



From: Craig E. Leen, City Attorney for the City of Coral Gables 

RE: Legal Opinion Regarding Legal Representation Policy Statement

It is the policy of the City Attorney's Office for the City of Coral Gables (the "City Attorney's Office") to provide representation to the City of Coral Gables (the "City") as well as City of Coral Gables' employees where claims are brought against those individuals for actions taken in the course and scope of their employment with the City of Coral Gables. Moreover, the City Attorney's Office finds that providing such representation to both the City and its employees does not engender a conflict of interest, but rather, serves the substantial public interest of protecting the welfare of City employees, thereby, permitting those employees to faithfully perform their official duties without fear of civil reprisal or retribution. Moreover, providing such representation also ensures that both the City and its employees are provided legal representation of the highest caliber. This Office's policy of providing representation to City employees is supported by Third District precedent, Section 111.07 of the Florida Statutes, and Article IV, Section 2-201(e)(5) of the City's Municipal Code. More specifically, in *Nuzum v. Valdes*, 407 So. 2d 277, 279 (Fla. 3d DCA 1981), the Third District recognized that "[t]o 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." Likewise, Florida Statutes Section 111.07, in relevant part, states:

Any agency of the state, or any county, municipality, or political subdivision of the state, 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, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Defense of such civil action includes, but is not limited to, any civil rights lawsuit seeking relief personally against the officer, employee, or agent for an act or omission under color of state law, custom, or usage, wherein it is alleged that such officer, employee, or agent has deprived another person of rights secured under the Federal Constitution or laws.

Fla. Stat. § 111.07. And, finally, Section 2-201(e)(5) of the City of Coral Gables' Municipal Code states, "[t]he city attorney shall be the head of the legal department, and in that capacity shall have the following authority . . . [t]o represent or provide for the representation of city officers and employees where required by law or where otherwise appropriate, and where such officers and employees are sued based on actions taken in their official capacities." City of Coral Gables' Municipal Code Article IV, § 2-205(c)(5).

Furthermore, it is this Office's position that the mere allegation that an employee willfully violated the civil rights of others or otherwise acted with malice is not sufficient to disqualify this Office from representing such an employee. Instead, there must be an actual finding, from a court of competent jurisdiction or the City itself, that the employee willfully violated the civil rights of others or otherwise acted with malice to create such a disqualification from representation. Otherwise, a complaint alone - regardless of how frivolous the allegations may be - could dictate an employee's entitlement to representation. Thus, in conclusion, the City Attorney's Office will provide legal representation to City employees for actions taken within the course and scope of her employment, unless there is a finding - from a court of competent jurisdiction or the City itself- that the employee willfully violated the civil rights of others or otherwise acted with malice.

Finally, any representation of City employees by this Office must not be adverse to the City, and must be otherwise consistent with the Florida Bar Rules, including Bar Rule 4-1.7, regarding representation and conflicts of interest where multiple defendants are sued (i.e. the City and its employees). In all situations where there are multiple defendants, the Office will provide an "explanation of the implications of the common representation and the advantages and risks involved," consistent with Rule 4-1.7(d). In situations where there is no conflict of interest, the Office will provide representation consistent with the policy discussed above if the employee signs a retainer agreement similar to the attached form. In situations where there is a potential or otherwise waivable conflict of interest, the Office will seek to provide representation to the City and its employees, assuming any appropriate conflict waivers and disclosures are provided as part of the retainer agreement, and representation is otherwise consistent with Bar Rule 4-1.7 and this policy. In situations where there is a present and unwaivable conflict of interest precluding representation of both the City and its employee(s), but where representation is otherwise consistent with the policy above, the Office will represent the City and will seek to retain outside conflict counsel to represent the employee(s) where appropriate and consistent with this policy. Any decision to retain outside conflict counsel must be approved by the City Attorney. The City Attorney always has the authority to hire outside conflict counsel where the City Attorney determines it is appropriate under the Florida Bar Rules, applicable law, or the policy discussed above.

This policy is a statement of principles and does not create any rights to representation in any individual employee. Below is a template retainer agreement for the representation of City employees by the City Attorney's Office.

**CITY OF CORAL GABLES
OFFICE OF THE CITY ATTORNEY**

TEMPLATE CITY EMPLOYEE RETAINER AGREEMENT

By service of a Summons and Complaint in the above-styled lawsuit, you have been made a defendant in this case. The Plaintiffs have sued you individually for purported violations of _____'s civil rights under federal law. In particular, Plaintiffs have alleged that you engaged in acts constituting a violation of _____'s Fourth Amendment rights under the Constitution of the United States.

The City Attorney's Office is employed by and represents the City of _____'s. As we now understand the facts and circumstances of this case, we are also able to represent you, provided that no conflict exists or arises between you and the other defendants, and provided that you fully cooperate with us in defending you. It is very important that you read, understand, and agree to these conditions, as we explain below.

Of course, you have the right to employ different counsel at your own expense, through your union, or through other means arranged by you. I emphasize that you are not required to employ private counsel, but that you have the right to do so if you choose.

Conflict of Interest. In addition to the City of _____, _____ has also been named as a defendant in this lawsuit, and may choose to be represented by this Office. Based on the information currently available, we do not believe any conflict of interest exists that would preclude us from fully defending you. However, because we represent the City of _____, we are ethically required to assert all appropriate legal positions and defenses on its behalf.

[In the event there is a waivable or resolvable conflict of interest, include language disclosing and waiving or resolving the conflict here in a manner consistent with the Florida Bar rules].

If a conflict of interest arises in the future, you will be promptly advised and steps will be taken to resolve the conflict. However, if the conflict cannot be resolved, the City Attorney's Office may not be able to continue representing you.

For example, we may withdraw from representation if we receive information that leads us to believe that you may not have acted within the scope of your employment or in the discharge of your duties, or that you were in violation of any law, rule, or regulation. We may also withdraw from representation if a conflict of interest arises between you and any other defendants in this action who are represented by our Office.

Since you have been sued individually, there is the possibility that a judgment for money damages may be entered against you. While the City will ~~try~~ to make every effort to pay any judgment entered against you, pursuant to Florida law, the City is not obligated to and cannot pay on your behalf any final judgment that arises from an act committed outside the scope of your employment, in bad faith, with malicious purpose, or in a manner

exhibiting wanton and willful disregard of human rights, safety, or property, or that is based on your intentional violation of Plaintiffs' civil rights. *See* Fla. Stat. §§ 111.07; 111.071(1)(a); 768.28(5); & 768.28(9)(a). Therefore, if Plaintiffs were to prove these allegations, you alone could be held personally liable for the payment of compensatory and punitive damages assessed against you, or you could be personally liable for any sums that might be payable in settlement of such claims. Plaintiffs may also be entitled to recover attorneys' fees and costs of suit against you individually.

As you can see, whether a conflict of interest exists, either now or at any time in the future, is very significant. If you have *any* concerns about the nature of your conduct or *any* potential conflicts of interest between you and the City or any other defendants, **WE STRONGLY RECOMMEND THAT YOU CONSULT WITH PRIVATE COUNSEL (OR YOUR UNION, IF APPLICABLE) TO ADVISE YOU OF YOUR OBLIGATIONS AND RIGHTS BEFORE DISCUSSING THE CASE WITH US OR SIGNING THIS CONSENT TO REPRESENTATION.**

Full Cooperation. As the litigation proceeds, we will need to communicate with you to protect your interests and to advise you about the litigation. Your presence and participation will likely be required for consultations, mediations, depositions, discovery, pre-trial preparation, and/or trial, and failure to appear could jeopardize your defense by this office. Therefore, if you change your address, phone number(s), or place of employment, you must advise us immediately.

Just as a conflict of interest, as described above, might require us to withdraw from representing you, any failure on your part to cooperate with our Office in defending against this lawsuit, or other irreconcilable differences arise between you and our attorneys, might require our withdrawal as well. Of course, before withdrawing, we will make every effort to resolve the problem otherwise.

If you decide to be represented by the City Attorney's Office, and agree to abide by the terms and conditions of that representation as outlined in this letter, please sign this letter below and return it to me as soon as possible. Again, you are free to consult private counsel before making your decision. If you have any questions whatsoever, please call me at _____.

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LEGAL REPRESENTATION POLICY STATEMENT

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Fla. Stat. § 111.07. And, finally, Section 2-201(e)(5) of the City of Coral Gables' Municipal Code states, "[t]he city attorney shall be the head of the legal department, and in that capacity shall have the following authority . . . [t]o represent or provide for the representation of city officers and employees where required by law or where otherwise appropriate, and where such officers and employees are sued based on actions taken in their official capacities." City of Coral Gables' Municipal Code Article IV, § 2-205(e)(5).

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retain outside conflict counsel to represent the employee(s) where appropriate and consistent with this policy. Any decision to retain outside conflict counsel must be approved by the City Attorney. The City Attorney always has the authority to hire outside conflict counsel where the City Attorney determines it is appropriate under the Florida Bar Rules, applicable law, or the policy discussed above.

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Of course, you have the right to employ different counsel *at your own expense*, through your union, or through other means arranged by you. I emphasize that you are not required to employ private counsel, but that you have the right to do so if you choose.

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also withdraw from representation if a conflict of interest arises between you and any other defendants in this action who are represented by our Office.

Since you have been sued individually, there is the possibility that a judgment for money damages may be entered against you. While the City will try to make every effort to pay any judgment entered against you, pursuant to Florida law, the City is not obligated to and cannot pay on your behalf any final judgment that arises from an act committed outside the scope of your employment, in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, or that is based on your intentional violation of Plaintiffs' civil rights. *See Fla. Stat. §§ 111.07; 111.071(1) (a); 768.28(5); & 768.28 (9) (a)*. Therefore, if Plaintiffs were to prove these allegations, you alone could be held personally liable for the payment of compensatory and punitive damages assessed against you, or you could be personally liable for any sums that might be payable in settlement of such claims. Plaintiffs may also be entitled to recover attorneys' fees and costs of suit against you individually.

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If you decide to be represented by the City Attorney's Office, and agree to abide by the terms and conditions of that representation as outlined in this letter, please sign this letter below and return it to me as soon as possible. Again, you are free to consult private counsel before making your decision. If you have any questions whatsoever, please call me at _____.