Municipalities, payment of attorney fees

Number: INFORMAL

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Mr. Randall Hanson, Esq.
Office of the City Attorney
2345 Providence Boulevard
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Dear Mr. Hanson:

Thank you for your letter to Attorney General McCollum requesting comment on a proposed motion relating to the payment of attorney's fees for representing municipal governmental officials. The Attorney General has asked me to respond.

Initially, I must advise you that this office does not comment on the validity of proposed motions or generally on local governmental legislation.[1] The Florida Attorney General is statutorily authorized to provide legal opinions on questions of law relating to state statutory and constitutional provisions.[2] Questions dealing with local legislation or local policy are referred to counsel for the governmental entity and may not be addressed by this office.

A number of Attorney General Opinions have been issued which discuss the payment of attorney's fees for local officials and the circumstances giving rise to requests for reimbursement. You may wish to do additional research on this issue on our website: www.myfloridalegal.com. You may search for relevant Attorney General Opinions using a search term such as "payment of attorney’s fees" or a statutory citation.

However, in an effort to provide you with some direct assistance in this matter, I would note that Florida courts have recognized a common law right of public officials to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose.[3] The object of this rule is to avoid the "chilling effect" that a denial of representation might have on a public official in performing his duties properly and diligently.[4] Such an obligation arises independent of statute, ordinance, or charter and "is not subject to the discretion of the keepers of the city coffers."[5]

As the First District Court of Appeal stated in *Ellison v. Reid*,[6]

"There is no doubt a valuable public purpose is served in protecting the effective operation and maintenance of the administration of a public office. If a public officer is charged with misconduct while performing his official duties and while serving a public purpose, the public has a primary interest in such a controversy and should pay the reasonable and necessary legal fees incurred by the public officer in successfully defending against unfounded allegations of official misconduct."

The courts have stated, however, that this obligation arises only when the conduct complained of

arises out of, or in connection with, the performance of the officer' s official duties and while serving a public purpose. For example, in *Chavez v. City of Tampa*,[7] a city council member sought reimbursement from the city for legal expenses she had incurred in successfully defending a charge of unethical conduct before the Florida Commission on Ethics. The charge arose from her vote as a city council member on her petition for an alcoholic beverage zoning classification at business premises she had leased.

While finding that the council member was performing her official duties by voting and thus satisfying the first part of the test, the court determined that her vote did not serve a "public purpose," but rather sought to directly advanced her own private interests. Thus, since both prongs of the test were not met, the city was not required to reimburse the city council member for the legal expenditures she incurred in defending the charges.

The Supreme Court of Florida, in *Thornber v. City of Fort Walton Beach*,[8] reiterated this common law principle. Citing *Chavez v. City of Tampa, supra*, the Court held that in order for public officials to be entitled to representation at public expense, the litigation must:

"1. arise out of or in connection with the performance of their official duties, and
2. serve a public purpose."[9]

If the above test is satisfied, the public official is entitled to reimbursement of attorney's fees in successfully defending his or her actions. The determination as to whether the two-prong test has been met is one that the city commission members must make as the governing body of the municipality.[10]

Finally, I would note that pursuant to Chapter 836, Florida Statutes, libel and other similar offenses are criminal in nature and should be reported to local law enforcement for investigation and possible prosecution.

I trust that these informal comments will be helpful to you in advising your clients.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See* Statement of Policy Concerning Attorney General Opinions (copy enclosed).

[2] *See* s. 16.01(3), Fla. Stat.

[3] *See, e.g., Markham v. State, Department of Revenue*, 298 So. 2d 210 (Fla. 1st DCA 1974); *Ferrara v. Caves*, 475 So. 2d 1295 (Fla. 4th DCA 1985).

[4] *Nuzum v. Valdes,* 407 So. 2d 277, 279 (Fla. 3d DCA 1981).

[5] *Lomelo v. City of Sunrise*, 423 So. 2d 974 (Fla. 4th DCA 1982), *petition for review dismissed*, 431 So. 2d 988 (Fla. 1983). *And see* s. 111.07, Fla. Stat., which authorizes a state agency, county, municipality, or political subdivision of the state to provide an attorney or pay attorney's fees in a 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.

[6] 397 So. 2d 352, 354 (Fla. 1st DCA 1981). *And see, Markham v. State, Department of Revenue,* 298 So. 2d 210 (Fla. 1st DCA 1974), stating the general principle that public officers are entitled to a defense at the expense of the public in defending against litigation arising from the performance of official duties and while serving a public purpose.

[7] 560 So. 2d 1214 (Fla. 2d DCA 1990).

[8] 568 So. 2d 914 (Fla. 1990).

[9] In *Thornber*, the officers' legal defense against a recall petition arose out of their alleged malfeasance in meeting in violation of the Sunshine Law and in subsequently voting on the issues at a public meeting. The Court concluded that both prongs of the test had been satisfied, finding that the vote taken at the public meeting fell within their official duties and "[t]he council members' action in defending against the recall petition also served a public purpose." The Court rejected the city's contention that defending against a recall petition only served the elected officials' personal interest in maintaining their positions. While the city had no interest in the outcome of a recall petition, the Court held that the public did have an interest and the city had a responsibility to ensure that the recall petition procedures were properly followed.

[10] *See* Ops. Att'y Gen. Fla. 90-74 (1990) (the determination whether the two pronged test for payment of attorney fees of a public official must initially be made by the governing body of the county based on such factual evidence as the governing body may require; such a determination is beyond the authority of this office); 91-58 (1991); and 85-51 (1985).