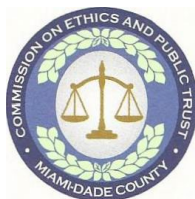


MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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August 10, 2023

Via electronic mail only to expedite delivery:
michaeljosephpa@gmail.com

Honorable Michael Joseph, Commissioner
City of North Miami Beach
17011 NE 19th Avenue
North Miami Beach, FL 33162

Re: INQ 2023-96, Section 2-11.1(d), Miami-Dade County Ethics Code, Voting Conflicts

Dear Commissioner Joseph,

Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust (hereinafter "COE") and seeking ethics guidance regarding the application of the voting conflict provision of the Miami-Dade County Code of Ethics and Conflict of Interest Ordinance (hereinafter "County Ethics Code").

Facts:

You are an elected Commissioner in the City of North Miami Beach, Florida (hereinafter "City"). You were named as a party to a civil case currently before the Eleventh Judicial Circuit Court, *Chernoff v. City of North Miami Beach, et al*, case no. 2023-002633-CA-01, filed by your fellow City Commissioner, Jay R. Chernoff.

On February 16, 2023, Commissioner Chernoff filed a Verified Complaint, in his individual capacity and as North Miami Beach City Commissioner, requesting declaratory relief and injunctive relief against you and the City. The Complaint alleged that you failed to attend City Commission meetings for a 120-day period as required by the City of North Miami Beach Charter (hereinafter "Charter") thereby vacating your seat on the commission.

On March 13, 2023, Commissioner Chernoff filed an Amended Complaint that included additional factual allegations and added Commissioner McKenzie Fleurimond ("Commissioner Fleurimond") as a defendant based upon Commissioner Fleurimond's alleged failure to attend City Commission meetings for a 120-day period pursuant to the Charter, also resulting in the automatic vacancy of Commissioner Fleurimond's seat on the commission. On May 19, 2023,

Commissioners Chernoff and Fleurimond filed a Joint Notice of Voluntary Dismissal dismissing their respective claims against each other. Thirty days passed with no party appealing the Notice of Voluntary Dismissal; therefore, the notice became a final non-appealable pleading.

On February 20, 2023, you and the former City Attorney, Hans Ottinot, signed an engagement agreement with a law firm, Brodsky Fotiu-Wojtowicz, PLLC, to act as counsel to you and the City as it pertains to *Chernoff v. City of North Miami Beach, et al.*

A review of the docket in the case before the Eleventh Judicial Circuit Court indicates that an order was signed by Judge Lopez on June 13, 2023, granting your Emergency Motion for Temporary Injunctive Relief. On June 14, 2023, a motion was filed requesting a stay pending appeal and a Notice of Appeal to the Third District Court of Appeal was filed on June 15, 2023. The appeal before the Third District Court of Appeal is currently pending.¹

The current City Attorney, John R. Herin, Jr., has informed you of his intention to bring forward two action items before the City Commission for consideration and vote. The first item is seeking authorization to pay invoices of legal fees incurred in the defense of Commissioner Fleurimond. The second item is seeking authorization to pay invoices of legal fees incurred in your defense. Specifically, Mr. Herin has indicated that while the engagement agreement was signed by you and the former City Attorney, the agreement must be brought before the Commission for approval in order for the arrangement to continue.² Thus, the payment of the legal fees of Brodsky Fotiu-Wojtowicz, PLLC would not continue until the engagement letter is ratified by vote of the City Commission. This resulted in outstanding legal fees for the firm's services, those already provided and those to be provided in future.

You inquire about your ability to participate in and/or vote on the two action items when they come before the City Commission at your upcoming August 15, 2023 meeting.

Discussion:

Your actions as a member of the City Commission are governed by the County Ethics Code inasmuch Section 2-11.1(b)(1) of the County Ethics Code applies to members of municipal elected legislative bodies.

The county voting conflict provision is contained in Section 2-11.1(d) of the County Ethics Code. The provision is stricter than that which is contained in the State Ethics Code. The county provision provides that a voting conflict exists if the voting member "would or might, directly or indirectly, profit or be enhanced by the action..." as opposed to the state standard contained in Section

¹ Case No. 3D23-1082.

² COE has previously provided guidance to City Attorney Herin regarding the authority of a City Attorney to retain outside counsel on behalf of the City or City Commissioners. See INQ 23-95. Such actions by a City Attorney implicate Section 2-11.1(p) of the Miami-Dade Code, which allows for the retainer of outside counsel, as long as the retainer is then presented to the voting board as soon as practicable. See RQO 10-12; RQO 19-01.

112.3134(3)(a), Florida Statutes, that limits the county or municipal public officer from voting upon any measure “which would inure to his or her special private gain or loss.”³

That section provides, in relevant part, that a local elected official may not:

[Vote] on or participate in any way in any matter presented...if said person has any of the following relationships with any of the persons or entities which would be or might be directly or indirectly affected by any action of the Board...(i) officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary; or

[if said person has any of the following relationships with any of the persons or entities which would be or might be directly or indirectly affected by any action of the Board] (ii) stockholder, bondholder, debtor, or creditor, if in any instance the transaction or matter would affect the person...in a manner distinct from the manner in which it would affect the public generally.

...or who would or might, directly or indirectly, profit or be enhanced by the action of the Board...

Consequently, officials may be prohibited from voting on a measure if they have a first tier enumerated relationship with a party who would or might be directly or indirectly affected by any action of the board.⁴ If such a relationship exists, an “automatic conflict of interest” arises, and the official is barred from voting. *See* INQ 22-69 and INQ 22-73.

Also, officials may be prohibited from voting on a measure if they have a second tier enumerated relationship with a party who would or might be directly or indirectly affected by any action of the board, if the transaction or matter would affect the person...in a manner distinct from the manner in which it would affect the public generally.⁵ If such a relationship exists, a “contingent conflict of interest” arises, and the official is barred from voting. *See id.*

Finally, officials may also be prohibited from voting if the official would or might, directly or indirectly, profit or be enhanced by the action of board. If such, then a “broad voting conflict” exists pursuant to the third clause in the local voting conflict provision and the official is barred from voting. *See id.*

Our office has noted that while Florida law is clear that an elected official is entitled to legal representation at the public’s expense when the litigation arises from the official performance of

³ *See* RQO 15-04 (As allowed by state law, the Board of County Commissioners has established a more stringent standard of conduct as regards the local voting conflict provision than exists under state law. The county voting conflict law specifically provides that a voting conflict may exist when an official “might, directly or indirectly profit or be enhanced” by a vote. The County standard does not require a definite or measurable private gain or loss and may apply where there is a reasonable possibility or expectation of such and effect).

⁴ The first tier enumerated relationships are officer, director, partner, of counsel, consultant, employee, fiduciary, or beneficiary.

⁵ The second tier enumerated relationships are stockholder, bondholder, debtor, or creditor.

his or her duties,⁶ the issue of whether the affected official may participate and vote on the matter is a question guided by conflict-of-interest provisions at the State and local level.

The COE has addressed the payment of legal fees incurred in defense of actions filed against elected officials arising from official duties, in both ethics opinions and in an ethics enforcement matter. In Case No. C18-32-08, the COE found that the South Miami Mayor violated the county voting conflict ordinance by participating in the discussion concerning the City paying *up front* for his legal defense in an ethics case.

In INQ 08-30, the COE opined that the Town of Miami Lakes Vice-Mayor was permitted to participate in and vote on a matter involving the *reimbursement* of her attorney's fees as long as the need for legal representation was related to her official duties as a local elected official and the defense was successful. *See also* INQ 19-13 (An elected official may request *reimbursement* from a municipal official for fees incurred in the successful defense of an ethics complaint and may vote on the matter if it requires action by the elected body, if in either instance, there is no debate regarding the amount at issue or negotiation over payment of a portion, as opposed to, the total bill). Also, in INQ 06-111, the COE staff concluded that an elected official should not participate in and vote on the question of *pre-payment* of her legal fees "due to the fact that she stands to personally gain."⁷

Similarly, the State of Florida Ethics Commission issued opinion CEO 88-46 which interpreted Section 112.313(5), Florida Statutes, to permit an elected official to vote on the *after the fact* reimbursement of legal fees and costs incurred in connection with an ethics complaint filed against that official when the ethics complaint had been successfully defended.

Here, the first action item is seeking authorization to pay invoices of legal fees incurred in the defense of Commissioner Fleurimond. The litigation against Commissioner Fleurimond has concluded, and you are not directly or indirectly affected by board action, nor would you profit or be enhanced by board action. *See* INQ 06-111; *see also* INQ 15-201 (the COE opined that an official's representation by a firm would not create a voting conflict prohibiting him from voting on the payment of fees owed to the same firm in the mayoral position reclaim litigation).

In regard to the second item action seeking authorization to pay invoices of legal fees incurred in your defense, you are one of two direct beneficiaries of the engagement agreement for the services of Brodsky Fotiu-Wojtowicz, PLLC in the continued defense of the litigation. The litigation has not concluded, and, at least in part, the engagement agreement allows for what amounts to a pre-payment of legal fees in the firm's ongoing representation. In applying the Ethics Code conflict voting prohibition, a vote to pay invoices of legal fees incurred in your defense would be a vote on an item for which you are personally affected, and by which would or might personally gain thereby constituting an automatic conflict of interest. *See* INQ 06-111 and INQ 19-13.

⁶ *See generally Thornber v. City of Fort Walton Beach*, 568 So.2d 914 (Fla. 1990).

⁷ Pre-payment of fees refer to legal fees paid up-front or the reimbursement of an official's legal fees arising out of a complaint filed against the official acting in his/her official capacity but prior to the conclusion of the case. As opposed to post-payment legal fees or reimbursement of fees after the case has concluded. *See* INQ 06-111.

Opinion:


Accordingly, Section 2-11.1(d) of the County Ethics Code would not prohibit you from considering and voting on the payment of fees owed to the law firm that represented Commissioner Fleurimond in the successful defense the civil action arising from the alleged performance or nonperformance of official duties. The only caveat to that proposition is that there can be no dispute or debate regarding the amount of the legal fees. *See* INQ 19-13.

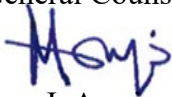
However, you are prohibited from voting on the pre-payment of legal fees associated with your defense because (1) the litigation is ongoing and you have not prevailed in the defense in this matter, and (2) you are clearly a person that will be directly affected by the vote and enhanced by the action of the voting body. Consequently, pursuant to Section 2-11.1(d) of the County Ethics Code you are required to announce publicly the nature of your conflict at the upcoming August 15, 2023 meeting, absent yourself from Commission chambers while the matter is being considered, and file a written disclosure regarding the nature of the conflict with the Clerk of the Board within fifteen (15) days after the vote. Whether or not your absence from Commission chambers during consideration of the item affects meeting quorum is a matter outside of this agency's jurisdiction.

This opinion is limited to the facts as you presented them to the COE and is limited to an interpretation of the County Ethics Code only and is not intended to interpret state laws. Questions regarding state ethics laws should be addressed to the Florida Commission on Ethics.

Thank you again for requesting ethics guidance from the Miami-Dade County Commission on Ethics and Public Trust and please do not hesitate to contact us again should you require additional assistance.

Sincerely,


Loressa Felix, Esq.
General Counsel


Jose J. Arrojo, Esq.
Executive Director

cc: All COE Legal Staff
John R. Herin, Jr., City Attorney

INQs are informal ethics opinions provided by the legal staff after being reviewed and approved by the Executive Director. INQs deal with opinions previously addressed in public session by the Ethics Commission or within the plain meaning of the County Ethics Code. RQOs are opinions provided by the Miami-Dade Commission on Ethics and Public Trust when the subject matter is of great public importance or where there is insufficient precedent. While these are informal opinions, covered parties that act contrary to the opinion may be referred to the Advocate for preliminary review or investigation and may be subject to a formal Complaint filed with the Commission on Ethics and Public Trust.