

## 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 2023-98, 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 Jay R. Chernoff, 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, Commissioner 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 defendant. Commissioner Chernoff similarly alleged that due to Commissioner Fleurimond's

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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.

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, Commissioners Fleurimond and Joseph filed Counterclaims 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.

As regards the litigation involving Commissioners Chernoff and Joseph, 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.

Notably, in that pending litigation, Commissioner Joseph seeks an award of taxable costs to be paid by Commissioner Chernoff.

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.

You inquire about Commissioner Chernoff’s ability to ability to participate and vote on the matters relating to the payment of fees incurred by Commissioner Fleurimond and Commissioner Joseph 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 another commissioner in a civil action arising out of the performance or nonperformance of the other commissioner’s official duties.
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 against another commissioner arising out of the performance or nonperformance of the other commissioner’s official duties.

3. Whether in the instance that a commissioner has a prohibited voting conflict, the commissioner must leave the commission chambers during the consideration and vote on the item.

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>3</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>3</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>4</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>5</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.*

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>6</sup>

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

Pursuant to Section 2-11.1(d) of the County Ethics Code, procedurally when a voting conflict does exist, the ordinance clearly provides that the official shall:

- (1) announce publicly at the meeting the nature of the conflict before the matter is heard;
- (2) absent himself or herself from the Commission chambers during the portion of the meeting when the matter is considered; and
- (3) file a written disclosure of the nature of th conflict with the Clerk of the Board within 15 days after the vote.

Opinion:

Based on the County Ethics Code provisions cited above, and consistent with the reasoning underlying the various opinions similarly cited, Section 2-11.1(d) of the County Ethics Code would not prohibit Commissioner Chernoff from considering and voting on the payment of fees owed to the law firm that represented Commissioner Fleurimond in the successful defense of a civil action arising from the alleged performance or nonperformance of official duties.

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

<sup>5</sup> The second tier enumerated relationships are stockholder, bondholder, debtor, or creditor.

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

The law firm and Commissioner Fleurimond are the entity and person, respectively, which would be or might be directly or indirectly affected by the consideration and vote on the payment of fees and costs incurred in the successful defense of Commissioner Fleurimond in the civil action arising out of the performance or nonperformance of official duties.

Commissioner Chernoff does not have a first or second tier relationship, as defined in the voting conflict ordinance, with the law firm or Commissioner Fleurimond and consequently no automatic or contingent voting conflict exists.

Moreover, the litigation between the two commissioners has concluded and there are no outstanding claims between the two and therefore Commissioner Chernoff will not directly or indirectly profit or be enhanced by the consideration and vote on the payment of fees and costs incurred in the successful defense of Commissioner Fleurimond in the civil action. No broad voting conflict exists.

Conversely, again based on the County Ethics Code provisions cited above, and consistent with the reasoning underlying the various opinions similarly cited, Section 2-11.1(d) of the County Ethics Code would prohibit Commissioner Chernoff from considering and voting on the payment of fees owed to the law firm that continues to represent Commissioner Joseph in the ongoing litigation of the civil action filed against Commissioner Joseph arising out of the performance or nonperformance of the other commissioner's official duties.

In that ongoing litigation, Commissioner Joseph is seeking an award of taxable costs to be paid by Commissioner Chernoff. Accordingly, Commissioner Chernoff might directly or indirectly profit or be enhanced by the consideration and vote on the matter relating to the payment of fees incurred by the law firm representing Commissioner Joseph. The retained attorneys are engaged, in part, to recover monies from Commissioner Chernoff. Clearly, at a minimum, a broad voting conflict exists that would prohibit Commissioner Chernoff's participation and vote on the item.

To be clear, the latter opinion only addresses whether the voting conflict ordinance permits Commissioner Chernoff 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 permit such payment is outside the boundaries of this ethics opinion.

Procedurally, Commissioner Chernoff must absent himself from the Commission chambers during the consideration and vote on the item relating to payment of attorney's fees incurred by Commissioner Joseph in the litigation between the two. Whether or not Commissioner Chernoff's leaving 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 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.