

## MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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August 10, 2023

Via electronic mail only to expedite delivery:  
JHerin@foxrothschild.com

John R. Herin, Jr., Esq.  
Fox Rothschild LLP  
2 South Biscayne Boulevard, Suite 2750  
Miami, Florida 33131

Re: INQ 2023-97, Section 2-11.1(d), Miami-Dade Code, Voting Conflicts

Dear Mr. Herin:

Thank you for contacting the Miami-Dade County Commission on Ethics and Public Trust and seeking ethics guidance on behalf of North Miami Beach Commissioner McKenzie Fleurimond, regarding the application of Section 2-11.1(d) of the Miami-Dade Code relating to voting conflicts of interest.<sup>1</sup>

### Facts:

On February 16, 2023, Jay R. Chernoff filed a Verified Complaint, in his individual capacity and as North Miami Beach City Commissioner, requesting declaratory relief and injunctive relief against the City of North Miami Beach and Commissioner Michael Joseph. Commissioner Chernoff alleged in that action that due to Commissioner Joseph's failure to attend city commission meetings for a 120-day period as required by the City of North Miami Beach Charter, he had “vacated his seat” on the commission.<sup>2</sup>

Thereafter, on March 13, 2023, Commissioner Chernoff filed an Amended Complaint that included supplementary factual allegations and added Commissioner McKenzie Fleurimond as a

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<sup>1</sup> Section 2-11.1 of the Miami-Dade Code may also be referred to as the “County Ethics Code.”

<sup>2</sup> Jay R. Chernoff v. City of North Miami Beach and Commissioner Michael Joseph, Case No. 2023-2633 CA (10), Miami-Dade Circuit Court.

defendant. Commissioner Chernoff similarly alleged that due to Commissioner Fleurimond's failure to attend city commission meetings for a 120-day period as required by the City of North Miami Beach Charter, he too had "vacated his seat" on the commission.

Subsequently, on April 24, 2023, Commissioner Fleurimond filed a Counterclaim against Commissioner Chernoff.

On May 19, 2023, Commissioner Chernoff and Commissioner 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, and therefore, it became a final non-appealable matter.

The North Miami Beach City Commission is due to consider and vote on the payment of attorneys' fees and costs incurred by private counsel in defense of Commissioner Fleurimond in the civil action filed against him by Commissioner Chernoff.

At the same meeting, the North Miami Beach City Commission is due to consider and vote on the payment of attorneys' fees and costs incurred by private counsel in the defense of Commissioner Michael Joseph in the same civil action.<sup>3</sup>

The same law firm represented Commissioner Fleurimond and Commissioner Joseph and continues to represent Commissioner Joseph. Both Commissioners signed retainer agreements with the law firm. It is reasonable to conclude, given the signed retainer agreements, that both Commissioners Fleurimond and Joseph are indebted to the law firm for fees generated in prior representation.

You inquire about Commissioner Fleurimond's ability to participate and vote on the matter relating to the payment of fees incurred in his case and Commissioner Joseph's case when both are considered by the city commission.

Issues:

1. Whether a city commissioner may consider and vote on the payment of fees and costs incurred by private counsel in successfully defending a civil action filed against him arising out of the performance or nonperformance of his official duties.

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<sup>3</sup> The trial court docket in the case reveals that an order was signed by the presiding judge on June 13, 2023, granting Commissioner Joseph's motion for temporary injunctive relief. On June 14, 2023, a motion was filed requesting a stay pending appeal and an appeal taken to the district court on June 15, 2023. The appeal is currently pending before the district court and consequently, the civil action involving claims and counterclaims by Commissioners Chernoff and Joseph, respectively, is still pending.

2. Whether a city commissioner may consider and vote on the payment of fees and costs incurred by private counsel in the ongoing defense of a civil action filed against another commissioner arising out of the performance or nonperformance of the other commissioner's official duties.

Discussion:

As a preliminary matter, Section 2-11.1(a) of the Miami-Dade Code provides that the County Ethics Code applies to members of municipal commissions as defined in Section 2-11.1(b)(1) of the Code.

The voting conflict provision is contained in Section 2-11.1(d) of the County Ethics Code (also "voting conflict ordinance"). 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 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."<sup>4</sup>

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

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<sup>4</sup> 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.)

action of the board.<sup>5</sup> 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.<sup>6</sup> 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.*

Arguably, an elected official who has retained a law firm to represent him or her, and incurred attorneys’ fees owing to the firm, is a debtor as defined in Section 2-11.1(d) of the Ethics Code. Consequently, voting on payment of fees to the law firm would create a contingent conflict of interest and the official should be barred from voting.

However, recognizing that Florida law allows for the payment of attorneys’ fees incurred by elected officials in certain circumstances, the Ethics Commission has specifically addressed the payment of legal fees expended in defense of actions filed against elected officials arising from official duties, in both ethics opinions and in an ethics enforcement matter.

The Ethics Commission has acknowledged that Florida law provides that an elected official is entitled to payment of attorneys’ fees when *successful* in defending against charges filed arising out of the performance of official duties.<sup>7</sup> However, the issue of whether the official may participate and vote on the matter is a question guided by conflict-of-interest provisions at the local and state level.

Accordingly, in INQ 06-111, the Ethics Commission opined that an elected official should not participate in and vote on the question of *pre-payment* of legal fees in defense of a complaint arising from actions taken in an official capacity. The Commission reasoned that voting to pay fees prior to the successful conclusion of the case constituted a personal financial gain for the official.

In INQ 08-30, the Ethics Commission opined that an elected official was permitted to participate in and vote on a matter involving the *reimbursement* of her attorney’s fees as long as the need for

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<sup>5</sup> The first tier enumerated relationships are officer, director, partner, of counsel, consultant, employee, fiduciary, or beneficiary.

<sup>6</sup> The second tier enumerated relationships are stockholder, bondholder, debtor, or creditor.

<sup>7</sup> *See generally* Thornber v. City of Fort Walton Beach, 568 So.2d 914 (Fla. 1990)

legal representation was related to her official duties as a local elected official and the defense was successful.

In INQ 19-13, the Commission similarly opined and clarified that an official may request reimbursement 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.

Similarly, in CEO 88-46, interpreting Section 112.313(5), Florida Statutes, the State of Florida Ethics Commission opined that an elected official is permitted 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.

In considering an ethics enforcement case, in Case No. C18-32-08, the Ethics Commission concluded that an elected municipal official violated the voting conflict ordinance by participating in a discussion concerning his city paying *up front* for his legal defense in an ethics case.

Finally, the Ethics Commission has considered whether an official can consider and vote on a matter involving the payment of legal fees incurred by a law firm when the same firm represented the voting official on a different matter. While not factually on all fours with the facts underlying this opinion, in INQ 15-201, the Ethics Commission considered whether an official was prohibited from voting on the payment of legal fees owed to a firm that represented his municipality in litigation involving a former mayor's attempt to reclaim his position after his acquittal in a criminal corruption prosecution, when the same firm also represented the official in a separate matter.

In that case, the Ethics Commission opined that the official's representation by the 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.

#### Opinion:

Based on the County Ethics Code provisions cited above, and consistent with the reasoning underlying the various opinion and enforcement cases similarly cited, Section 2-11.1(d) of the County Ethics Code would not prohibit Commissioner Fleurimond from considering and voting on the payment of fees owed to the law firm that represented him in the successful defense of a 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.

Also, the voting conflict ordinance would not prohibit Commissioner Fleurimond from considering or voting on the payment of fees owed to a law firm in the ongoing defense of a civil action filed against another commissioner arising out of the performance or nonperformance of the other commissioner's official duties, even though the same firm represented him.

To be clear, the latter opinion only addresses whether the voting conflict ordinance permits Commissioner Fleurimond to consider and vote on the payment of fees owed to a law firm in the ongoing representation of a fellow commissioner in a civil action. Whether state law or local laws,

over which this agency has no jurisdiction to interpret, permit such payment is outside the boundaries of this ethics opinion.

This opinion is limited to the facts as you presented them to the Commission on Ethics and is limited to an interpretation of the County Ethics Code only and is not intended to interpret state laws or local laws over which the agency has no jurisdiction. 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,



Jose J. Arrojo, Esq.  
Executive Director



Loressa Felix, Esq.  
General Counsel

cc: All Commission on Ethics Legal Staff

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.