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I. HONEST SERVICES FRAUD

A. Background.

The concept of "honest services" is derived from 18 U.S.C. Chapter 63 on Mail Fraud. Under 18 U.S.C. § 1341 (Frauds and swindles):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

And, pursuant to 18 U.S.C. § 1343 (Fraud by wire, radio, or television):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The phrase utilized in both §§ 1341 and 1343, "scheme or artifice to defraud," was defined by Congress in 1988 as "a scheme or artifice to deprive another of the intangible right of *honest services*." 18 U.S.C. § 1346. (Emphasis supplied.)

Congress specifically enacted 18 U.S.C. § 1346 (Definition of "scheme or artifice to defraud") in 1988 in reaction to the U.S. Supreme Court decision rendered one year earlier in the case of McNally v. United States, 483 U.S. 350 (1987). In the McNally decision, the U.S. Supreme Court overruled a long line of lower court decisions when it determined that a former public official in the Commonwealth of Kentucky and a private citizen could not be convicted of mail fraud concerning a scheme to require an insurance agent, which provided insurance for the state, to share commissions with certain agencies in which the defendants had an interest, because 18 U.S.C. § 1341 did not prohibit schemes to defraud citizens of their intangible rights to honest and impartial government. However, in enacting 18 U.S.C. § 1346, it was explained by members of Congress that the purpose of the legislation was to overturn the McNally decision and restore the "honest services" mail fraud provision which existed prior to McNally. See Joshua A Kobrin, Note, "Betraying Honest Services: Theories of Trust and Betrayal Applied to the Mail Fraud Statute and § 1346," 61 N.Y.U. ANN. SURV. AM. L. 779, 814 (2006**)**. See also United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996) ("We have recognized that § 1346 was intended to overturn McNally"); United States v. Walker, 490 F.3d 1282, 1297 n. 16 (11th Cir. 2007) (the honest services amendment was enacted to override McNally).

B. What Constitutes Honest Services Fraud?

Although the term "honest services" is broad and undefined, the federal statute (18 U.S.C. § 1346) has nevertheless withstood numerous challenges for unconstitutional vagueness. In the case of United States v. ReBrook, 837 F. Supp. 162, 171 (S.D.W.Va. 1993), aff'd in part, rev. in part, 58 F.3d 961 (4th Cir. 1995), cert. den. 516 U.S. 970 (1995), the Court reasoned as follows:

> Concrete parameters outlining the duty of honest service should not be necessary in order for a person to be charged with violating this duty. The concept of the duty of honest service sufficiently conveys warning of the proscribed conduct when measured in terms of common understanding and practice. The Constitution requires no more.

(Citations omitted.)

As stated in United States v. Walker, 490 F.3d 1282, 1297 (11th Cir. 2007) (citations in text):

> The term "honest services" is not defined in the statute, but we have found that "when a political official uses his office for personal gain, he deprives his constituents of their right to have him perform his official duties in their best interest." *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir.1997). "Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest." *United States v. deVegter,* 198 F.3d 1324, 1328 (11th Cir.1999). "If an official instead secretly makes his decision based on his own personal interests-as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest," the official has deprived the public of his honest services. *Lopez-Lukis,* 102 F.3d at 1169.

In the public sector, honest services cases typically involve "serious corruption, such as embezzlement of public funds, bribery of public officials, or the failure of public decision-makers to disclose certain conflicts of interest." United States v. Czubinski, 106 F.3d 1069, 1076 (1st Cir. 1997). As set forth in the case of United States v. Mangiardi, 962 F. Supp. 49, 51 (M.D. Penn. 1997), aff'd 202 F.3d 255 (3rd Cir. 1999), cert. den. 529 U.S. 1060 (2000):

> The typical case of honest services fraud is that the public is not getting what it deserves: honest, faithful, disinterested service from a public official. This concept applies whether the official is bribed or fails to disclose a conflict of interest. Finally, the scheme or artifice must lead to actual or intended actual injury. That is, the official must be performing a discretionary function which the scheme or artifice is intended to influence because it is the exercise of a discretionary function (the "service") which must be the target of the scheme.

(Citations omitted.)

However, "[t]he broad scope of the mail fraud statute… does not encompass every instance of official misconduct that results in the official's personal gain." United States v. Sawyer, 85 F.3d 713, 725 (1st Cir. 1996). In addition, "the right to honest services is not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing." United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003). Further, "although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official for honest-services fraud cannot stand where the conduct does not actually deprive the public of its right to her honest services, and it is not shown to intend that result." Sawyer, 85 F.3d at 725.

During the past couple of months the U.S. Supreme Court has heard oral arguments in three high profile cases involving honest services fraud, and during these hearings various justices made comments suggesting that the honest services law was vague and perhaps unconstitutional. Justice Scalia reportedly called the law "mush." The first case heard by the Court, Black v. United States (U.S. Supreme Court Case No. 08-876), involved Conrad M. Black, former chairman of a media company which owned and published several newspapers, including the *Chicago Sun-Times* and *The Daily Telegraph* (in the U.K.). Mr. Black and other corporate officials were convicted of three counts of mail fraud for taking $6 million in improper noncompetition fees, plus one count for obstruction of justice, and sentenced to 78 months in prison. The second case, Weyhrauch v. United States (U.S. Supreme Court Case No. 08-1196) involved former Alaska state representative Bruce Weyhrauch, who was charged with bribery, extortion, conspiracy and mail fraud, for seeking work with an oil services company that was lobbying the state. Then, on March 1, 2010 the U.S. Supreme Court heard arguments in the honest services case involving former Enron CEO Jeffrey K. Skilling (Skilling v. United States, U.S. Supreme Court Case No. 08-1394). Skilling's lawyers argued that the honest services law was unconstitutionally vague, potentially turning a workplace lie into a federal crime. Decisions in these cases are expected in June of this year.

C. Examples.

Below is a sampling of honest services fraud cases rendered in Florida over the past few years. The listing is illustrative and not exhaustive.

1. Escambia County, Florida. In 2006, W.D. Childers, former president of the Florida Senate and chairman of the Escambia County Commission, was found guilty of two charges of bribery and unlawful compensation and sentenced to 42 months in prison. The unlawful acts were related to the county's purchase of property for a soccer complex in the amount of $6.2 million from associates of Childers. To push the purchase through the commission, he was found to have bribed a fellow commissioner, who subsequently committed suicide. He was released from prison on June 17, 2009, and will be on probation for 18 months. In 2006 Mr. Childers was also convicted of violating Florida's Government-in-the-Sunshine Law, a misdemeanor, and served 49 days in jail.

2. Palm Beach County, Florida. In June 2007 the former chairman of the Palm Beach County Commission, Anthony R. Masilotti, pleaded guilty for his involvement in a public corruption conspiracy stemming from the unlawful use of his elected position to promote and conceal significant financial ventures, including land deals which netted him millions of dollars. He also accepted significant travel gratuities, including free air travel valued at approximately $100,000, from a developer in return for voting favorably on measures for the developer. He was convicted of a single count of honest services fraud and sentenced to prison for five years. He was also ordered to forfeit two parcels of real estate worth approximately $9 million, as well as $175,000 in cash. In addition, his ex-wife had to forfeit $400,000 which she received in a divorce settlement, as the money came from a tainted land deal brokered by Masilotti.

In 2008 another former Palm Beach County commissioner, Warren H. Newell, was sentenced to five years in prison, followed by two years of supervised release, for conspiracy to commit honest services fraud. Newell concealed his financial interest in a "success fee contract" relating to the sale of certain property for a regional water storage project. The "success fee contract" netted him approximately $366,000. In addition, on another project that came before the county commission involving the purchase of a waterfront preservation easement for a yacht center, Mr. Newell concealed that he docked his boat at the yacht center and owed significant boat dockage fees ($40,000), later receiving forgiveness of his dockage fees as a kickback. He also concealed his financial interest in another land deal which came before the commission. Newell's sentence was subsequently reduced by two years for providing evidence against former Palm Beach County Commissioner Mary McCarty.

On January 8, 2009, Palm Beach County Commissioner Mary B. McCarty resigned her post, stating that she had failed to disclose free and discounted hotel rooms provided to her by a company doing business with the county, and also had failed to recuse herself on county bond issues that benefited companies that employed her husband. The benefits to the McCarty's were said to have been in the amount of $300,000. Mrs. McCarty pleaded guilty to depriving the public of her honest services, and was sentenced on June 4, 2009, to serve a prison term of 42 months, to be followed by three years of supervised release, and must pay a fine in the amount of

$100,000. The McCarty's had previously forfeited $272,000 to the U.S. government. Her husband was sentenced to a prison term of eight months.

The Palm Beach County Commission recently adopted several ethics reforms, including the creation of an ethics commission and hiring an inspector general as an independent watchdog.

3. Levy County, Florida. On December 4, 2009, a jury found former Levy County Commissioners William Samuel Yearty and Robert Anthony Parker guilty on charges of one count of conspiracy to commit bribery and one count of bribery, in connection with their offers of approval for real estate developments in exchange for money and other inducements. Yearty was also convicted of one count of knowingly making a false or fraudulent statement to a federal investigator. Sentencing is scheduled for April 5, 2010.

4. Dixie County, Florida. On August 6, 2009, former County Commissioners Alton Land and John Lee Driggers, along with retired building and zoning inspector Billy Keen, Jr., were convicted for solicitation of bribes, conspiracy to commit that offense, and lying to federal agents, for accepting money and other inducements to approve rezonings and real estate developments. Keen was also convicted of federal program fraud for obtaining grant funds in his girlfriend's name to renovate his personal home. Keen received a 78-month prison sentence, and was ordered to forfeit a house and pay $32,010 in restitution. On January 13, 2010, Land and Driggers were both sentenced to 37 months in federal prison.

Two Cross City officials, Councilman Marcellus Dawson and City Superintendent Johnny Miller Green, were convicted on January 8, 2010 of conspiracy and accepting bribes. Greene was also convicted for making false statements to the FBI. The officials allegedly offered their approval of building projects to an undercover agent in exchange for money and other inducements. Dawson accepted $1,600 and Greene accepted $600 from the undercover agent. The sentencing hearing is set for May 3, 2010.

On October 9, 2009, former Dixie County Attorney Joseph T. (Joey) Lander was convicted of six felony counts of mail fraud and 11 felony counts of money laundering, for fraudulently requiring developers to pay him personally for performance bonds for developments, plus using his position to entice others to invest in his start-up vitamin business. It is estimated that he pocketed over $1 million during a period of 18 months. He was sentenced to 87 months in federal prison plus three years probation, ordered to pay a $50,000 fine and $1,600 in court costs, and had to forfeit his co-ownership in a local weekly newspaper. A restitution hearing for the victims of his schemes is forthcoming.

5. St. Johns County, Florida. On July 31, 2009, former St. Johns County Commissioner Thomas G. Manuel pleaded guilty to one count of bribery for taking a $10,000 bribe from a developer to obtain approvals for a development known as Twin Creeks. According to the Factual Basis filed in this case by the U.S. government, Mr. Manuel met with an attorney for the developer and the developer, and pressured the developer to make charitable donations to various organizations. The attorney and developer informed the FBI of this matter and began recording conversations with Mr. Manual. Mr. Manuel continued to tell the developer

to make contributions to various charitable organizations, or the developer's future business before the County Commission would be in jeopardy. Mr. Manuel subsequently accepted $10,000 in cash and then $50,000 in cash from the developer for Mr. Manuel's continued support. After accepting the $50,000 cash payment, Mr. Manuel was immediately detained by the FBI and the $50,000 was seized. He was sentenced to 21 months in prison, to be followed by 16 months of house arrest and three years probation.

6. Monroe County, Florida. In 2005 former Monroe County Mayor John L. "Jack" London pleaded guilty to one count of tax fraud for the receipt of a $29,000 bribe from a lobbyist hired by a real estate developer to help obtain building permits for a Marathon hotel project. The funds were used to satisfy a real estate lien on property London owned in Ireland. As part of his plea Mr. London also agreed to testify in the government's case against former County Attorney James T. Hendrick, who had acted as a conduit between London and the lobbyist. However, prior to the trial of Hendrick, Mr. London died of natural causes. In 2007 Hendrick was found guilty of one count of conspiracy, one count of obstruction of justice, and two counts of witness tampering, and received five years probation. On appeal, the 11th Circuit Court of Appeals upheld the convictions but found the sentence to be unreasonable (i.e., not tough enough) and remanded the case for resentencing. On September 11, 2009, Mr. Hendrick was resentenced to probation, plus house arrest, a $50,000 fine, and 1,500 hours of community service.

7. Broward County, Florida. In the early morning of September 23, 2009, three Broward public officials were arrested in a federal sting dubbed "Operation Flat Screen." Broward County Commissioner Josephus ("Joe") Eggelletion was charged with conspiring to launder money and filing a false tax return, for his role in the laundering of more than $900,000 through a Bahamas bank account. Mr. Eggelletion pleaded guilty to these charges and was sentenced to 30 months in prison. He is cooperating with state prosecutors in the cases involving his co-conspirators.

School Board member Beverly Gallagher was charged with five counts of honest services fraud, one count of extortion and one count of bribery, for allegedly accepting $12,500 in cash, boat trips and restaurant meals to steer school board construction projects to undercover FBI agents posing as subcontractors. She pled guilty to the bribery charge and will be sentenced on June 10, 2010.

Former Miramar City Commissioner Fitzroy Salesman was also arrested on two counts each for mail fraud, extortion and bribery, for allegedly receiving $4,340 to steer city construction contracts to undercover FBI agents. His jury trial began March 22, 2010.

In September 2007, former City of Hollywood Commissioner Keith Wasserstrom was convicted on two felony counts of official misconduct for failing to disclose financial ties to a sludge company that won an $18 million contract with the city. He was sentenced to 60 days in jail and four years probation, which he appealed. A state appeals court recently upheld the conviction.

8. Miami. On March 3, 2010, a grand jury issued an indictment charging suspended Miami Commissioner Michelle Spence-Jones with grand theft and bribery, felonies of the second degree, for allegedly funneling $50,000 in grant funds to a family business. On November 13, 2009, Miami Commissioner Angel Gonzalez was charged with a misdemeanor count of exploitation of public position for orchestrating his daughter's employment at a construction company without her actually having to report for work. Earlier in the year Gonzalez was cited for failing to report $135,000 in rental income on his financial disclosure forms, but he amended the forms and paid a $2,500 fine.

On November 30, 2009, City of West Miami Mayor Cesar Raul Carasa was charged with two counts of exploitation of official position, relating to his use of a city-issued cell phone to make personal long distance phone calls to the Dominican Republic and other locations outside the United States in excess of $70,000.

D. Other Developments.

1. Senate Bill. For the 2010 legislative session, Senator Dan Gelber of Miami Beach filed Senate Bill S 0444, which, if approved, would create a state law prohibiting a public servant from engaging in a scheme or artifice to deprive another of the intangible right of honest services.

2. Statewide Grand Jury. At the request of Governor Charlie Crist, the Supreme Court of Florida entered an order on December 2, 2009, directing the impanelment of a statewide grand jury for a period of 12 months to investigate crimes committed by local and state officials when acting in their official capacity. The statewide grand jury will be allowed to make inquiries into offenses occurring, or having occurred, in two or more judicial circuits, or when any such offenses are connected with an organized criminal activity affecting two or more judicial circuits. The Honorable Victor Tobin, Chief Judge in and for the Seventeenth Judicial Circuit (Broward County), was designated as the presiding judge over the statewide grand jury.

3. Ethics Commission. The Florida Commission on Ethics will reportedly ask the Legislature to raise the fines for violations of the state's ethics laws, plus increase the Commission's powers, specifically, the power to initiate investigations of wrongdoing by public officials.

II. LEGAL REPRESENTATION OF A PUBLIC OFFICIAL ATTORNEY'S FEES AND COSTS OF DEFENSE

A. Statute. Pursuant to Section 111.07, Florida Statutes, any agency of the state, or any county, municipality or political subdivision of the state is authorized to:

(1) 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 any of its officers, employees, or agents arising out of and in the scope of his or her employment or function;

(2) recover any attorney's fees paid from public funds, should the officer, employee, or agent be 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; or

(3) reimburse such person who prevails in the action for court costs and reasonable attorney's fees, should the county be authorized to provide an attorney to defend the 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, and the county fails to provide such attorney.

B. Cases.

The case of Ellison v. Reid, 397 So.2d 352 (Fla. 1st DCA 1981) centered on a request by a property appraiser for the payment of attorney's fees incurred in the successful defense of a complaint before the Florida Commission on Ethics. The First District Court of Appeal held that the use of public funds to pay for the attorney's fees of the property appraiser was proper. The Court determined that public officers were "entitled to a defense at the expense of the public in a lawsuit arising from the performance of the officer's official duties and while serving a public purpose." 397 So.2d at 354. The First District Court of Appeal further stated as follows:

> 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.

Id. (Emphasis supplied.)

The case of Lomelo v. City of Sunrise, 423 So.2d 974 (Fla. 4th DCA 1982), involved a request by the mayor of the City of Sunrise for the payment of attorney's fees incurred in his successful defense against a felony indictment. In this case, the Fourth District Court of Appeal held that the mayor was entitled to have his attorney's fees paid by the city, and that the city could not refuse to pay the fees simply because they disapproved of the mayor=s actions. The Court stated as follows:

> [A] municipal corporation or other public body is **obligated** to furnish or pay fees for counsel to defend a public official subject to attack either in civil or criminal proceedings where the conduct complained of arises out of or in connection with the performance of his official duties. This obligation arises independent of statute, ordinance or charter. It is not subject to the discretion of the keepers of the city coffers.

423 So.2d at 976. (Emphasis supplied.)

Moreover, in the case of Thornber v. City of Ft. Walton Beach, 568 So.2d 914 (Fla. 1990), the Florida Supreme Court set forth the following general rule:

> Florida courts have long recognized that public officials are entitled to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose. The purpose of this common law rule is to avoid the chilling effect that a denial of representation might have on public officials performing their duties properly and diligently. This entitlement to attorney=s fees arises independent of statute, ordinance, or charter. 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.

568 So.2d at 916-917. (Citations omitted.) This case involved a claim by three city council members for the reimbursement of attorneys fees expended in successfully enjoining a recall petition and successfully defending a civil rights action. The Supreme Court found that the city council members met the two-pronged test and were thus entitled to the reimbursement.

However, in the case of Chavez v. City of Tampa, 560 So.2d 1214 (Fla. 2d DCA 1990), the Second DCA held that the city was not required to provide reimbursement for the legal expenses of a city council member who successfully defended an ethics charge. In this case, the ethics charges arose from her vote as a city council member on a petition for an alcoholic beverage zoning classification at a business premises she had leased. Although the court did determine that the council member was performing an official duty by voting, the court concluded that the action did not serve a "public purpose." Rather, the vote directly advanced the private interests of the city council member. Thus, the city was not required to pay for the legal fees incurred by the city council member in defending the charges.

C. Leon County examples.

In 2007 the First District Court of Appeal issued opinions in two Leon County cases: Maloy v. Board of County Commissioners of Leon County, 946 So. 2d 1260, (Fla. 1st DCA 2007), rev. den. 962 So. 2d 337 (Fla. 2007), and Leon County v. Stephen S. Dobson, III, P.A., 957 So. 2d 12 (Fla. 1st DCA 2007), rev. den. 962 So. 2d 337 (Fla. 2007). Both cases emanated from requests by former Leon County Commissioner Rudy Maloy for reimbursement of attorney's fees and costs pursuant to Leon County policy.

The first case, Maloy, centered on the request by former Commissioner Maloy for reimbursement of attorney's fees incurred in the successful defense of ethics charges. The lower court ruled in favor of Leon County, and upheld the decision by the Leon County Board of County Commissioners to not reimburse Maloy for legal fees in that matter. The First District Court of Appeal affirmed the lower court's opinion, finding that Maloy failed to satisfy the public purpose prong of the Thornber test, stating as follows:

> Mr. Maloy's conduct in the present case did not serve a public purpose. That is, 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. Although cleared of the alleged misconduct, Maloy's underlying activity did not serve the public interest and the trial court's ruling correctly reflects this conclusion.

942 So. 2d at 1265.

The second case, Dobson, involved a request by former Commissioner Maloy for reimbursement of attorney's fees incurred in defending criminal proceedings brought by the State Attorney's Office. Maloy was found not guilty of the charges, and his attorney, Dobson, filed suit seeking in excess of $300,000.00 in attorney's fees. The circuit court determined that Leon County was responsible for a portion of the fees pursuant to the Thornber test, as Maloy's actions arose out of his official duties while serving a public purpose. On appeal, the First District Court of Appeal likewise affirmed the lower court's award of attorney's fees to Dobson. However, the First DCA also upheld the circuit court's denial of Dobson's request for attorney's fees for successfully litigating entitlement to indemnification.

D. Policy. All local governments should adopt in advance a policy and procedure that addresses when the local government will provide a defense to a local government official who is charged with an ethics violation or is named as an individual defendant in litigation. Below is Leon County's policy on the reimbursement of attorney's fees and costs.

Policy No. 03-02.

It shall be the policy of the Board of County Commissioners of Leon County, Florida, that:

Section 1.
INTENT: As used in the balance of this policy, the words "successfully defend or prevail" shall apply to individual counts, charges and/or allegations, and shall mean the dismissal, the finding of not guilty, or a verdict in favor of the person covered herein as set forth in Section 3, below. A failure to successfully defend or prevail against one or more counts, charges or allegations shall not necessarily affect the application of the policy to other counts, charges and/or allegations which were successfully defended or against which the officer or employee prevailed.

Section 2.
DEFINITIONS: "Reasonable attorney's fees" shall mean fees earned by an attorney and/or attorneys licensed to practice law in the State of Florida, based on the customary per hour rate charged in Leon County, Florida, for similar work performed by attorneys within the county, but in no event to exceed $175 per hour.

Section 3.
Subject to Section 7, the Board of County Commissioners of Leon County shall, pursuant to the procedures set forth herein, reimburse present and former county commissioners and county public officers, and their present and former employees and agents, including appointees of the Board or such officers, for the reasonable attorney's fees and costs that such persons have incurred when they successfully defend or prevail in civil, criminal, and/or ethical investigations and/or actions that arise out of and in connection with their scope of county employment or county function, while acting in their official capacity, and while serving a public purpose. The Board of County Commissioners shall determine if the attorney's fees and costs shall be reimbursed, and if so, in what amount.

Section 4.
Any person who believes that he or she is allowed or entitled to payment for reasonable attorney's fees and costs pursuant to the provisions of this policy shall as a condition precedent to entitlement to such reimbursement, notify the County through its County Attorney, in writing within 10 days of the retention of a private attorney. Such notification shall include the reason for retention of a private attorney and recitation of the fee agreement. Thereafter, at anytime should fees and costs exceed $5,000, such person shall immediately notify the County Attorney in writing that such threshold amount has been expended and establish good cause why the threshold amount should be exceeded.

Subsequently, any person who believes he or she is entitled to reimbursement of attorney's fees and costs pursuant to this policy shall file within 30 days of conclusion of the matter a written request for such fees and costs with the County Attorney, which request shall at the minimum state:

a. the name and current address of the person making the request;
b. a description of the entity conducting the investigation or proceeding;
c. the case number or file number of the investigation or proceeding, if known;
d. a description of each count, charge and/or allegation made or being investigated;
e. the date(s) that the alleged wrongful incidents are alleged to have occurred;

f. the person's office or position of employment with the county on the dates described in (e.) above;
g. a narration of the reasons why such person believes that the request meets the criteria set forth in this policy and that his or her attorney's fees and costs should be reimbursed by the county;
h. the name(s), address, and telephone number of the attorney(s) representing such person against the counts, charges, and/or allegations described in (d.) above;
i. a description of the fee arrangement or agreement between the person and his or her attorney(s); the amount of attorney's fees and costs paid to the date of the written request for attorney's fees and costs for defense against the counts, charges, and/or allegations described in (d.) above; and the total balance due, if any, of all attorney's fees and costs that have been incurred in defense against the counts, charges, and/or allegations described in (d.) above; and
j. such other information as the Board of County Commissioners and/or the County Attorney's Office may reasonably require.

Section 5.
Within a reasonable time following receipt of the written request for payment of attorney's fees and costs, the County Attorney shall prepare and present an agenda item for consideration by the Board. In the agenda item for the Board's consideration, the County Attorney shall include a recommendation on the applicability of this policy to the request for payment of attorney's fees and costs. The Board may: (1) request additional relevant information from the applicant; (2) continue the request to a date and time certain; or (3) take action upon the written request and determine if the attorney's fees and costs shall be reimbursed, and if so, in what amount.

Section 6.
Upon receipt of the written request, the County Attorney shall also communicate with the County's "insurance" providers to determine and advise the Board whether such "insurance" providers will indemnify the County for any attorney's fees and costs incurred by the applicant in defense against such counts, charges, or allegations.

Section 7.
Notwithstanding anything to the contrary stated or implied herein, this policy does not address or pertain to recall proceedings or to employee discipline or termination proceedings. In the event such recall, discipline or termination proceedings occur concurrently with the issues and/or proceedings described above, such recall, discipline or termination proceedings shall not affect the application of this policy to the above described non-recall, non-discipline or non-termination issues or proceedings.

Section 8.
This Policy shall become effective upon adoption and shall apply to all requests for reimbursement of attorneys fees and costs.

III. UPDATE ON ADVISORY OPINION 09-1

On January 22, 2010, the Professional Ethics Committee approved Proposed Advisory Opinion 09-1, interpreting Rule 4-4.2 of the Rules of Professional Conduct of The Florida Bar (the "no-contact" rule) to permit a lawyer to communicate with government officers, agents and employees who are represented by counsel. Appeals to the Board of Bar Governors have been filed by Marion J. Radson on behalf of the City, County, and Local Government Law Section of The Florida Bar and Mr. Radson, individually. In addition, the Office of Financial Regulation, Financial Services Commission, State of Florida, has filed an appeal on behalf of that office, as has the Florida Association of County Attorneys. The appeals will be considered on May 27, 2010.