

RESOLUTION NO. -2008

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA SUPPLEMENTING *RESOLUTION 017-2005* REGARDING THE REIMBURSEMENT OF ATTORNEY'S FEES AND COSTS INCURRED BY COUNTY OFFICERS AND EMPLOYEES IN DEFENSE OF ACTIONS TAKEN IN THE COURT AND SCOPE OF THEIR DUTIES WHEN THE OFFICE OF THE COUNTY ATTORNEY CANNOT PROVIDE REPRESENTATION.

WHEREAS, in *Resolution 017-2005*, the Board established a formal policy of authorizing payment of attorney's fees incurred by County officers and employees named in civil actions arising out of an act or omission in the course of performing County duties within the limits set forth in F.S. 111.07; and

WHEREAS, recent case law holds that F.S. 111.07, and consequently *Resolution 017-2005*, does not apply to administrative and/or other non-civil, non-criminal actions, such as Ethics Committee investigations and complaints; and

WHEREAS, in addition to the provisions set forth in F.S. 111.07, the Florida Supreme Court has enunciated a common law doctrine affording public officials the right to legal representation at taxpayer expense in defending themselves against litigation arising out of their public duties and while serving a public purpose including matters before the Ethics Commission; and

WHEREAS, the Florida Supreme Court has stated 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; and

WHEREAS, the Florida Bar revised Ethics Opinion 77-30 in 2006 in order to authorize the County Attorney to represent County officers and employees before the Ethics Commission under certain, very limited circumstances; and

WHEREAS, because of the limits set forth in Florida Bar Ethics Opinion 77-30, it is not likely that the County Attorney will be able to represent County officers and employees before the Ethics Commission in many instances; and

WHEREAS, it is the intent of the County Commission to set a policy for reimbursing reasonable attorney's fees incurred by any County officer or employee to which he or she is entitled under the common law when that representation cannot be provided by the County Attorney;

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA, THAT:

Section 1. Should any County Officer or employee be served with a notice or complaint or other document indicating that he or she is the subject of an investigation or complaint by the Florida Commission on Ethics, that person shall notify the County Attorney of the matter and forward to the County Attorney copies of all materials served. The County Attorney shall place an item on the agenda for the next B.O.C.C. meeting to report the matter to the Board and make a recommendation on whether, in the County Attorney's professional judgment, it is appropriate for that office to represent the officer or employee before the Ethics Commission.

Section 2. In the event that it is determined that the Officer or employee should not be represented by the County Attorney before the Ethics Commission or other administrative panel, the Officer or employee shall retain an attorney of his or her choice. The Board shall determine by vote whether to reimburse the officer or employee's attorney's fees and costs in periodic increments as they are incurred or after successful conclusion of the matter.

Section 3. In the event the Officer or employee is found to have been acting in connection with the performance of his or her official duties and that his or her actions served a public purpose, the County shall reimburse the Officer or employee for his or her reasonable attorney's fees and costs, based in part on the reasonable prevailing rate for similar services provided by attorneys practicing within Monroe County, Florida. Any fees and costs determined to be in excess of the reasonable prevailing rate shall be the sole responsibility of the officer or employee who retained that attorney or incurred those costs.

Section 4. Any attorney's fees paid from County funds on behalf of an officer or employee who is found not to have been acting in connection with the performance of his or her official duties or not otherwise serving a public purpose, may be recovered by the County in a civil action against the officer or employee.

PASSED AND ADOPTED by the Board of County Commissioners of Monroe County, Florida, at a regular meeting of said Board held on the 19th day of March 2008.

Mayor Charles "Sonny" McCoy _____
Mayor Pro Tem Mario DiGennaro _____
Commissioner Sylvia Murphy _____
Commissioner George Neugent _____
Commissioner Dixie M. Spehar _____

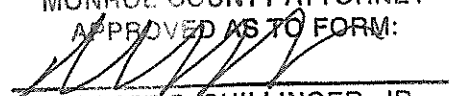
(SEAL)

Attest: DANNY L. KOLHAGE, Clerk

BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA

By _____
Deputy Clerk

By _____
Mayor/Chairman

MONROE COUNTY ATTORNEY
APPROVED AS TO FORM:

ROBERT B. SHILLINGER, JR.
CHIEF ASSISTANT COUNTY ATTORNEY
Date: 3-4-08

RESOLUTION NO. 017-2005

A RESOLUTION AUTHORIZING THE PAYMENT OF REASONABLE ATTORNEY'S FEES FOR REPRESENTATION OF COUNTY OFFICERS AND EMPLOYEES SUED FOR ACTIONS TAKEN IN THE COURSE AND SCOPE OF THEIR DUTIES WHEN THE OFFICE OF THE COUNTY ATTORNEY CANNOT PROVIDE REPRESENTATION.

WHEREAS, the Office of the County Attorney is authorized by Section 2-358(a)(5) of the Monroe County Code to defend all current and former County officers and employees in their personal and official capacities, against any non-criminal action, arising out of acts or omissions undertaken or omitted in the course of the performance of County business, and

WHEREAS, the potential for a conflict of interest exists when a County officer or employee is named as a co-defendant or co-respondent with the Board of County Commissioners and/or any other County officer or employee, which might preclude the Office of the County Attorney from representing both parties in the litigation; and

WHEREAS, the Rules of Professional Conduct regulating the practice of law in Florida places conditions and limits on the dual representation of two or more clients when a potential conflict exists between the clients; and

WHEREAS, Section 111.07 of Florida Statutes authorizes the County to provide an attorney to defend an officer or employee in any civil action arising from a complaint for damages or other injury suffered as a result of any act or omission arising out of and in the scope of his or her duties except for those acts undertaken in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

NOW THEREFORE; BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA, THAT

Section 1. In the event that the Board, the County Attorney, or a court of competent jurisdiction determines that the Office of County Attorney is precluded by the Rules of Professional Conduct from defending a County officer or employee in a civil action arising out of an act or omission in the course of performing County duties or employment, that the Board of County Commissioners will pay reasonable attorney's fees and costs incurred by the employee in defense of that action within the limits set forth in F.S. 111.07 and as otherwise set forth herein.

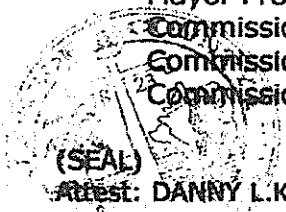
Section 2. When the Office of the County Attorney is precluded from representing the officer or employee due to a potential or actual conflict of interest, the employee shall retain an attorney of his or her choice. Any and all fees and costs determined by the Board or a court of competent jurisdiction to be in excess of the reasonable prevailing rate for similar services provided by attorneys practicing within Monroe County, Florida, shall be the sole responsibility of the officer or employee who retained that attorney or incurred those costs.

Section 3. The Board shall not be liable for any fees and costs that are incurred by an officer or employee when the Rules of Professional Conduct do not prohibit representation of the officer or employee by the Office of County Attorney unless the Board consents prior to the engagement of that attorney.

Section 4. Any attorney's fees paid from County funds on behalf of an officer or employee who is found to be personally liable by virtue of acting outside the scope of his or her employment or was acting in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, may be recovered by the County in a civil action against the officer or employee.

PASSED AND ADOPTED by the Board of County Commissioners of Monroe County, Florida, at a regular meeting of said Board held on the 19th day of January, 2005.

Mayor Spehar	<u> yes </u>
Mayor Pro Tem McCoy	<u> yes </u>
Commissioner Nelson	<u> yes </u>
Commissioner Neugent	<u> yes </u>
Commissioner Rice	<u> yes </u>



(SEAL)
Attest: DANNY L. KOLHAGE, Clerk

BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA

By *Camela Hancock*
Deputy Clerk

By *Wojciech M. Spehar*
Mayor/Chairperson

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MONROE COUNTY ATTORNEY
APPROVED AS TO FORM:
Robert B. Shillinger, Jr.
ROBERT B. SHILLINGER, JR.
ASSISTANT COUNTY ATTORNEY
Date 1-5-5

CLERK OF COUNTY
MONROE COUNTY, FLA
1/5 FEB -3 PM 1:16

OPINION 77-30 (Reconsideration)
(September 29, 2006)

Whether a conflict of interest involving representation of an individual county commissioner before the Florida Commission on Ethics by a county attorney may be waived depends on the individual circumstances of the matter. In cases where the conflict may be waived, both the individual commissioner and the county must give informed consent, confirmed in writing, and consent on behalf of the county must be given by someone other than the individual commissioner to be represented.

RPC: 4-1.7, 4-1.13(e)

Opinion: 77-30

Florida Statutes: §§ 111.065 and 111.07

The Florida Bar Board of Governors has revised Florida Ethics Opinion 77-30 to clarify its views on conflicts involving a county attorney's representation of a county commissioner charged with ethics violations before the Florida Commission on Ethics. In the 1978 opinion, the Professional Ethics Committee gave its opinion on the following circumstances:

A county commissioner is charged before the ethics commission with misuse of public office in directing county employees to work on private property during normal working hours with county road equipment. The subject commissioner asks the county attorney to represent him as legal counsel. The county attorney is on contract with the county and engages in the private practice of law in addition to his work for the county.

The Committee found that the "situation represents an inherent conflict and the appearance of impropriety."

The Committee's opinion was based on the disciplinary rules and ethical canons. Since the opinion was written, the Rules Regulating The Florida Bar were adopted. Rule 4-1.7 states as follows:

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer shall not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

The Board has heard from both the Florida Commission on Ethics, which has indicated that individual commissioners are frequently represented by a local government lawyer despite the opinion's existence, and from the City, County and Local Government Law Section, which believes that the opinion is overbroad.

The Board agrees with the City, County and Local Government Law Section that the opinion may be overbroad, particularly the following statement:

A county attorney represents the county commission, not the individual members serving on it. He places his responsibility as county attorney in jeopardy when he accepts an engagement to represent a particular commissioner before the Florida Ethics Commission.

A county attorney may be required to represent individual commissioners by ordinance or charter or by contract with the county. Florida statutes also require particular governmental entities to provide representation to individual constituents in certain circumstances. See, e.g., Florida Statutes §§ 111.065 and 111.07. It is a legal and factual question, outside the scope of an ethics opinion, whether a county attorney is required to represent individual commissioners.

The Board is of the opinion that there are some conflicts involving the representation of individual county commissioners that may be waived by both the individual commissioner and the county. For example, if a frivolous ethics complaint is filed against an individual commissioner and the county attorney can readily determine that the allegations are unfounded, the county attorney may represent the individual commissioner if both the individual commissioner and the county give informed consent, confirmed in writing, to the dual representation. Someone other than the individual commissioner to be represented must give informed consent on behalf of the county. Rule 4-1.13(e), Rules of Professional Conduct.

Whether a county attorney may represent an individual commissioner in a particular ethics complaint will depend on the circumstances of the individual situation, and such an analysis must occur on a case by case basis.

[Updated: 10-06-2006]