officers are aware of the Legal Protection/Defense Plans available to them through their membership in the Policemen's Benevolent Association ("PBA") or Fraternal Order of Police ("FOP"). Under these plans, law enforcement officers pay a yearly fee to have access to a plan-approved attorney in the event that administrative, civil or criminal charges are brought against them. The yearly out-of-pocket cost to the officers is reasonable (from \$150 to \$250 per year) and the plan pays the fees of an "approved" attorney, either fully or up to a specific amount (e.g. \$20,000 for administrative charges, \$40,000 for civil charges, etc.), depending upon the specific coverage provided under the plan.

Clearly, these Legal Protection/Defense Plans provide law enforcement officers with inexpensive legal representation. Law enforcement officers can obtain (essentially) free legal advice and assistance from an attorney who is supposed to be experienced in administrative cases. For minor administrative matters, this arrangement can be, and usually is, mutually beneficial to both the officer and the employer. Given the relatively minor level of the charges and potential discipline (such as, a letter of reprimand or short suspension, etc.), conflict between the municipality/law enforcement agency and the charged officer are minimal, and a plan-approved attorney can provide assistance to ensure that the matter is disposed of quickly and more serious charges are avoided.

However, what about cases where an individual law enforcement officer faces serious disciplinary charges (e.g. long-term suspension without pay, demotion, or termination) that could permanently effect the officer's reputation, career or pension?

Or when a law enforcement officer intends to file his or her own Superior Court lawsuit arising from the same incident(s) at issue in the administrative matter? Is a PBA or FOP plan-approved attorney alone sufficient to protect an officer's legal rights in these serious situations? Can a plan-attorney's relationship with the PBA or FOP create conflicts of interest that undermine his or her professional obligations to an individual officer covered under the plan?

"A lawyer has a fundamental duty of loyalty to his or her clients." *In re Educ. Law Ctr., Inc.*, 86 N.J. 124, 133 (1981). As stated by the New Jersey Supreme Court, one "of the most basic responsibilities incumbent on a lawyer is the duty of loyalty to his or her clients. From that duty issues the prohibition against representing clients with conflicting interests." *Matter of Opinion No. 653*, 132 N.J. 124, 129 (1993). Further, a lawyer's duty of loyalty can extend beyond the time when his or her representation of a client has concluded. *Estate of Spencer v. Gavin*, 400 N.J. Super. 220, 242 (App. Div. 2008).

An attorney's duty of loyalty is embodied in Rule of Professional Conduct ("R.P.C.") 1.7, which prohibits a lawyer from representing a client if the representation will be "directly adverse" to another client of the lawyer, or if the representation will be "materially limited" by the lawyer's responsibility to another client or to a third-party. R.P.C. 1.7 reflects "the fundamental understanding that an attorney will give 'complete and undivided loyalty to the client' [and] 'should be able to advise the client in such a way as to protect the client's interests, utilizing his professional training, ability and judgment to the utmost.'" *In re S.G.*, 175 N.J. 132, 139 (2003) (quoting *In re Dolan*, 76 N.J. 1, 9 (1978)).

"The attorney-client relationship embodies the concept of the client's trust in his fiduciary, the attorney" *In re Loring*, 73 N.J. 282, 289 (1977). "All fiduciaries are held to a duty of fairness, good faith and fidelity, but an attorney is held to an even higher degree of responsibility in these matters than is required of all others." *In re Honig*, 10 N.J. 74, 78 (1952). "[F]ew [obligations are] more anxiously guarded by the law, or governed by sterner principles of morality and justice [.]" *Loring, supra*, at 289. "Moreover, apart from the duty of loyalty, an attorney's fiduciary role includes an affirmative obligation to act in, and to look out for, a client's best interests." *Estate of Spencer, supra*, at 242.

Thus, an attorney breaks his fiduciary duty of loyalty to a client whenever he or she agrees to represent one client in a case in which the attorney's loyalty to either that client, or another current or former client, is, or could potentially be, compromised by the best interests of either client. If a lawyer cannot or will not make arguments and take positions necessary to one client's best interests because they may conflict with the interests of another one or more of his clients, an attorney has a conflict of interest under R.P.C. 1.7 and must withdrawal from representation.

In the representation of individual law enforcement officers, legal protection plan attorneys are often placed in an unethical conflict of interest under R.P.C. 1.7 through their representation of local PBA and FOP units in contractual negotiations. As noted on one law enforcement website: "Many times the union attorney may not be comfortable representing the individual officer as it may present a conflict of interest between the unions' goal as an entity and the officer's individual best interest."

(Continued on page 12)

(Continued from page 10)

For example, an attorney may represent a local unit of the PBA or FOP in contractual negotiations with the state, county or municipal entity who employs an individual law enforcement officer. In representing the bargaining unit of the particular PBA or FOP, the attorney is clearly obligated to consider the best interests of the *entire* membership of the union, which may be at odds with his duty of loyalty to an individual law enforcement officer who has selected him under a Legal Protection/Defense plan in a disciplinary case where the PBA or FOP does not support the individual officer.

Also, a plan-attorney's conflict of interest does not necessarily have to be direct. In many cases, a plan-attorney may have a conflict of interest because he or she often handles administrative cases with one particular local police department through which an overly-friendly relationship may have developed over several years. In order to maintain that close relationship with senior officers in one local police department, the plan-approved attorney's duty of loyalty may be conflicted if the attorney is also selected to represent an individual officer who wants to vigorously defend against administrative charges brought by those same senior officers.

Part of an attorney's duty of loyalty to a client is to ensure that all of the client's independent legal rights are fully protected and preserved. Yet, aside from their potential conflicts of interest, protection plan attorneys are often unaware of the negative preclusive effect that the administrative/departmental process can have on a law enforcement officer's ability to pursue an independent legal action against his or her employer.

As an example, in *Hennessey v. Winslow Twp.*,

183 N.J. 593 (2005), the Appellate Division ruled that if a municipal employee appeals a departmental disciplinary decision to the Merit Service Board, the employee is thereafter permanently barred from filing a Superior Court action based upon any of the same issues raised in the administrative case. In order to prevent this "claim" preclusion, a law enforcement officer must "short-circuit" the applicable civil service administrative process by preemptively filing an independent Superior Court action. *Hennessey* at 603.

Thus, in departmental disciplinary cases, law enforcement officers need experienced legal advice with regard to the potential preclusive effect that arguments made, and decided, in their administrative cases could have on any affirmative lawsuit they may want to file against their employer. "We recognize that the Supreme Court has held that this equitable doctrine of claim preclusion does not apply where an employee opted to file a civil complaint... instead of litigating the claim in an administrative proceeding before the OAL." *In re Certificates of Paraskevopoulos*, 2012 WL 1314129 (April 18, 2012), citing *Hennessey* at 604.

For all of the reasons set forth above, it is important that law enforcement officers only engage plan-attorneys who are fully committed to vigorously representing them and advocating their interests, rather than not offending the Chief, the Borough Administrator, or members of the local town council. Demanding undivided loyalty from an attorney is a serious matter, especially in cases where a law enforcement officer faces potential career-altering or career-ending discipline. Engaging a conflicted attorney who doesn't "have your back" can sometimes cause more damage than having no attorney at all.

As a private, independent attorney, I am not an "approved" attorney on any Legal Protection Plan. This allows me to represent law enforcement officers without any conflict of interests. Therefore, I am often separately engaged by law enforcement officers as "co-counsel" to work with, and supervise, their selected plan attorneys in internal affairs investigations and administrative disciplinary proceedings. This co-counsel arrangement provides law enforcement officers with a high level of legal representation in cases where serious disciplinary charges have been made and the officer has filed, or may want to file, an independent Superior Court action against their employer for wrongful suspension, demotion or termination.

*Matthew A. Peluso, Esq. is an attorney based in Princeton. He has over 20 years of experience in numerous types of complex litigation, including criminal, employment, insurance and business law. Mr. Peluso has successfully represented police officers in employment and contract disputes involving wrongful termination, failure to promote, race, gender and age discrimination, hostile work environment and whistle-blower actions. Mr. Peluso is a graduate of the University of Miami School of Law and George Washington University. He can be reached at: 609-306-2595. His e-mail address is: mpeluso@live.com. His experience can be reviewed on LinkedIn.com and on his firm website: http://mpeluso@sq.webs.com. The opinions expressed by Mr. Peluso in his article are not intended to provide legal advice. Anyone interested should consult a qualified attorney prior to making any significant employment or legal decision.*



**If you would like to submit stories, pictures, or suggestions, send us an email at:**

**[njbluenow@gmail.com](mailto:njbluenow@gmail.com)**

**NJ BLUE NOW Magazine**  
Bryce, son of delegate Richard Brown, Monmouth County Corrections  
**We ARE that interesting!**