# Public official, reimbursement of attorney fees

**Number:** INFORMAL

**Date:** December 04, 2017

Ms. Alison P. Rogers
Escambia County Attorney
221 Palafox Place, Suite 430
Pensacola, Florida 32502

Dear Ms. Rogers:

On behalf of the Escambia County Board of County Commissioners ("Board"), you have requested an opinion addressing the following question:

Whether the Board may legally determine under the common law that a sitting Commissioner is entitled to legal representation at public expense to defend himself against a second defamation action brought by a former Commissioner where the alleged defamatory statements were made prior to the Commissioner's candidacy and current term of office, but the alleged statements were not [posted on Facebook] until after the Commissioner was elected?[1]

You have confirmed that the Commissioner's request has been made in connection with a lawsuit filed by a former commissioner ("Plaintiff"), who is suing a present commissioner ("Commissioner") and an additional defendant ("Defendant"), each described in the complaint as "a natural person residing in Escambia County, Florida."[2] Your letter to this office reflects that the Commissioner making the request was elected in November of 2014. Attorney General Bondi has asked me to respond to your request.

In his complaint, the Plaintiff (a former political opponent of the Commissioner) alleges that Defendant, "on behalf of himself and [the Commissioner]," posted allegedly "defamatory material" on Facebook, consisting of emails purportedly exchanged (and therefore first "published")[3] between the Defendant and the Commissioner from November 6, 2013 through September 28, 2014. The Plaintiff continues:

"7. ...In pertinent part, those materials accuse the Plaintiff of engaging in affairs and marital infidelities.

8. The publication of these statements were *(sic)* intended to cause *(sic)* aspersions upon the Plaintiff's conduct and character.

9. The statements made by the Defendants…and the implications contained therein, are false, malicious (in law and fact), and defamatory.

10. The statements published by the Defendants were done so *(sic)* in complete disregard of their obviously harmful effect on the Plaintiff's reputation and good-standing in the community."

As a threshold matter, although you have asked about the Commissioner's entitlement to "legal

representation at public expense to defend himself" against this lawsuit, you have not asked about the applicability of section 111.07, Florida Statutes ("Defense of civil actions against public officers, employees, or agents"). It provides that "any county…is authorized to provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents for an act or omission arising out of and in the scope of his or her employment or function[.]" Because, in this case, the alleged statements on which the lawsuit is predicated were made before the Commissioner became a county officer, section 111.07 would not, on its face, appear to apply.

But even where the statute does not apply, a public official may, under certain circumstances, be entitled to reimbursement under the common law for attorney's fees incurred in a civil suit based on his or her challenged official actions. *See generally Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 916 (Fla. 1990) ("In this case, however, our inquiry does not end at whether the council members are entitled to recover fees under section 111.07."). In every case where reimbursement is sought relying on the common law principle regarding reimbursement of fees for public officials who "successfully [defend] against unfounded allegations of official misconduct," however, the doctrine may only be applied consistent with the basic tenet of Florida law that the expenditure of public funds must be used primarily for a public, and not a private, purpose.[4] Thus, an official seeking payment of public funds to reimburse him or her for attorney's fees incurred must establish entitlement to this common law exception, demonstrating that the official's claim is consistent with the justification underlying it.

That justification was clearly articulated in *Thornber*. There, the Florida Supreme Court observed that the "purpose of this common law rule is to avoid the chilling effect that a denial of representation might have on public officials in *performing their duties properly and diligently*." 568 So. 2d at 917 (Emphasis added). "To deny a public official representation for acts *purportedly arising from the performance of his official duties* would have a chilling effect upon the proper performance of his duties and the diligent representation of the public interest." *Nuzum v. Valdes*, 407 So. 2d 277, 279 (Fla. 3d DCA 1981) (Emphasis added).

However, as later stated in *Maloy v. Bd. of Cty. Comm'rs of Leon Cty.*, 946 So. 2d 1260, 1262 (Fla. 1st DCA 2007), "[u]nder *Thornber*, a public official is not entitled to taxpayer funded representation simply because an allegation of misconduct arises in the course of his public duties":

"Rather, the context out of which the alleged misconduct arose must also serve a public purpose. In *Ellison*, a property appraiser's participation in a training seminar served a public purpose. In *Lomelo* [*v. City of Sunrise*, 423 So. 2d 974, 976 (Fla. 4th DCA 1982)], a mayor's use of his authorized power to release an arrestee served a public purpose. In *Chavez*, a city council member's vote, although part of her official duties, served only her private financial interests and not a public purpose."

*Id.* at 1265.

Consistent with these principles, a framework for analysis has emerged from the cases (decided both before and after *Thornber*) in which the common law doctrine has been examined. Under this framework, the relevant questions are: 1. Was the official's successful defense against the

charges undisputed?[5] 2. Did the challenged acts arise out of the official's performance of public duties and serve a public purpose?[6] 3. Is the substance of the litigation of interest to the administration of the business of the prospective payor (here, Escambia County)?[7] 4. Did the prospective payor (here, Escambia County) authorize the challenged acts?[8]

Ultimately, the Commission must make the decision, based on the factual evidence before it, regarding whether the circumstances applicable to the Commissioner's request satisfy the common law prerequisites for reimbursement. Hopefully, however, the informal comments provided herein will assist you in advising your client.

From the facts presented, it appears that the crux of the complaint against the Commissioner is that, prior to the time he was elected to county office, the Commissioner sent emails to a person other than the Plaintiff that allegedly contained "false, malicious (in law and fact), and defamatory" statements "intended to [cast] aspersions on the Plaintiff's conduct and character." After the Commissioner was elected to county office, the person to whom the emails were sent, allegedly "on behalf of himself and [the Commissioner]," posted the emails on Facebook. Using these allegations (whose truth, falsity, or legal sufficiency has not yet been judicially determined) as the context for the Commission's analysis, the following questions arise:

§ Has the matter been successfully concluded?

No. The Commissioner seeks to have Escambia County (the "County") provide his legal defense in the pending litigation.

§ Did the challenged acts arise out of the official's performance of public duties?

No. You have referenced no legal authority—and I have found none—that imposed a public duty on the commissioner to send emails which allegedly cast "aspersions" on a former political opponent by purportedly accusing him of "engaging in affairs and marital infidelities." Unlike the allegedly defamatory statements of the mayor in *Duplig*—made in his official capacity and in the course of bringing to the council's attention information concerning the conduct of officials serving at the pleasure of the council[9]—here, the predicate acts (writing the emails) occurred *prior* to the time the Commissioner was elected to county office, and served no official function. Their subsequent posting on Facebook does not make the ensuing litigation "arise" out of the Commissioner's performance of public duties. *Cf. Markham*, 298 So. 2d at 214 (rejecting an argument that, "although the election contest was personal prior to his assuming office,…it thereupon acquired a public purpose.").

§ Did the challenged acts serve a public purpose?

No. You have referenced no legal authority—and I have found none—that reflects that sending, or posting on social media, emails which allegedly cast "aspersions" on a former political opponent by purportedly accusing him of "engaging in affairs and marital infidelities" furthers a "public purpose." *Cf. Maloy*, 946 So. 2d at 1265 ("[A] public official's sexual conduct, whether in the form of illicit sexual harassment or consensual relations between adults, and whether occurring inside or outside of the workplace, does not serve a public function."); *Chavez*, 560 So. 2d at 1218 ("From our study of the intent and policy of the legislature in the context of ethical

behavior, we think ‘public purpose’ equates with ‘public interest’ and excludes any taint of ‘private interest.’”).

§ Is the substance of the litigation of interest to the administration of the business of the potential payor (here, the County)?

No. In your letter, you state that the Plaintiff had previously filed a defamation action against the Commissioner “in his personal capacity,” and that such action “was ultimately dismissed with prejudice after the trial court concluded the statements were not actionable[.]” You indicate that, in connection with the Commissioner’s request regarding the Plaintiff’s second suit based on alleged defamation, the Commission has “questioned whether the pattern or practice of litigiousness by a former political opponent against an elected official may be relevant under the *Thornber* analysis.”

However, you have referenced no legal authority—and I have found none—that would support a conclusion that the litigiousness of the Plaintiff is a relevant consideration. Instead, courts have examined whether the gravamen *of the matter alleged* in the complaint implicates the proper administration of the local government from whom reimbursement is sought.[10] Because the complaint in this case challenges allegedly defamatory statements pertaining to a former political opponent made by a Commissioner prior to his election and in his personal capacity (albeit posted on Facebook after the Commissioner’s election to office), the business of the County does not appear to be implicated.

§ Did the potential payor (here, the County) authorize the challenged acts?

No. Relevant to this question, on August 20, 2009,[11] the County Commissioners' Technology Policy was adopted.[12] It provides, in pertinent part, as follows:

“A. Purpose:

* * *

New Policy

The purpose of this policy is to *establish rules for how the County Commissioners use technology to communicate to ensure they conduct themselves in a responsible, professional, ethical and efficient manner, with an eye towards the public's perception of their elected officials and how they conduct business*. Improvements and evolutions in technology are occurring so rapidly that it is difficult for the laws and rules that govern County business and elected officials to keep pace. The Florida Sunshine Law and Public Records Law pose special challenges to the County Commissioners who should follow not just the letter of those laws, but also their intent. It is vital to the credibility of Escambia County government that the public perceive their Commissioners are respectful of those laws and of the citizens they govern.

B. Policy:

1. Applicability: *This policy is intended as an additional layer of control over the County*

*Commissioners' use of technological resources, regardless of the ownership of those resources*. This policy is intended to supplement any existing policy, rule or law that applies to the County Commissioners or to County-owned resources.

* * *

3. Electronic Mail (E-Mail): In order to ensure compliance with Florida's Public Records' Law, including record retention requirements, Commissioners *shall not use private e-mail accounts to conduct County business*. Private e-mail accounts include outside business e-mail accounts, personal accounts and any other e-mail account that does not operate through Escambia County's server. However, should a Commissioner receive e-mail in a private e-mail account, the Commissioner *shall forward the e-mail to a County-maintained email account* and shall request that the author of the original e-mail use the County-maintained e-mail account for future communications. Such actions shall not be a violation of this policy.

* * *

5. Social Networking Accounts, Twitter, Story Forum Comments, Blogs and Similar Communications: *Commissioners shall not discuss County business on social networking sites, including, but not limited to, Facebook and Twitter, and shall not blog or otherwise communicate on the internet about County business other than via e-mail as provided above* and in other applicable laws and regulations.

However, a commissioner may post a story forum comment or response on a blog on a site maintained by another person or media outlet regarding County business so long as the commissioner posts the comment or response using the commissioner's actual name and the commissioner does not post a comment or response when another commissioner has already posted on that specific article or issue. *A copy of any such posting shall be retained by the County*.

* * *

C. Enforcement:

A majority of the County Commission may take any available enforcement action against a fellow Commissioner found to be in violation of this policy. *Additionally, the County shall not be responsible for any costs resulting from a Commissioner's failure to follow this policy. Such costs are to include, but not be limited to*, text messaging charges and *attorney's fees, unless specifically allowed by State law*. All other applicable laws, rules and policies may have other enforcement mechanisms that could apply. County Commissioners are responsible for compliance with the Sunshine Law and Public Records' Law at all times during their term."

(Emphasis added).

As analyzed above, the challenged emails allegedly authored by the Commissioner before he was elected, sent by private email to a third party, and subsequently posted on Facebook involve allegedly defamatory statements made about a former political opponent prior to the

Commissioner's assumption of any County duties. Therefore, such emails would not appear to pertain to "County business."

However, any argument that these actions *do* implicate the County's business would also lead to a conclusion that the sending and posting of such emails would appear to violate various provisions of the County Commissioners' Technology Policy. Rather than being authorized by the potential payor (the County), such actions (if done by a sitting Commissioner) would appear, when compared to the County's technology policy, to have been prohibited by it.

Based on the foregoing, although the Commission must ultimately decide whether it can legally authorize the use of County funds to reimburse the Commissioner for attorney's fees incurred in his defense against the subject defamation action, from the facts alleged in the complaint and providing the context in which the subject litigation has arisen, none of the *Thornber* factors authorizing payment of such fees at taxpayer expense facially appear to be met in this case. I trust that these informal observations will assist you in advising the Commission regarding its potential actions.

Sincerely,

Teresa L. Mussetto
Senior Assistant Attorney General

TLM/tsh

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[1] In phrasing your question, you used the word "published," apparently intending its common meaning. Because the word "published" is a legal term of art as it pertains to allegations of slander or libel (*see* note 2, *infra*), the factual phrase "posted on Facebook" has been substituted here.

[2] *See generally Duplig v. City of S. Daytona*, 195 So. 2d 581, 584 (Fla. 1st DCA 1967) (reflecting that the first step in deciding whether the City could pay for the mayor's defense in an action for defamation filed against him was to review the allegations of the complaint to determine whether the mayor had been sued in his individual or official capacity).

[3] *See* Restatement (Second) of Torts, § 577 ("Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.") (quoted in *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1016 (Fla. 2001)).

[4] *See* Art. VII, § 1, Fla. Const.

[5] *See, e.g., Maloy*, 946 So. 2d at 1262 (reflecting that Commissioner Maloy, in defending against an ethics complaint alleging sexual misconduct involving female staff members, had "prevailed in all respects"); *Chavez v. City of Tampa*, 560 So. 2d 1214, 1215–16 (Fla. 2d DCA 1990) (reflecting that the ethics complaint against Commissioner Chavez had been dismissed based on the hearing officer's conclusion that her challenged vote—used to break an impasse with respect to an "alcoholic beverage zoning classification permitting…liquor sales at premises she had recently leased"—was merely "procedural and not a vote on the substance of the

ordinance itself"); *Ellison v. Reid*, 397 So. 2d 352, 354 (Fla. 1st DCA 1981) (reflecting the Ethics Commission's findings that Reid "committed no act of wrongdoing"); *Estes v. City of N. Miami Beach*, 227 So. 2d 33, 33–34 (Fla. 1969) (reflecting that the complaint filed by a losing candidate for councilman against four of seven members of the city council, charging election law violations and seeking to enjoin the councilmen from performing certain duties pending outcome of the suit, "was successfully defended by the special counsel").

[6] *Compare Maloy*, 946 So. 2d at 1265 ("Although cleared of the alleged misconduct, Maloy's underlying activity did not serve the public interest[.]"), Chavez, 560 So. 2d at 1218 ("The appellant's admission that there was a private interest present underlying her vote is inconsistent with, and cannot equate to, the 'public purpose' requirement in the second prong of the common law test. Thus, because she voted for her private interest, there is no support for the award of fees and costs under common law principles."), *and Markham v. State, Dep't of Revenue*, 298 So. 2d 210, 212 (Fla. 1st DCA 1974) ("The suit giving rise to the incurring of the attorney's fees was not against the appellant in his official capacity nor did it arise from a discharge of his official duties nor serve a public purpose. The suit was a pure and simple election contest relating to the validity of certain absentee votes.") *with Ellison*, 397 So. 2d at 354 (reflecting that Reid was entitled to attorney's fees where the activity for which the Ethics Commission had exonerated him—involving allegations that he had improperly given examination papers to his employees while attending a training program—involved the public purpose of attending training intended to enable him [as the property appraiser] and his staff to become better educated and skilled in their official responsibilities).

[7] *Compare Estes*, 227 So. 2d at 35 ("The granting of an injunction in the Weithorn case would prevent the city from continuing the operation of its business affairs during the pendency of the litigation as the injunction would have enjoined four of the seven councilmen. The three councilmen not involved could perform no functions for the city.… Being concerned about the chaotic condition which might ensue and being confronted with the effect of such an injunction on the public welfare and property of the municipality, it was not an abuse of discretion for the city council to determine that the city had an interest which would be affected by the outcome of the proceedings.") *and Duplig*, 195 So. 2d 581 (reflecting that the city had a pecuniary interest in seeing that the mayor brought to the council's attention information concerning the conduct of officials serving at the pleasure of the council, and therefore had an interest in the outcome of a defamation suit brought by a former city clerk against the mayor based on allegedly defamatory statements he had made to the council concerning the city clerk, where there was no "allegation in the complaint 'that the actions complained of were performed by the Mayor in his personal capacity with bad faith'") *with Peck v. Spencer*, 26 Fla. 23, 7 So. 642, 644 (1890) ("And now, admitting the right of corporations to sue and to defend suits, and to protect their officers in the lawful discharge of their duties, to be correct, still, where did the town council of Daytona derive their powers to appropriate money in the defense of contested elections in the result of which the corporation had no pecuniary interest whatever? Such power is not given in its charter, either expressly or by reasonable implication. These contests are personal, and the corporation can have no interest in the result, and an appropriation to pay any one of the parties the expenses he may be put to is without legal authority.") *and Markham*, 298 So. 2d at 214 ("Appellant claims that although the election contest was personal prior to his assuming office, that it thereupon acquired a public purpose. In the *Peck* case the defendant was acting mayor while he was defending the suit and was thus a public official, but that fact did not make the suit any less

personal.…In conclusion, we hold that an election contest between opposing candidates for an office, arising out of a challenge directed to specific votes sufficient in number to change the result of the election, is personal between the candidates and litigants and is not an official duty of the candidate holding the office and serves no public purpose justifying the expenditure of public funds incident thereto.").

[8] *See Maloy*, 946 So. 2d at 1264–65 (observing that, in *Lomelo v. City of Sunrise*, 423 So. 2d 974, 976 (Fla. 4th DCA 1982), the subject official, who "was found innocent" of charges of threatening an officer or his family, had "obtained an arrestee's release by virtue of his power as mayor granted in the city charter. Thus he clearly acted in his official capacity and such actions were authorized by the public body.").

[9] *See Duplig*, 195 So. 2d at 581.

[10] *Compare Thornber*, 568 So. 2d at 917 ("The city does not have an interest in the outcome of a recall petition because any individual, not any specific individual, can be the officeholder at issue....It does have a decided interest, however, in protecting its officers from untimely and illegal recall petitions."), *Miller v. Carbonelli*, 80 So. 2d 909 (Fla. 1955) ("In this situation the council was thoroughly justified in expending public funds to insure that the action they had taken in the choice of a mayor was properly defended, and consequently to dispel any doubt about the exercise by Cudlipp of the prerogatives of the office of mayor."), *Estes*, 227 So. 2d at 35 ("The granting of an injunction in the Weithorn case would prevent the city from continuing the operation of its business affairs during the pendency of the litigation as the injunction would have enjoined four of the seven councilmen."), *and Duplig*, 195 So. 2d at 584 ("In the case at bar, however, we think that the Town of South Daytona had a pecuniary interest in seeing that its chief executive officer, the Mayor, brought to the attention of the Town Council information concerning the conduct, loyalty, and efficiency of officials serving at the pleasure of the Council.") *with Peck*, 7 So. at 644 ("[W]here did the town council of Daytona derive their powers to appropriate money in the defense of contested elections in the result of which the corporation had no pecuniary interest whatever?…These contests are personal, and the corporation can have no interest in the result, and an appropriation to pay any one of the parties the expenses he may be put to is without legal authority."), *Williams v. City of Miami*, 42 So. 2d 582 (Fla. 1949) ("[The City of Miami] was not interested in the result of the recall election, but such interest was personal to and the law required that the costs should be paid by appellant and not by the taxpayers of the City of Miami."), *and Markham*, 298 So. 2d at 214 ("Appellant claims that although the election contest was personal prior to his assuming office, that it thereupon acquired a public purpose.…[W]e hold that an election contest between opposing candidates for an office…is personal between the candidates and litigants and is not an official duty of the candidate holding the office and serves no public purpose justifying the expenditure of public funds incident thereto.").

[11] This adoption date predates the operative dates of the facts alleged in the complaint involved here.

[12] At our request, you provided this office with a copy of the County's technology policy.