THE ETHICAL AND EFFECTIVE REPRESENTATION OF GOVERNMENT EMPLOYEES BY GOVERNMENT ATTORNEYS

Craig E. Leen*[1]

I. INTRODUCTION—ROLE OF GOVERNMENT ATTORNEY AND OF GOVERNMENT EMPLOYEE

Local governments are composed of local government employees tasked with the duty to serve the public on a daily basis.[2] These employees provide essential government services such as police and fire protection, building inspections, structural and engineering plan reviews, garbage

 Craig E. Leen, City Attorney, City of Coral Gables. J.D., Columbia Law School; B.A., *cum laude*, Georgetown University. Mr. Leen was appointed city attorney and chief legal officer of the City of Coral Gables in 2011. He is Board Certified by the Florida Bar in city, county, and local government law. Mr. Leen is on the adjunct faculty of the University of Miami School of Law and the Florida International University College of Law, where he teaches state and local government law and other subjects. Prior to being city attorney, Mr. Leen served as chief of the Federal Litigation Section, and previously as chief of the Appeals Section at the Miami-Dade County Attorney's Office. At the County Attorney's Office, Mr. Leen served as counsel of record in approximately fifty civil rights cases in federal court, representing individual government employees in many of these cases. Mr. Leen also previously served as a federal law clerk to the Honorable Robert E. Keeton, United States District Judge, for the United States District Court, District of Massachusetts. Mr. Leen presently serves on the Florida Rules of Judicial Administration Committee, including as chair of its Drafting and Internal Operating Procedures Subcommittee; on the Executive Council of the City, County, and Local Government Law Section of the Florida Bar; on the Ad Hoc Committee on Rules and Procedures for the Southern District of Florida (Local Rules Committee); on the Steering Committee of the Florida Municipal Attorneys Association; and on the City Attorney Advisory Committee for the Miami-Dade County League of Cities. Previously, Mr. Leen was the vice chair of the Florida Appellate Court Rules Committee and served on the Resolutions and Legislative Committees of the Florida League of Cities.

1. This Article follows from several lectures and panel discussions Mr. Leen has recently given regarding the representation of government employees, including: (1) *Preserving Attorney Fee Issues and Ethical Considerations Representing Local Governments and Local Government Officials* at the 38th Annual Local Government Law in Florida Seminar; (2) *Local Government Attorneys, Who's the Client?* at the Coral Gables Bar Association July 2015 CLE Luncheon; and (3) *Who Owns the Privilege?* at the Miami-Dade County League of Cities Attorney Luncheon Seminar. In addition, many of the points discussed in this Article are based on ideas and approaches Mr. Leen developed handling cases and motion practice as a government attorney representing individual government employees. Mr. Leen would like to give special thanks to the Coral Gables City Attorney's Office and the Miami-Dade County Attorney's Office, as his entire time as a government attorney has been spent in these two great offices.

2. *See generally* Waggoner Carr, *Interrelated Responsibilities*, 29 TEX. B.J. 577, 577–80 (1996) (discussing responsibilities of federal, state, and local governments).

collection, legal and compliance review, and sewer services.[3] These employees also provide highly desired programs such as parks and recreation, historic preservation, and art and cultural opportunities.[4] A city like Coral Gables (the City), for which I serve as City Attorney, also has a very robust planning and zoning division that ensures its beauty and the long-term retention of property values.[5]

In my experience, similar to that of Coral Gables, most local governments in Florida are structured to have a Commission–Manager form of government.[6] In these systems, the Commission establishes policy and provides oversight for the city government, which is headed by a chief administrative officer.[7] There is also traditionally a chief legal officer who works directly for the Commission.[8] Municipal governments are the focus of this Article, so these officers will be referred to as the city manager and city attorney.

The government employees who provide the government services discussed above take administrative direction from the city manager (often through directors appointed by the city manager),[9] and receive legal counsel, advice, and opinions from the city attorney.[10] The ideal

3. *Id.*

4. *See 2015–2016 Budget Estimate*, CITY CORAL GABLES, http://www.coralgables.com/modules/showdocument.aspx?documentid=16496 (last visited Mar. 28, 2016) (stating that a city—Coral Gables, Florida in this instance—"remains committed to delivering essential municipal services (including Public Safety, Sanitation, and Parks [and] Recreation)").

5. *See id.* (describing the City's structure).

6. For purposes of this Article, the governing body is referred to as the Commission, although it is often referred to as Council. There are five recognized forms of municipal governments, including: Commission–Manager, Mayor–Commission (strong mayor or weak mayor), Commission, Town Meeting, and Representative Town Meeting. *Forms of Municipal Governments*, NAT'L LEAGUE OF CITIES, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-structures/forms-of-municipal-government (last visited Mar. 28, 2016).

7. *Id.*; *The Commission–Manager Form of Government*, NAT'L ASS'N OF CNTYS., http://www.naco.org/sites/default/files/documents/Commission-Manager%20Form%20of%20Governmnet.pdf (last updated Oct. 2009).

8. In my experience as city attorney, and formerly as assistant county attorney, local government attorneys typically answer directly to the Commission or Council, and not to the chief administrative officer. In fact, I have not seen a case where the city manager or county manager hired the city attorney or county attorney. In the City of Coral Gables, the city attorney is hired by the City Commission. CORAL GABLES, FLA., CODIFIED ORDINANCES § 17 (Municode through Ordinance No. 3292, enacted Dec. 16, 1997), *available at* https://www.municode.com/library/FL/coral_gables/codes/code_of_ordinances?nodeId=PTICHRELA_SPACH_ARTIICICOMA_S17APOFREPR (authorizing the Commission to hire city manager, city clerk, and city attorney, "which officers shall hold office at the will of the Commission").

9. CORAL GABLES, FLA., COMPILED CHARTER §§ 20, 21, 22, 23 (compiled on Jan. 1, 1954 with the approval of the City Attorney), *available at* https://www.municode.com/library/fl/coral_gables/codes/code_of_ordinances?nodeId=PTICHRELA_SPACH_ARTIICIMA (granting executive and administrative authority to city manager).

10. CORAL GABLES, FLA., CODIFIED ORDINANCES § 2-201(e)(1), (5) (Municode through Ordinance No. 2012-05, enacted Mar. 27, 2012), *available at* https://www.municode.com/

goal of this system is to provide government services in an administratively efficient and legal manner without resulting in unnecessary liability for the government or its employees.[11]

Of course, lawsuits can never be completely avoided. Even if the government acts with perfect intent, negligence can still occur, such as in the form of a car accident involving a city employee or a trip-and-fall on a city sidewalk. Likewise, even though the government acts lawfully, such as when a police officer conducts an arrest on probable cause, the suspect may still sue and challenge the basis for his arrest. In addition, there are reported cases where government employees do not act with good intent, or where flawed individuals make wrongful decisions, exposing the public to harm and the government to liability.

The purpose of this Article is to provide a guide to practitioners and government attorneys on how to handle lawsuits against government employees from start to finish. Part II establishes the importance of a moral commitment from the government to the employees to provide them with representation for actions taken in their official capacities. Part III assesses the relevant statutory authority that authorizes representation of government employees by government entities. Part IV discusses adoption of a representation policy by the government to provide clear notice to the employees in advance of a matter arising that the government will provide broad representation to its employees, which ensures that the decision is never based on personalities or politics, but rather on the underlying facts and established rules. Part V analyzes the relevant Florida Bar Rules of Professional Responsibility regarding the decision whether to provide representation to an employee in a given case and recommends the use of standardized representation and conflict letters. This Part further explains how these letters can be modified to address the specific facts at issue to help ensure that the government employee is fully informed and knows the scope of the representation.

Part VI then addresses how to effectively represent a government employee, including raising the specific immunities and defenses that are uniquely available to government employees. Parts VII analyzes the ability to seek stays of discovery to protect the purpose of the underlying immunity, while Part VIII discusses whether interlocutory appeals are in the employees' best interests; how to prosecute them, once they are taken; and how to handle such an appeal when the trial court has rejected an

library/fl/coral_gables/codes/code_of_ordinances?nodeID=SPAGEOR_CH2AD_ARTIVOFEM_S2-201CIATLEDE.

11. *The Commission–Manager Form of Government*, *supra* note 7.

immunity defense. Finally, Parts IX and X cover trials of government employees, including the government attorney's ability to request special interrogatories and verdict forms (Part IX), and analyze the types of judgments entered against the employees (Part X).

The underlying premise is that the government, the public, the parties, and the justice system all benefit when government employees receive the full benefit of representation by government attorneys or government-paid outside counsel from beginning to end in a case, except for when the employee has clearly acted maliciously or in bad faith. This guidance also comes with a warning: once a decision to represent the employee has been made, and all representation and conflict issues have ethically been resolved, the government attorney must zealously represent that client, raise all available defenses and immunities, and seek interlocutory review where warranted.

II. MORAL COMMITMENT TO REPRESENT GOVERNMENT EMPLOYEES

Government employees rely on the government's moral commitment to represent them if they are sued while conducting the public's business. Individual government employees, including Florida government attorneys and doctors, do not typically purchase malpractice or other insurance to protect them from individual liability.[12] The reason: individual government employees cannot lawfully be sued for mere negligence under Florida law except for where they act outside the scope of employment.[13] This concept is called official immunity and is established in Section 768.28(9)(a) of the Florida Statutes, which reflects the common law rule making it difficult to sue government employees.[14] The purpose of these rules is to protect government employees from the specter of liability so that they may perform their public function without interference.[15] Instead of placing the liability for negligence on an

12. In my ten years of government service, including at both Miami-Dade County and the City of Coral Gables, I have not met a single government attorney or government doctor who has individually procured malpractice insurance, as such attorneys and doctors rely on the protection of the government entity and Section 768.28(9)(a), Florida Statutes.

13. FLA. STAT. § 768.28(9)(a) (2015).

14. *Id.* ("No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.")

15. *E.g.*, Tucker v. Resha, 648 So. 2d 1187, 1189 (Fla. 1994) ("The central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" (internal citation omitted) (quoting Elder

individual employee, the government entity bears the liability under Florida law within certain statutory caps.[16]

Even though government employees are protected from paying a judgment for negligence,[17] this does not necessarily protect them from suit when they have been negligent. This is because a plaintiff is the master of his or her complaint,[18] and may decide to sue the employee under a recklessness or willfulness theory, and may seek to allege a basis for punitive damages.[19] The government entity could conceivably decide not to represent the employee because the allegations are for conduct that is worse than mere negligence, even though the employee's actual conduct may not fit the allegations. The government does not have to accept the veracity of the allegations and may still represent the employee if the government believes the employee's actions were rightful—or even negligent.[20]

---

v. Holloway, 510 U.S. 510, 514 (1994))); *see also* Keck v. Eminisor, 104 So. 3d 359, 364–66 (Fla. 2012) (determining "that the policy considerations for allowing review by non-final-order" in the *Keck* case for a government employee raising immunity under Section 768.28(9)(a), Florida Statutes, is similar to the considerations in *Tucker* for federal qualified immunity). The concept that government employees do not bear liability for negligence runs counter to the rule for private parties, where both the employee and the employer are potentially liable for an employee's torts committed within the scope of employment under the doctrine of *respondeat superior*, although an election must be made when the suit is brought, with the employee being discharged from liability if the employer is successfully sued and a judgment satisfied. Atl. Cylinder Corp. v. Hetner, 438 So. 2d 922, 922–23 (Fla. 1st Dist. Ct. App. 1983); Weaver v. Stone, 212 So. 2d 80, 81 (Fla. 4th Dist. Ct. App. 1968).

16. *See* FLA. STAT. § 768.28(5) (limiting local government's tort liability to $200,000 per person, with a total cap of $300,000 per incident).

17. *Id.* § 111.071.

18. Jonathan S. Coleman, *"For Want of a Nail": Applying Florida's Reasonable Certainty Test to Lost Profit Damage Claims*, 83 FLA. B.J., May 2009, at 11, 18 (citing Am. Int'l Grp., Inc., v. Cornerstone Bus., Inc., 872 So. 2d 333, 338 (Fla. 2d Dist. Ct. App. 2004)).

19. Under Section 768.28(5), Florida Statutes, a plaintiff may not recover punitive damages against a government entity under state law, but no such restriction exists for suits against employees in their individual capacities. Likewise, the United States Supreme Court does not permit claims for punitive damages against local government entities under federal law, but does permit them against individual government employees. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266–69 (1981) (prohibiting claims for punitive damages against municipalities under Section 1983 while recognizing ability to assert claims for punitive damages against officials in their individual capacities).

20. Indeed, the government entity may have a moral, if not legal, duty to provide the representation in those specific circumstances to protect the employee's official immunity conferred by state law:

> [I]f a defendant who is entitled to the immunity granted in [S]ection 768.28(9)(a) is erroneously named as a party defendant and is required to stand trial, that individual has effectively lost the right bestowed by statute to be protected from even being named as a defendant. If orders denying summary judgment based on claims of individual immunity from being named as a defendant under [S]ection 768.28(9)(a) are not subject to interlocutory review, that statutory protection becomes essentially meaningless for the individual defendant.

Keck, 104 So. 3d at 366.

In fact, there is a moral responsibility to represent the government employee except in cases where the government believes that the employee has acted with malice or in bad faith.[21] The employee must sometimes make unpopular decisions or take actions that will expose the employee to substantial liability, all in serving the public. Indeed, there are times when any decision that is made on a particularly controversial matter could result in a lawsuit by an aggrieved party (from either side) challenging the government action, which places employees in an untenable situation if required to bear the costs of defending such a decision. Accordingly, unless the government entity is convinced that an employee betrayed the public trust and did not act in good faith, the government should offer a defense for that individual. This is ultimately in the interest of all stakeholders and parties, as it ensures accountability by the government entity for government action and allows government employees to act for the public good without substantial fear of personal liability.

III. LEGAL AUTHORITY TO REPRESENT GOVERNMENT EMPLOYEES

For purposes of this Article, I will refer to three different hypothetical government employees who have been sued: (1) a police officer sued for false arrest; (2) a government doctor sued for malpractice; and (3) a department director sued for defamation after the director spoke about a vendor's alleged lack of compliance with the requirements of a city contract.

When a government employee is named in a lawsuit and receives service of process, it is my experience that the government attorney may not receive the complaint until only a few days before a response is due. Indeed, although government entities receive thirty days to respond to a complaint under Section 768.28 of the Florida Statutes,[22] a government employee is not mentioned in the provision, so he is only entitled to the typical twenty days.[23]

The city attorney's initial responsibility is to ensure that there is no default. The attorney should receive the employee's approval to request

21. FLA. STAT. § 768.28(9)(a). As indicated in Section 768.28(9)(a), state law is clear that the government entity should be named in the lawsuit to the exclusion of the employee. In the Author's view, this places a moral responsibility on the government entity to provide a defense to the employee who has been improperly named in lieu of the government entity (as the government entity is the proper party unless bad faith or malice is present).

22. *Id.* § 768.28(7).

23. FLA. R. CIV. P. 1.140(a)(1).

an extension of time from the plaintiff's counsel to respond, which will typically be granted. If a motion for extension must be filed, the attorney should explain in the motion that the extension is sought to protect the employee's due process rights, and that the attorney and employee need time to determine whether the City Attorney's Office will represent the employee in the matter, or whether outside counsel will be obtained.

Once the attorney is certain that the government employee's rights are preserved, the attorney and the employee must determine whether the City Attorney's Office or outside counsel will represent the employee. If outside counsel is retained, the determination must be made whether the government entity or the employee will pay outside counsel.

The first question for the city attorney is whether the government has the legal authority to represent the government employee. This question is separate from the ethical issue of whether the attorney may ethically represent the employee, which must also be reviewed, and is addressed in Part IV. In Florida, the initial place to refer to is Section 111.07 of the Florida Statutes.[24]

Section 111.07 establishes that a government entity may provide an attorney to a government employee[25] sued civilly for damages for an action done within the scope of employment, unless the employee acted "in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."[26]

This section runs parallel with Sections 768.28(1)[27] and (9) of the Florida Statutes, which contain the limited waiver of tort liability for government entities and establish official immunity for government employees.[28] These sections establish that a government entity is liable, to the exclusion of the government employee, for tortious conduct occurring within the scope of employment, except where the employee acts "in bad faith[,] . . . with malicious purpose[,] or in a manner exhibiting wanton and willful disregard of human rights, safety, or

24. FLA. STAT. § 111.07.

25. The statute refers to "officers, employees, [and] agents," but for purposes of this analysis, the focus will be on government employees. *Id.*

26. *Id.*

27. "In accordance with [Section] 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act." *Id.* § 768.28(1).

28. *Id.* § 768.28(9)(a) ("No officer, employee, or agent of the state or of any of its subdivisions shall be . . . named as a party defendant in any action . . . ."); *see also* Rosenberg v. Kriminger, 469 So. 2d 879, 881 (Fla. 3d Dist. Ct. App. 1985) (determining that an officer was entitled to immunity in his personal capacity under Section 768.28 for statements made in the scope of office, and "the rationale for *official immunity* is the promotion of 'fearless, vigorous, and effective administration of policies of government.'" (emphasis added) (internal quotation marks omitted) (quoting Rupp v. Bryant, 417 So. 2d 658, 663 (Fla. 1982))).

property."[29] In cases where the employee acts in this extreme manner, the employee is liable to the exclusion of the government entity.[30]

The limitation in Section 111.07 is also similar to Section 111.071, Florida Statutes, authorizing payment of judgments by a government entity for actions of a government employee, as long as the limitations in Section 768.28 are followed. Likewise, under Section 111.071, payment is authorized for judgments against employees for civil rights violations (typically arising under Title 42 U.S.C. Section 1983), unless the employee is "determined in the final judgment to have caused the harm intentionally."[31]

The crucial concept that is common to these three sections of the Florida Statutes is that the government entity is typically liable for tortious conduct to the exclusion of the government employee (who has official immunity) except where the employee has acted in an extreme or egregious fashion. In such circumstances, the employee is liable to the exclusion of the government entity (which has a form of sovereign immunity).[32]

Of course, there is a potential conflict of interest issue here, as the entity and the employee could have mutually exclusive liability in tort.[33] The first issue to address, however, is determining when the entity is legally authorized to provide representation. For example, under the hypothetical of the police officer sued for false arrest, assume that the officer has been sued under a theory that the officer fabricated evidence and had no probable cause for the arrest. Further assume that the entity has uncovered no evidence of fabrication in its own investigation, and the officer based the arrest on the testimony of at least one eyewitness.

Under this scenario, if the plaintiff is correct, there is a good argument that the entity cannot lawfully provide representation because intentional fabrication of evidence to demonstrate probable cause would likely constitute criminal conduct, and at the very least constitute bad

29. FLA. STAT. § 768.28(9)(a).

30. *Id.*; McGhee v. Volusia Cnty., 679 So. 2d 729, 733 (Fla. 1996) ("That veil is lifted only where the employee's act fell outside the scope of employment, in which event sovereign immunity then shields the employing agency from liability. . . . The employing agency is immune as a matter of law only if the acts are so extreme as to constitute a clearly unlawful usurpation of authority the deputy does not rightfully possess . . . .").

31. FLA. STAT. § 111.071(1)(a).

32. *McGhee*, 679 So. 2d at 733.

33. *Id.*; *see infra* Part V (explaining that local government resolves potential ethics issues by making internal determinations as to whether an employee acted in good faith and, if so, the government would raise an immunity defense on behalf of the government employee at the earliest possible stage of litigation).

faith.[34] On the other hand, the plaintiff may be incorrect, and the information the government has in its possession may indicate that the police officer did not act in bad faith. The question presented then is whether the government can provide representation. If the answer is no, then a plaintiff would effectively prevent the government from representing a government employee by alleging actions that would constitute bad faith, even if those allegations turned out to be incorrect.[35]

Fortunately for government employees, the Third District Court of Appeal of Florida addressed the matter in *Nuzum v. Valdes*[36] very favorably towards government entities providing representation for government employees.[37]

In *Nuzum*, the plaintiffs sued executive employees of the Division of Alcoholic Beverages in their personal capacities, claiming interference with advantageous business relationships and conspiracy.[38] The plaintiffs sought and obtained an order from the trial court preventing government counsel from representing the individual defendants in their personal capacities.[39] A petition for certiorari, filed with the Third District, sought to quash the order.[40] In granting the petition, the Third District reasoned that Section 111.07

> recognizes the common law principle that a public officer is entitled to representation at the public expense in a lawsuit arising from performance of official duties while serving a public purpose. To deny a public official representation for acts purportedly arising from the performance of his official duties would have a *chilling effect* upon the

34. "Although the statute does not define 'bad faith,' under [S]ection 768.28(9)(a), '[b]ad faith has been equated with the actual malice standard.'" Parker v. State of Fla. Bd. of Regents *ex rel.* Fla. State Univ., 724 So. 2d 163, 167 (Fla. 1st Dist. Ct. App. 1998) (citing Ford v. Rowland, 562 So. 2d 731, 734 (Fla. 5th Dist. Ct. App. 1990)).

35. Of course, such allegations would be subject to the pleading threshold of Rule 11 of the Federal Rules of Civil Procedure in federal court and Section 57.105 of the Florida Statutes in state court. *See generally* FED. R. CIV. P. 11 (generally requiring that pleadings, motions, and other papers filed in federal court be signed by the attorney, have legal and factual support, and be non-frivolous; if these requirements are breached, the court may award sanctions and attorneys' fees consistent with the rule); FLA. STAT. § 57.105 (establishing the same general requirements as Rule 11 for pleadings, motions, and other papers filed in state court). Those standards are satisfied as long as the allegations are made with an evidentiary basis, even if they turn out to be incorrect or against the greater weight of the evidence.

36. 407 So. 2d 277 (Fla. 3d Dist. Ct. App. 1981).

37. *Id.* at 279.

38. *Id.* at 278.

39. *Id.*

40. *Id.*

> proper performance of his duties and the diligent representation of the public interest.[41]

The Third District noted that courts do not typically decide whether a government employee should receive counsel—such decisions come early in a case, before any findings of bad faith or malice could be made by a court.[42] Instead, the court held that the Legislature intended to place this decision in the hands of the governmental unit itself, making the decision "primarily an executive function."[43]

The importance of the *Nuzum* decision for government employees cannot be overstated. The Third District established that the government could provide counsel to its employees even where they allegedly acted with bad faith or malice, as long as the government determines that the provision of representation is warranted based on its own review.[44] By definition, any time a government employee is sued in a personal capacity, the employee must either be alleged to have acted in a bad faith or extreme manner under Section 768.28(9), Florida Statutes (state law), or in a manner that constituted a civil rights violation (federal law).[45] Had *Nuzum* been decided the other way, the government could rarely provide counsel—and the government would certainly not provide representation to the police officer in the hypothetical suit for false arrest.[46]

The Florida Supreme Court further broadened the above concept nine years after *Nuzum*, in *Thornber v. City of Fort Walton Beach*.[47] *Thornber* involved a request by several city council members for reimbursement of attorneys' fees related to claims they brought to enjoin a recall petition and to their defense of a civil rights claim.[48] The court stated at the forefront of its analysis that "Florida courts have long recognized that

41. *Id.* at 279 (emphasis added) (citations omitted). Interestingly, the court's determination that a failure to provide counsel would have a "chilling effect" on government employees' performance is almost identical to the rationale behind the federal doctrine of qualified immunity and the state doctrine of official immunity that insulate government employees in their individual capacities from suit.

42. *Id.*

43. *Id.*

44. *Id.*

45. 42 U.S.C. § 1983 (2012); Kentucky v. Graham, 473 U.S. 159, 166 (1985) ("On the merits, to establish *personal* liability in a [Section] 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.").

46. Instead, because of *Nuzum*, in the case of a police officer sued for false arrest, even if the plaintiff claimed the officer lied on the arrest form, as long as the officer provided a credible explanation that he did not lie to the city, the city could represent the officer. Likewise, for a government doctor (i.e., an employee of a public hospital) sued for malpractice, even if the malpractice is alleged to constitute gross negligence or reckless conduct, the local government can provide representation as long as the doctor can reasonably argue he was merely negligent.

47. 568 So. 2d 914 (Fla. 1990).

48. *Id.* at 916.

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."[49] Consistent with this principle, the court further held that "[f]or 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."[50] The *Thornber* Court further noted that a lawsuit to enjoin a recall petition would normally serve a private purpose since the law is indifferent to who holds an office.[51] Nevertheless, the court ultimately held that under the unique circumstances of the case, where the question was whether a particular process was not followed, making the recall petition itself illegal, the public had an interest in the outcome so as not to undermine the government through an illegal petition.[52] Interestingly, under the logic of this analysis, there is a good argument that the city could have taken on the representation from the outset, instead of reimbursing for expenses at the end.

When read together, *Nuzum* and *Thornber* demonstrate strong support from Florida courts for government agencies providing representation to government employees except where egregious conduct is evident from the outset of the case or in circumstances where the representation serves only a private, as opposed to public, purpose. Indeed, *Thornber* goes beyond the language of Section 111.07 by authorizing the government to provide representation when asserting an action as a plaintiff, as opposed to merely providing representation to a government defendant, which is the focus of the statute.[53]

IV. GOVERNMENT POLICY TO REPRESENT GOVERNMENT EMPLOYEES

Reading *Nuzum*, *Thornber*, and Section 111.07, Florida Statutes, together makes it clear that the local government has broad legal authority to provide representation to an employee under state law.[54]

49. *Id.* at 916–17.
50. *Id.* at 917.
51. *Id.*
52. *Id.* at 917–18.
53. *See* FLA. STAT. § 111.07 (2015) (authorizing government entity to *defend* a civil action).
54. In Coral Gables, the City Commission grants this authority to the city attorney. *See* CORAL GABLES, FLA., CODIFIED ORDINANCES § 2-201(e)(5) (Municode through Ordinance No. 2012-05, enacted Mar. 27, 2012), *available at* https://www.municode.com/library/fl/coral_gables/codes/code_of_ordinances?nodeId=SPAGEOR_CH2AD_ARTIVOFEM_S2-201CIATLEDE (authorizing the city attorney to provide representation for government officers and employees); *see also id.* § 2-677 (Municode through Ordinance No. 2008-27, enacted Oct. 28, 2008), *available at*

Indeed, the Legislature and the courts have established a legal framework whereby governments can provide representation to their employees in almost all circumstances. The underlying questions then are what should government policy be and who should be granted the authority to determine whether representation will be provided in a given case. In a city government, for example, there would be three possibilities: the City Commission (governing body), the city manager (chief executive officer), or the city attorney (chief legal officer).

In my view, as it is a question that relates to due process and the judicial system, which may expose the city to liability, the decision should be as apolitical as possible and should be delegated by the City Commission to the city attorney. A government attorney should seek this authority from the City Commission and establish the standard for exercising this authority in advance to avoid problems in the future.

Consider the example of the department director sued for defamation by a city vendor related to a city contract. In this hypothetical, assume that the director asserted, based on at least some evidence, that a well-respected and popular vendor was overcharging the city, was dishonest, and should be disbarred from bidding for contracts. The vendor then sued the director for defamation. The vendor also met with city officials in an effort to convince them not to provide representation to the director. The decision whether to represent the director in the defamation suit should be based on a policy established in advance. Otherwise, it may appear that the decision was based on pressure from the vendor and other non-legal considerations.

Consider the example of the City of Coral Gables, which has established a broad and strong policy in favor of representation of its employees. By ordinance, the City Commission granted the city attorney the full discretion to determine when a government employee will be provided representation in Section 2-201(e)(5) of the City Code, which states that the city attorney has the 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

https://www.municode.com/library/fl/coral_gables/codes/code_of_ordinances?nodeID=SPAGEOR_CH2AD_ARTVIIIPRCO_DIV2PROR_SDIVORPUPR_S2-677AUCOLESE (authorizing the city attorney to hire multiple outside attorneys in event of conflict).

> taken in their official capacities. This authority does not limit any right to indemnification as established elsewhere in the City Code.[55]

Consistent with this broad grant of authority to represent city employees, my office adopted a policy in City Attorney Opinion 2014-024 (the Opinion),[56] which established that the city attorney would represent employees to the furthest extent authorized by law, subject to the discretion of the city attorney as expressed in the opinion and consistent with the applicable Bar Rules.[57] The Opinion emphasizes the importance of a government entity representing government employees, making the finding 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."[58]

This principle should be the cornerstone of a governmental representation policy. The government entity is essentially recognizing that it is in its enlightened best interest to stand with the government employee in that employee's time of need. The *Nuzum* decision supports this principle and allows the government to adopt a robust policy in support of representing the government employee.[59] Indeed, instead of relying on the pleadings in a plaintiff's complaint, the Opinion expressly enables the City to determine for itself how the employee acted and whether representation should be provided at public expense.[60] "Otherwise, a complaint alone—regardless of how frivolous the allegations may be—could dictate an employee's entitlement to representation."[61]

---

55. CORAL GABLES, FLA., CODIFIED ORDINANCES § 2-201(e)(5); *see also id.* § 2-677 (granting city attorney authority in procurement code to contract for legal services).

56. *Infra* Appendix I (providing a detailed policy for determining when, if at all, the City of Coral Gables will provide representation to its employees). I would like to specially thank former Deputy City Attorney Bridgette Thornton, who worked with me in developing this policy, along with the retainer letter (which is quoted in full in Appendix II *infra*).

57. To view City Attorney Opinion 2014-024 in its entirety, see Appendix I *infra* or Legal Op. Regarding Legal Representation Policy Statement, Coral Gables C.A.O. Op. 2014-024 (2014), *available at* http://www.coralgables.com/modules/showdocument.aspx?documentid=15229 [hereinafter C.A.O. Op. 2014-024]. For a discussion of the Florida Bar ethics rules, see *infra* Part V.

58. *Infra*, Appendix I.

59. Nuzum v. Valdes, 407 So. 2d 277, 279 (Fla. 3d Dist. Ct. App. 1981).

60. C.A.O. Op. 2014-024, *supra* note 57 ("[I]t 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.").

61. *Id.*

The policy then includes a model conflict/representation letter that addresses ethical issues.[62] The benefit of a broad policy of representation is clear—the City is making a commitment to its employees to have their backs if a claim is brought against them. This commitment would include elected officials, appointed officials, professionals (for example, doctors, lawyers, or engineers), and all staff. If such a commitment is not made, a government official/employee may be less apt to take action and more likely to reject requests for action out of concern for individual liability. The importance of providing representation is therefore manifest. It is the exact same reason why the United States Supreme Court and Florida Supreme Court provide qualified and official immunity for government employees, including the right to interlocutory appeal when such an immunity is denied pre-trial.[63]

Finally, the government attorney should also review the City Charter, City Code, personnel rules, and collective bargaining agreements to determine if any of these documents have guidelines or commitments as to the provision of counsel. The collective bargaining agreement is of particular importance, as it is very possible that the question of legal representation has been addressed as part of bargaining.[64] Of course, any such commitment must be followed, always subject to applicable Florida Bar Rules. A city or county should grant legal representation broadly to employees and should not lessen this commitment through bargaining. There are significant benefits to the local government and the employee in having the local government provide representation directly, instead of relying on the union or the individual employee to do so.

V. REVIEW OF FLORIDA BAR ETHICS RULES AND PREPARATION OF REPRESENTATION/CONFLICT LETTER

Once a determination is made to provide representation to an employee, the next question for the city attorney is how to provide the

62. For a detailed discussion of the letter, see *infra* Part V.

63. *See* Tucker v. Resha, 648 So. 2d 1187, 1190 (Fla. 1994) ("As the Supreme Court explained[,] . . . society as a whole also pays the 'social costs' of 'the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" (internal quotation marks omitted) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982))); *see also* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (establishing the right to take interlocutory appeals of pre-trial orders denying qualified immunity under the collateral order doctrine).

64. *See generally* FLA. STAT. ch. 447 (2015) (providing for collective bargaining between government unions and management).

counsel. A decision must be made whether to handle the case in-house or hire conflict counsel. This is a significant decision and involves Florida Bar Rule 4-1.7, relating to conflicts of interest and representation of multiple defendants.[65] This rule prohibits attorneys in Florida from representing a client whose interests are directly adverse to another client unless the lawyer has a reasonable belief that the representation will not adversely affect the relationship with and responsibilities to the other client, each affected client consents after consultation, and other criteria are met.[66]

Additionally, the attorney is not allowed to take on new representation without a reasonable belief that the attorney's duties to other clients will not adversely harm the attorney's ability to handle this new matter, the new client consents after consultation, and other criteria are met.[67] This provision is of particular relevance to this situation, as the city attorney already has a standing client (the city),[68] and is now considering representation of a new client (the government employee in his or her personal capacity),[69] whose representation should not be compromised based on commitments to the standing client.[70] Finally, in situations where the city attorney is representing multiple parties or clients at once in litigation, the rule contains a provision that states: "When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved."[71]

For purposes of discussing Rule 4-1.7, this Article will focus on the role of a city attorney and the specific example of Coral Gables. The city attorney, whose office represents the city as general counsel in all matters,

65. FLA. BAR R. 4-1.7.

66. FLA. BAR R. 4-1.7(a).

67. FLA. BAR R. 4-1.7(b).

68. *See* CORAL GABLES, FLA., CODIFIED ORDINANCES § 2-201(a) (Municode through Ordinance No. 2012-05, enacted Mar. 27, 2012), *available at* https://www.municode.com/library/fl/coral_gables/codes/code_of_ordinances?nodeId=SPAGEOR_CH2AD_ARTIVOFEM_S2-201CIATLEDE (establishing the city attorney as "chief legal officer of the city"); *see also* FLA. BAR R. 4-1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

69. *See* CORAL GABLES, FLA., CODIFIED ORDINANCES § 2-201(e)(5) (Municode through Ordinance No. 2012-05, enacted Mar. 27, 2012), *available at* https://www.municode.com/library/fl/coral_gables/codes/code_of_ordinances?nodeId=SPAGEOR_CH2AD_ARTIVOFEM_S2-201CIATLEDE (authorizing representation of employees by City Attorney where "required by law or where otherwise appropriate"); *see also* FLA. BAR R. 4-1.13(e) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 4-1.7.").

70. FLA. BAR R. 4-1.7(b).

71. FLA. BAR R. 4-1.7(c).

is the chief legal officer of the city.[72] This ethical principle is further explained in Rule 4-1.13, which relates to the representation of an organizational client such as a municipal corporation.[73] In Coral Gables, the City Commission has also authorized the city attorney to represent government employees sued in their personal capacities for actions taken as employees.[74] Coral Gables, through the Commission and city attorney, has taken the position that it is in the government's interest to represent its employees and assert official immunity on their behalves, and it has authorized this as a matter of government policy, consistent with the Third District's decision in *Nuzum*.[75] Other cities may come to the same conclusion in a collective bargaining agreement or other policy statement.

Of course, in situations where both the city and a government employee are sued in the same case, an additional discussion and analysis must be conducted under Rule 4-1.7(c) to determine whether the advantages to the parties of joint representation outweigh the disadvantages, which will be further discussed below.

Accordingly, when a government employee is sued, the city attorney must determine whether he or she can provide the representation in-house or if separate conflict counsel must be hired.[76] The question is a simple one when the interests of the employee and the government are aligned, such as when a doctor is sued for mere negligence and the city and employee wish to argue there was no negligence. There is no conflict in such instance as both the city and the employee are advancing the same position.

Indeed, my experience has been that in most instances where a government employee is sued, as long as the government entity has made a *Nuzum* determination that the employee did not act with malice or in bad faith, the government entity's counsel can represent the employee and raise official immunity on the employee's behalf with little chance of an irreconcilable conflict. Both the government entity and its government employee significantly benefit from this arrangement.

---

72. CORAL GABLES, FLA., CODIFIED ORDINANCES § 2-201(a), (e)(1) (Municode through Ordinance No. 2012-05, enacted Mar. 27, 2012), *available at* https://www.municode.com/library/fl/coral_gables/codes/code_of_ordinances?nodeId=SPAGEOR_CH2AD_ARTIVOFEM_S2-201CIATLEDE.

73. FLA. BAR R. 4-1.13.

74. CORAL GABLES, FLA., CODIFIED ORDINANCES § 2-201(e)(5); FLA. BAR R. 4-1.13(e).

75. C.A.O. Op. 2014-024, *supra* note 57.

76. In Coral Gables, the city attorney may hire outside conflict counsel, as the office has been granted the authority "[t]o retain, supervise, and remove outside counsel in accordance with the procurement provision of the City Code relating to the authority to contract for legal services." CORAL GABLES, FLA. CODIFIED ORDINANCES § 2-201(e)(10).

The government entity benefits because the in-house counsel (city attorney) oversees the entire litigation and, therefore, additional fees and costs do not need to be spent on conflict counsel. This allows the city attorney to ensure that: (1) the co-defendants have a coordinated litigation and mediation or settlement strategy; (2) appropriate immunities from suit are raised for both the entity and individual as soon as possible; and (3) stays of discovery and interlocutory appeals are sought where appropriate.

The government employee benefits from both the actual and symbolic backing of the government entity. The employee will receive legal services rendered by an attorney with experience in raising immunities from suit, and the government will likely pay any settlement or judgment that may result from the case. Likewise, the employee avoids the anxiety and hardship of finding and paying for an attorney.

Interestingly, there is also a benefit to the plaintiff and the justice system. The State of Florida has enacted a limited waiver of sovereign immunity in tort up to the level of certain statutory caps ($200,000 per person and $300,000 per incident).[77] If the government entity is found liable and a judgment is entered, the government has a ministerial legal duty to pay the judgment following any appeals[78] and can be compelled by a court to pay the judgment up to the statutory caps through a writ of mandamus.[79] In other words, there is no need to pursue execution of the judgment, and the government entity will generally have the funds to pay the entire judgment. In situations where the employee does not receive government representation and the employee loses the case, it is possible that the employee will be unable to pay the judgment.

Once a decision is made to provide representation to an employee, the employee then must review the representation/retainer agreement.[80] The employee should have an opportunity to review the agreement in advance and should be informed of his or her right to confer with independent counsel regarding whether to sign the document. Indeed, in cases where there is a potential conflict, it may be appropriate for the government entity to hire conflict counsel to meet with the employee to

77. FLA. STAT. § 768.28(5) (2015).

78. *See* FLA. R. APP. P. 9.310(a), (e) (granting the local government an automatic stay of any money judgment or order pending an appeal, unless the stay is vacated by the lower court, which is then subject to review by the appellate court).

79. *See* Navarro v. Bouffard, 522 So. 2d 515, 517 (Fla. 4th Dist. Ct. App. 1988) (explaining that "[s]ince a judgment creditor is ordinarily not entitled to levy execution on property of a municipal or public entity, mandamus is the proper, and indeed only, vehicle for enforcing a judgment against a governmental entity") (citing City of Ocoee v. State *ex rel.* Harris, 20 So. 2d 674, 675 (Fla. 1945)).

80. C.A.O. Op. 2014-024, *supra* note 57. To view the Template City Employee Retainer Agreement in its entirety, *see* Appendix II *infra* [hereinafter Retainer Agreement].

discuss whether it is in the client's interest to waive a potential conflict and accept representation by the government. The conflict counsel would be paid for by the city but would have the attorney–client relationship with the employee.

In Coral Gables, the City Attorney's Office uses a template retainer agreement that addresses each of these issues.[81] In order to meet the requirements of Florida Bar Rules 4-1.7 and 4-1.13, the agreement contains several components, better ensuring that the employee fully understands the city attorney's standing relationship with the city, including: (1) a synopsis of the claim; (2) a statement of the city attorney's present attorney–client relationship with the city; (3) a reminder that the employee could hire his or her own attorney; (4) a description of the potential conflict of interest, if any; (5) a statement of what would occur if a future conflict of interest arises after representation is undertaken; (6) a description of the grounds upon which the city attorney could withdraw from representation; (7) a statement of the options if a judgment is entered against the employee; (8) a recommendation that the employee consult with private counsel or the union regarding whether to sign the retainer agreement; (9) a request for full cooperation in the representation if the retainer is signed; and (10) a statement of how to execute and return the agreement.[82]

In addition to ensuring compliance with ethical obligations, an agreement of this nature ensures the new client (the municipal employee) is fully aware of the city attorney's obligation to the city as a whole and that state law might require the employee to pay a judgment that results from representation.[83] Otherwise, the employee may assume that the government will always indemnify the employee for a judgment that is entered.[84]

In addition to having a formal retainer agreement, the city attorney must also ensure that the employee knows he or she has a right to confer with separate counsel regarding the agreement, both to consider its terms and to determine whether it is in the employee's best interests to be

81. Retainer Agreement, *supra* note 80.

82. *Id.*

83. FLA. STAT. § 111.071(1)(a) (2015).

84. There are many good reasons why a government entity should not only defend the employee, but also indemnify the employee for any settlement or judgment that may ensue. Nevertheless, it is important that the ground rules of the representation are clear from the outset, in order to avoid any unmet expectations that could later harm the attorney–client relationship. For example, the client must be informed early on that in certain limited circumstances a government entity is legally prohibited from paying the employee's judgment.

represented by the city attorney.[85] This can be crucial. For example, in the hypothetical case of a police officer sued for false arrest, if the officer did commit some type of potential misconduct resulting in the arrest, that conduct could be disclosed to the outside attorney to detect any potential conflict in the representation. The outside attorney may then advise the employee not to engage the government attorney and to retain his or her own attorney. As a second example, if a department director is sued for defamation and has a history with the allegedly defamed plaintiff that could indicate malicious intent, the director may prefer to retain his or her own counsel instead of having to disclose the history to the city attorney. Indeed, if the evidence of malice is substantial enough, the employee, and not the government, may be the party facing liability.[86] This could result in a conflict situation where the city attorney would have to assert that the government entity is not liable and that the employee is liable.[87]

The government entity can choose whether to pay for this separate consulting counsel. In my experience, it is in the best interest of an entity to pay for consulting counsel where there is a higher likelihood of a conflict of interest. In such circumstances, the employee should be represented by counsel in negotiating a conflict letter and in determining whether to waive the conflict. This also protects the government entity from engaging in representation of the employee when such representation is inappropriate.

Some further discussion of the issues of conflict of interest is warranted. A conflict of interest does not occur merely because an employee has made a mistake, done something wrong, or committed actionable negligence.[88] Indeed, state law is very clear that the government entity is responsible for paying for representation and judgment where the employee was negligent.[89] Instead, in evaluating whether a non-waivable conflict exists, the city attorney should evaluate whether it is in the interests of either client to be adverse to the other or,

85. In my experience, this ensures that the employee does not have regrets or second thoughts about the representation later.

86. FLA. STAT. § 768.28(1), (9)(a).

87. *Id.* § 768.28(9)(a). The government entity should determine as soon as possible whether it will take the position that the government employee acted with malice. If the government entity decides to take on the representation of the employee, it should seek to dismiss the employee based on official immunity and should not sacrifice the employee's interests to the entity's interests.

88. *See* FLA. BAR R. 4-1.7 cmt. "Conflicts in litigation" (indicating that conflict may occur when there is "substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question").

89. FLA. STAT. § 768.28(1), (9).

as indicated in Rule 4-1.7(a)(2), whether representing one of the clients will be "materially limited"[90] by the representation of the other.

In evaluating this concept, consider a federal civil rights claim brought under Title 42 U.S.C. Section 1983 against (1) a police officer alleged to have unlawfully used deadly force against a fleeing felon in violation of the Fourth Amendment, and (2) a Section 1983 *Monell* claim against a government entity alleged to have failed to train officers in the use of deadly force in violation of the Fourth Amendment.[91] Also, assume it is a close question whether the officer was justified in the use of such force under the criteria established by the Supreme Court in *Tennessee v. Garner*.[92] Finally, assume that the officer sued in his or her individual capacity has a viable argument for qualified immunity. Where the officer was exercising discretionary authority and either did not commit a violation of the Fourth Amendment or such violation was not clearly established under the binding precedent, dismissal or summary judgment in favor of a police officer is required.[93]

The fact that the officer used deadly force and that it is a close question whether the force was justified under *Garner* does not mean that there is a conflict of interest prohibiting representation of the entity and the employee. In fact, the interests of both the government entity and the employee are aligned here, as the principal element of the claim against the city and the employee is whether a constitutional violation occurred. The city attorney can permissibly assert qualified immunity for the individual employee and at the same time argue that the city should not be liable because there was no constitutional violation and because there was no policy and practice. In other words, the fact that allegations are very serious, or may even support a claim of liability, does not create a conflict of interest preventing representation. Instead, the specific

90. *See* FLA. BAR R. 4-1.7(a)(2) (establishing when potentially adverse interests exist among current clients).

91. A *Monell* claim is permitted against a municipality or county where a constitutional violation has occurred, and such violation was caused by a policy or practice of a final policymaker for the entity (which can include a claim of failure to train where such failure demonstrates deliberate indifference by the final policymaker), such as an ordinance or resolution of the council or commission. *See* Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690 (1978) (stating that "Congress *did* intend municipalities and other local government units to be included among those . . . to whom [Section] 1983 applies" (footnote omitted)).

92. 471 U.S. 1, 11–12 (1985) (explaining that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given").

93. *See* Pearson v. Callahan, 555 U.S. 223, 232 (2009) (explaining the general two-step inquiry for analyzing an officer's qualified immunity claim).

elements of the claim must be evaluated to determine whether the clients' interests are aligned or are potentially conflicting.

Of course, there may be situations where it is not in the interest of one of the parties to waive the conflict after consultation or where the conflict is non-waivable. In such circumstances, the city should consider paying for outside counsel to represent the employee separately from the government attorney's office. The attorney–client relationship would then be between the outside counsel and the employee, and the government would simply pay the reasonable expenses. This approach is consistent with state law, which allows for payment of outside counsel for an employee, except where the employee has acted in bad faith, with malicious purpose, or in wanton and willful disregard of life, safety, or property.[94] Unless the government has made an internal finding that one of these three circumstances is present, consistent with the analysis in *Nuzum*, the government may pay for the representation.[95]

Finally, it is important to emphasize that the government entity benefits from establishing, in advance, a policy that sets ground rules for when the government attorney's office will provide representation and when the entity will pay for outside counsel. A policy established in advance is apolitical and protects the representation decision from becoming ad hoc or overly politicized. An elected official, appointed official, police officer, or general employee may commit a negligent act, or may act in a manner that is lawful but causes controversy. These acts may result in lawsuits against the official or employee. The existence of already established policies—provided they are followed in an evenhanded manner—protects the government from making an unfair representation decision or from a claim of ad hoc decision-making by the press or public.

Ultimately, the government employee performs his or her job on behalf of the city and the public and should be provided representation by the city in a manner that instills confidence with the public.

VI. RESPONDING TO THE COMPLAINT AND RAISING IMMUNITIES FROM SUIT ON BEHALF OF GOVERNMENT EMPLOYEES

Once a decision is made to represent a government employee, the next step is to determine how one shall proceed with a defense.

94. FLA. STAT. § 111.07.
95. *Id.*

Representation of government employees is highly technical and requires familiarity with a substantial body of caselaw relating to immunities from suit, interlocutory appellate jurisdiction, stays of discovery, and the relationship between the government and employees established in Section 768.28, Florida Statutes, and under the *Monell* body of caselaw.

Career government attorney's familiarity with these concepts is one of the many reasons why the city should provide representation to the employee, where possible. There are three particular immunities from suit that should be considered: qualified immunity (federal claims),[96] official immunity under Section 768.28(9)(a), Florida Statutes (state claims),[97] and absolute immunity (state and federal claims).[98] The attorney should be seeking to raise these defenses, where applicable, at the earliest possible stage of litigation, including in immediate motions to dismiss and for summary judgment. In addressing qualified immunity, but in providing analysis that could be applicable logically to all immunities from suit, the United States Supreme Court has "'repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'"[99] The concern is always that an immunity from suit is progressively lost the longer the case proceeds against the employee, as the suit itself causes the harm that the immunity from suit is meant to protect against, and an employee can never be reimmunized after-the-fact.[100] It is thus incumbent on the government attorney, when ethically and zealously representing a government employee, to raise immunity from suit as soon as it can reasonably be raised.

A. Qualified Immunity in Federal Claims

Qualified immunity from suit is a recognized defense to federal claims against government employees in their individual capacities.[101] Typically, the federal claim will be brought under Title 42 U.S.C.

96. *Pearson*, 555 U.S. at 231–32.

97. FLA. STAT. § 768.28(9)(a); Keck v. Eminisor, 104 So. 3d 359, 366 (Fla. 2012).

98. *See* Woods v. Gammel, 132 F.3d 1417, 1419–20 (11th Cir. 1998) (extending absolute immunity to county commissioners in a Section 1983 claim relating to budget legislation); McNayr v. Kelley, 184 So. 2d 428, 433 (Fla. 1966) (applying absolute immunity under state law).

99. *Pearson*, 555 U.S. at 232 (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)).

100. *See* Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985) ("The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.").

101. *Pearson*, 555 U.S. at 231.

Section 1983, although it could be based on another federal statute, or be a *Bivens* claim based directly on the United States Constitution.[102]

The purpose of qualified immunity is to allow individual government employees to exercise the discretion of their offices without fear of litigation.[103] The central concept of qualified immunity is that the employee will not be subject to suit or liability under federal law unless the employee acts in violation of clearly established law that a reasonable employee would have known about.[104] The inquiry as to whether an action violated clearly established law "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'"[105]

The law that is allegedly violated generally must have been established in binding precedent.[106] In the case of a police officer who is sued for false arrest, to defeat qualified immunity, the plaintiff would have to demonstrate that the arrest was in violation of clearly established law. As long as probable cause arguably existed under applicable law, the officer could not be sued even if the court determined that the arrest violated the Fourth Amendment.[107]

The plaintiff has the burden to plead, and ultimately prove, facts that overcome the qualified immunity defense.[108] The United States Supreme Court held in a series of cases, including in *Hunter v. Bryant*[109] and *Crawford-El v. Britton*,[110] that pre-trial motions should be used to raise the qualified immunity defense in a manner that allows it to be resolved as soon as possible in a case, so that the employee is exposed to as little litigation and discovery as possible.[111]

---

102. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (allowing a claim for money damages based on an alleged violation of the Fourth Amendment by federal officials).

103. *See* McCullough v. Antolini, 559 F.3d 1201, 1205 (11th Cir. 2009) (explaining how "[t]he purpose of qualified immunity is to allow officials to carry out discretionary duties without the chilling fear of personal liability or harrassive litigation" (citing Anderson v. Creighton, 483 U.S. 635, 638–39 (1987))).

104. *Pearson*, 555 U.S. at 231.

105. Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

106. *See* Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2011) ("Our Court looks only to binding precedent—cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the claim arose—to determine whether the right in question was clearly established at the time of the violation.").

107. *See, e.g.*, Jones v. Cannon, 174 F.3d 1271, 1283 n.3 (11th Cir. 1999) (noting that "[a]rguable probable cause, not the higher standard of actual probable cause, governs the qualified immunity inquiry").

108. Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002).

109. 502 U.S. 224 (1991).

110. 523 U.S. 574 (1998).

111. *Id.* at 599–600 ("The trial judge can therefore manage the discovery process to facilitate prompt and efficient resolution of the lawsuit; as the evidence is gathered, the defendant-official may move for partial summary judgment on objective issues that are potentially dispositive and are more

Thus, the city attorney handling a federal claim against a government employee should review the complaint carefully to determine whether the facts alleged, if assumed true, demonstrate that qualified immunity does not apply.[112] In making this determination, the attorney should also consider documents attached to and made part of the complaint under Federal Rule of Civil Procedure 10(c),[113] as well as public records and other documents that are central to the claim and of undisputed authenticity,[114] such as an arrest form or medical report.

If there is a reasonable argument that the facts alleged do not demonstrate a violation of clearly established law, then qualified immunity should be immediately raised through a motion to dismiss. In arguing the motion, the attorney has the option to argue: (1) that the plaintiff has not alleged facts demonstrating a violation of a federal constitutional or statutory right; or (2) that the alleged violation of a federal constitutional or statutory right was not clearly established based on binding precedent.

An effective motion to dismiss will often raise both arguments, as a close argument on point (1) will often be dispositive as to point (2). For example, if the legal question is whether a police officer can lawfully make an arrest based on the sworn eyewitness statement of a robbery victim identifying a particular suspect, while disregarding an alibi raised by the suspect indicating he or she was somewhere else at the time, it would be helpful to first assess whether the situation violates the Fourth Amendment. Typically, under the Fourth Amendment, a police officer can rely on a sworn eyewitness statement to demonstrate probable cause even in the face of an alibi from the suspect.[115] If there was a deficiency in the eyewitness statement, or if the alibi were easily verifiable and appeared to be true, the question may be much closer as to whether probable cause existed and whether a constitutional violation occurred.

---

amenable to summary disposition than disputes about the official's intent, which frequently turn on credibility assessments. Of course, the judge should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible." (footnote omitted)); *Hunter*, 502 U.S. at 227 ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.").

112. *See* Ashcroft v. Iqbal, 556 U.S. 662, 684–85 (2009) (emphasizing that the plausibility standard under Rule 8 applies to determining whether qualified immunity is abrogated by the plaintiff's complaint).

113. FED. R. CIV. P. 10(c) ("A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

114. Horsley v. Feldt, 304 F.3d 1125, 1134–35 (11th Cir. 2002).

115. Rankin v. Evans, 133 F.3d 1425, 1436 (11th Cir. 1998) (citing State v. Riehl, 504 So. 2d 798, 800 (Fla. 2d Dist. Ct. App. 1987) (stating that "[i]n order to establish the probable cause necessary to make a valid arrest, . . . it is not necessary to eliminate all possible defenses")).

Regardless of the district court's determination as to this question, however, the district court must still address the question of arguable probable cause and clearly established law, which are the touchstones of qualified immunity. Based on the closeness of the question of whether a constitutional violation occurred, there is a comparably stronger argument that the officer should receive qualified immunity because of that very closeness.[116]

In the example above, it also cannot be emphasized enough the importance of attaching to the motion to dismiss the witness statement that the officer relied upon, as well as the arrest form explaining the basis of the arrest. The caselaw interpreting the federal pleading rules allows the attachment of these documents when they are central to the claim and of undisputed authenticity.[117] This helps the district court understand the arrest in a broader context, even at the motion to dismiss stage, and determine whether the plaintiff has satisfied the *Iqbal* pleading standard[118] by plausibly pleading facts that demonstrate a violation of clearly established law.

If the motion to dismiss is denied by the district court, and if there is a colorable basis to argue that the district court erred, the city attorney and employee should consider whether to file an interlocutory appeal under the collateral order doctrine.[119]

As mentioned above, qualified immunity can also be raised in a motion for summary judgment.[120] Indeed, in situations where the pleadings do allege a violation of clearly established law, but the actual facts do not support such pleadings, or where additional facts would show the police officer was justified in taking certain actions, a motion for summary judgment may be the only option.

In addressing motions for summary judgment based on qualified immunity, the city attorney must first understand that a previously denied motion to dismiss on the same subject, even if affirmed on

116. It should also be noted that in addressing qualified immunity for an arrest, the officer may raise any lawful basis for the arrest, not just the charge stated in the complaint or arrest form. For example, if the plaintiff was arrested for trespass, but also was extraordinarily noisy in arguing with the property owner at night in violation of a municipal ordinance, qualified immunity would defeat a claim for false arrest if there was arguable probable cause that either trespass or a noise ordinance violation occurred. *See* Lee v. Ferraro, 284 F.3d 1188, 1195–96 (11th Cir. 2002) (determining that qualified immunity barred a claim for violation of the Fourth Amendment because of noise ordinance violation, even though this was not charged on the arrest form).

117. *Horsley*, 304 F.3d at 1134–35.

118. *See* Ashcroft v. Iqbal, 556 U.S. 662, 684–85 (2009) (applying Rule 8 plausibility pleading standard established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) to qualified immunity cases).

119. For discussion of the collateral order doctrine, see Part VIII.

120. Crawford-El v. Britton, 523 U.S. 574, 597–600 (1998).

interlocutory appeal, does not prevent a later motion for summary judgment on the same subject, as the standard is different at this later stage of proceedings.[121]

In my experience, a motion for summary judgment based on qualified immunity will either be based on admissions made in the plaintiff's deposition, which demonstrate a legal basis for his or her arrest, or will be based on an affidavit of the police officer explaining the evidence supporting the arrest and addressing facts that are undisputed. As further indicated below, the district court should limit discovery to solely the qualified immunity question in order to protect the immunity from suit. Indeed, as indicated by the United States Supreme Court in *Crawford-El*, the district court should consider motions to dismiss at various stages of the discovery process as facts develop that relate to the qualified immunity question.[122]

B. Official Immunity in State Claims

Claims based on state law are generally not actionable against a government employee, except where such employee is alleged to have acted in bad faith, with malicious purpose, or in wanton and willful disregard of life, safety, or property.[123] Claims sounding in negligence cannot be brought against a government employee under this standard; instead, any negligence-based claims must be brought against the government entity itself.[124]

For example, in the case of a claim against a doctor at a government hospital for medical malpractice based on negligence in failing to adhere to a medical duty of care, such claim must be asserted against the government entity and cannot be asserted against the doctor.[125] If such a claim is nevertheless brought, the government attorney should raise official immunity in a motion to dismiss.

---

121. Oladeinde v. City of Birmingham, 230 F.3d 1275, 1289 (11th Cir. 2000) ("Thus, as this court recognized when it published its first opinion on this issue, the defendants were not precluded from asserting the qualified immunity defense throughout the proceedings as the facts developed. . . . Here, because the complaint did not contain all of the relevant facts that were introduced both at summary judgment and at trial, this court's first opinion affirming the denial of qualified immunity did not establish the law of the case." (citations omitted)).

122. *Crawford-El*, 523 U.S. at 598–600.

123. FLA. STAT. § 768.28(9)(a) (2015).

124. FLA. STAT. § 768.28(1), (9)(a).

125. Stoll v. Noel, 694 So. 2d 701, 703–04 (Fla. 1997); *see also* Willingham v. City of Orlando, 929 So. 2d 43, 47–48 (Fla. 5th Dist. Ct. App. 2006) ("Thus, unless [the arresting officer] acted in bad faith, or with malicious purpose, or with willful and wanton disregard of human rights, safety or property, he was entitled to summary judgment with respect to any personal liability, and [the plaintiff] was limited to seeking damages against the officer's governmental employer.").

Section 768.28(9)(a), Florida Statutes, which is the statutory basis for this immunity, states that no government employee "shall be held personally liable in tort *or named as a party defendant* [in a tort action except for where the employee] acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."[126]

This immunity is well-recognized as an immunity from suit itself, and not simply from liability. The Florida Supreme Court has stated that Section 768.28(9)(a) provides government employees and agents with "statutory immunity *from suit* and liability."[127] More recently, in *Keck v. Eminisor*,[128] while recognizing that official immunity barred a claim for negligence against a bus driver, the Florida Supreme Court treated official immunity as equivalent to federal qualified immunity from suit and even recognized a right to interlocutory appeal under state law where the immunity from suit was denied in a pretrial ruling.[129] Often, particularly in claims against police officers, there may be a federal claim under Section 1983 and a state claim for false arrest or battery. To the extent a reasonable argument can be made, it is typically in the employee's and entity's mutual interests to raise qualified immunity and official immunity and seek to have the employee dismissed entirely from the case.

Even in situations where a government employee is alleged in conclusory fashion to have acted with malice or in bad faith, such allegations should not be sufficient to abrogate official immunity unless supported by specific factual averments demonstrating such maliciousness or bad faith.[130]

There may be an occasion where the plaintiff will allege an intentional tort, such as battery, against both the government entity and the government employee. The plaintiff may seek to simultaneously allege in the alternative that the employee acted without bad faith or malice (pursuing a claim against the government to the exclusion of the employee) and that the employee acted with bad faith and malice

126. FLA. STAT. § 768.28(9)(a) (emphasis added).

127. *Stoll*, 694 So. 2d at 703 (emphasis added); *accord Willingham*, 929 So. 2d at 48.

128. 104 So. 3d 359 (Fla. 2012).

129. *Id. See* Craig E. Leen, *The Collateral Order Doctrine and Florida's Official Immunity from Suit*, THE AGENDA (Fla. Bar City, Cnty. & Loc. Gov't L. Sec., Fla.), Fall 2014, at 1, 36, *available at* http://locgov.org/wp-content/uploads/2014/10/CCLG-Fall-2014.pdf (explaining the collateral order doctrine's relationship to official immunity in Florida).

130. *See, e.g.*, Nelson v. Prison Health Servs., Inc., 991 F. Supp. 1452, 1465–66 (M.D. Fla. 1997) (determining that a claim against a sheriff in personal capacity should be dismissed under Section 768.28(9)(a) where the allegations did not demonstrate sufficiently "extreme" conduct).

(pursuing a claim against the employee to the exclusion of the entity).[131] For these cases, as an ethical matter, it is imperative that the government attorney determines at the outset whether he or she can represent the government employee and assert official immunity. A Florida Bar Rule 4-1.7(c) consultation must take place to determine whether the entity and the employee can be effectively represented by one attorney. Typically, if the entity makes a *Nuzum* determination that the employee has acted lawfully, or at least not in a malicious or otherwise extreme manner, the interests of the entity and employee are completely aligned, and the attorney may represent both parties, asserting official immunity for the employee, and defending on liability as to both. Indeed, in these circumstances, the entity may wish to enter into a stipulation with the plaintiff that the employee did not act in a malicious or extreme manner so that the individual employee can be dismissed from the state claim.

C. Absolute Immunity in Federal and State Claims

In my experience, unless the attorney is representing a judge, prosecutor, or commissioner in his or her legislative capacity,[132] absolute immunity is much less commonly raised than qualified or official immunity.[133] Absolute immunity should always be raised where it is applicable, however, as it is absolute (except where the employee acts outside the scope of jurisdiction or office),[134] and should almost always result in dismissal or summary judgment.[135]

131. *See* FED. R. CIV. P. 8(a), 8(a)(3) (allowing for "pleading that states a claim for relief" to "include relief in the alternative or different types of relief"); *see also* FLA. R. CIV. P. 1.110(b) ("Relief in the alternative or of several different types may be demanded.")

132. *See* Van de Kamp v. Goldstein, 555 U.S. 335, 341 (2009) (referencing absolute immunity that applies to prosecutors, legislators, judges, and jurors).

133. In the many civil rights cases that I handled for police officers, qualified immunity was raised in almost every case, while absolute immunity potentially applied on only a couple occasions. Absolute immunity applies to very specific tasks (i.e., judicial, prosecutorial, legislative) but does not apply to more general investigative and discretionary functions. *See, e.g.*, *Van de Kamp*, 555 U.S. at 342–43 (emphasizing that absolute immunity does not apply to a prosecutor acting in an investigative role; instead, qualified immunity would apply).

134. *See* Forrester v. White, 484 U.S. 219, 223–28 (1988) (determining that a judge did not receive judicial immunity when acting outside of judicial role and performing other types of functions); Crowder v. Barbati, 987 So. 2d 166, 168 (Fla. 4th Dist. Ct. App. 2008) (determining that absolute immunity applied to statements made within scope of executive, legislative, or judicial office).

135. Hart v. Hodges, 587 F.3d 1288, 1298 (11th Cir. 2009) ("Absolute immunity renders certain public officials completely immune from liability, even when their conduct is wrongful or malicious prosecution. . . . Rather, the absolute immunity doctrine has evolved such that even wrongful or malicious acts by prosecutors are allowed to go unredressed in order to prevent a flood of claims against the remainder of prosecutors performing their duties properly." (citation omitted)).

Absolute immunity applies to judicial, legislative, and executive officers acting within the scope of their jurisdiction or office.[136] For example, a commissioner would have absolute immunity in his or her individual capacity in speaking at the commission meeting in favor of a government policy and then voting for such policy, and a judge would have absolute immunity for orders issued where the judge has jurisdiction.

I will address two applications of absolute immunity that may be relevant to government attorneys. In the example where a city department director is sued for defamation based on statements made within the scope of office, the official should raise absolute immunity. As stated by the Florida Supreme Court in *Hauser v. Urchisin*,[137] "[t]he public interest requires that statements made by officials of all branches of government in connection with their official duties be absolutely privileged."[138] The test is whether the statements were made within the scope of the employee's office.[139] The scope of an employee's office is viewed broadly.[140]

In addition, in situations where a government official is complying with a statutory or judicial mandate (including a court order), the official should raise absolute immunity as a bar to such claim.[141] Ultimately, the city attorney should be seeking ways to reasonably and effectively raise these and other immunities from suit as soon as possible in the litigation.

VII. PROTECTING THE IMMUNITY FROM SUIT THROUGH A STAY OF DISCOVERY

In raising the immunities from suit, the city attorney should protect the substantial rights of the employee by seeking to stay discovery pending determination of the immunity issue, which is typically an issue of law. Indeed, as indicated by the United States Supreme Court, "[u]ntil this threshold immunity question is resolved, discovery should not be

136. *See, e.g.*, McNayr v. Kelly, 184 So. 2d 428, 433 (Fla. 1966) (establishing that executive immunity is identical to judicial and legislative immunities).

137. 231 So. 2d 6 (Fla. 1970).

138. *Id.* at 8. *See* City of Miami v. Wardlow, 403 So. 2d 414, 416 (Fla. 1981) (indicating that absolute immunity applies to both mid-level and high-level officials).

139. *Crowder*, 987 So. 2d at 168.

140. *Id.*; *see also* Danford v. City of Rockledge, 387 So. 2d 967, 968 (Fla. 5th Dist. Ct. App. 1980) (affirming the dismissal of defamation and tortious interference claims without leave to amend based on absolute immunity where statements were made in scope of office).

141. Willingham v. City of Orlando, 929 So. 2d 43, 49 (Fla. 5th Dist. Ct. App. 2006) ("Indeed, many courts have held that so long as a warrant is valid on its face, the officer is entitled to an absolute grant of immunity springing from the judicial immunity of the judicial officer who issued the warrant.").

allowed."[142] After all, as indicated by the Eleventh Circuit Court of Appeals, "[t]he defense of sovereign or qualified immunity protects government officials not only from having to stand trial, but from having to bear the burdens attendant to litigation, including pretrial discovery."[143]

In my view, the government attorney should consider seeking an immediate stay of discovery upon filing a motion to dismiss or for summary judgment based on qualified, official, or absolute immunity. This is done to protect the individual employee's immunity from suit, such as his or her right not to respond to interrogatories or be deposed as a party, until the immunity from suit issue is resolved. The motion for stay should indicate in the title that it is based on the assertion of immunity from suit, should cite to the binding *Harlow* decision, and should emphasize that the stay should be viewed as mandatory since immunity from suit is at issue.[144] If specific discovery requests are pending, the employee should include a motion for protective order,[145] as that may offer protection to the employee if the deadline to respond to discovery passes while the motion to stay is under consideration. Indeed, Federal Rule of Civil Procedure 37(d)(2) indicates that a failure to comply with discovery "is not excused on the ground that the discovery sought was objectionable, *unless the party failing to act has a pending motion for a protective order under Rule 26(c)*."[146]

Ultimately, the district court should grant the stay of discovery pending resolution of the immunity from suit, along with any interlocutory appeal that results from the district court's decision. If the district court attempts to defer ruling on the immunity from suit in order to allow discovery to proceed, this may be sufficient error to support an immediate appeal.[147] Indeed, the United States Supreme Court expressly

142. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

143. Blinco v. Green Tree Servicing, LLC, 366 F.3d 1249, 1252 (11th Cir. 2004); *see also* Siegert v. Gilley, 500 U.S. 226, 232 (1991) ("One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.").

144. The motion should emphasize that it intends to protect immunity from suit, because it will ensure that the district court does not view this as a more generalized motion to stay based only on the existence of a dispositive motion. *See* Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997) ("Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before discovery begins." (footnote omitted)).

145. FED. R. CIV. P. 26(c).

146. FED. R. CIV. P. 37(d)(2) (emphasis added).

147. *See* Collins v. Sch. Bd. of Dade Cnty., Fla., 981 F.2d 1203, 1204–05 (11th Cir. 1993) (holding that it was an error for a district court to refuse to rule on a motion for summary judgment raising qualified immunity and permitting immediate appeal).

rejected the allowance of even limited discovery where the case is still at the pleadings stage and qualified immunity is at issue.[148]

Finally, even after a motion to dismiss raising immunity from suit is denied, motions should still be filed requesting that the district court carefully limit and manage the discovery process to protect the immunity defense.[149]

VIII. GOVERNMENT EMPLOYEES HAVE IMPORTANT RIGHTS TO INTERLOCUTORY APPEALS AND STAY OF PROCEEDINGS

The general rule, in both state and federal courts, is that an appeal can only be taken from a final judgment.[150] An extraordinarily important exception exists for government employees in both federal and state court. In federal court, the denial of a dispositive motion raising immunity from suit can be appealed on an immediate, interlocutory basis under the collateral order doctrine.[151]

In state court, a party may immediately appeal a non-final order denying a motion raising any of the immunities from suit listed in Florida Rule of Appellate Procedure 9.130, as long as the decision is made as a "matter of law."[152] These immunities include "absolute or qualified immunity in a civil rights claim arising under federal law," official immunity arising under Section 768.28(9), Florida Statutes, and sovereign immunity.[153]

148. Ashcroft v. Iqbal, 556 U.S. 662, 686 (2009) ("We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.").

149. *See* Crawford-El v. Britton, 523 U.S. 574, 599–600 (1998) ("Of course, the judge should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible.").

150. FED. R. APP. P. 4; FLA. R. APP. P. 9.110.

151. The collateral order doctrine allows appeals of orders that finally decide issues during the course of a case that are collateral to the eventual final judgment and which cannot later be appealed in a meaningful way. Immunity from suit is one of the quintessential issues that is subject to the collateral order doctrine, as the denial of immunity from suit cannot be cured by an appeal following final judgment after the suit has already occurred. *See* Mitchell v. Forsyth, 472 U.S. 511, 524–25 (1985) (applying the collateral order doctrine to the denial of a motion raising qualified immunity (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949))); *see also* Griesel v. B.D. Hamlin, 963 F.2d 338, 340–41 (11th Cir. 1992) (applying the collateral order doctrine to a denial of a motion raising state immunity from suit).

152. FLA. R. APP. P. 9.130.

153. FLA. R. APP. P. 9.130(a)(3)(C)(vii), (x), (xi). I served on the Appellate Court Rules Committee when the rule changes related to sovereign and official immunity were considered, and I was assigned the referral to draft the proposed rules. *See* Fla. App. Ct R. Comm., Meeting Minutes (June 28, 2013), *available at* https://www.floridabar.org/cmdocs/cm205.nsf/

Of course, the order denying the employee's motion should be reviewed carefully before deciding whether to appeal. Nevertheless, if the motion was colorable, there will typically be grounds for an appeal, as issues of law such as immunities from suit are reviewed de novo.[154] Accordingly, the government attorney has an ethical obligation to carefully consider the appeal, which is a unique right, and to confer with the employee before waiving it.[155] After all, the employee has much to gain, and very little to lose, in bringing the appeal, as a successful appeal may win the entire case, while a loss will only result in the case proceeding to the next stage of litigation.[156] Of course, the employee may be concerned about creating negative precedent that will harm the employee later in the case, but even such negative precedent is better to learn about earlier than later, so settlement of the claims can be considered.

When an appeal is brought based on an immunity from suit, the employee should always focus the appeal on issues of law.[157] In doing so, the employee will be required to accept the plaintiff's version of the facts as true (either pleadings or evidence, depending if the stage is dismissal or summary judgment) along with any undisputed facts. This will create a pure question of law—namely whether plaintiff's version of the facts abrogate the immunity from suit.[158]

Once an appeal is brought, the employee should seek a stay of proceedings in the lower court pending the appeal, as this is the only way to preserve the immunity from suit from being diminished by the suit proceeding. As stated by the Eleventh Circuit, "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on

c5aca7f8c251a58d85257236004a107f/9a2ffe29e1349d8685257b9c00734aed/$FILE/ACRC%206-2813%20Minutes%20Corrected%2010% 2021%2013.pdf.

154. Keck v. Eminisor, 104 So. 3d 359, 366–67 (Fla. 2012).

155. FLA. BAR R. 4-1.2(a).

156. The interlocutory appeal belongs to the employee, not the government entity. The attorney must be careful not to subordinate the employee's interests in bringing the appeal to the entity's concern about potentially negative precedent for future cases.

157. Indeed, the Eleventh Circuit has held that there is no interlocutory appellate jurisdiction to challenge a factual issue such as the sufficiency of the evidence. Therefore, an appeal challenging a factual issue will be dismissed. *See generally* Koch v. Rugg, 221 F.3d 1283, 1295–97 (11th Cir. 2000) (noting that "[w]hen discriminatory intent is a predicate factual element of the underlying constitutional tort, . . . sufficiency of discriminatory-intent evidence generally is not part of the core qualified immunity analysis" (footnote omitted)); Cottrell v. Caldwell, 85 F.3d 1480, 1485 (11th Cir. 1996) (noting the lack of "interlocutory appellate jurisdiction over the denial of summary judgment on qualified immunity grounds where the sole issues on appeal are issues of evidentiary sufficiency").

158. *See* Mitchell v. Forsyth, 472 U.S. 511, 528 n.9 (1985) ("We emphasize . . . that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law.").

the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."[159]

Finally, I will briefly address appeals by government employees of state immunities from suit in federal court. The Eleventh Circuit had previously prevented such appeals under the theory that Florida sovereign immunity was merely immunity from liability, and not from suit.[160] Since the issuance of those decisions, the Florida Supreme Court has expressly clarified that sovereign immunity in Florida does constitute immunity from suit in *Wallace*.[161]

Moreover, official immunity for government employees is based on Section 768.28(9)(a), Florida Statutes.[162] The statutory text expressly makes this an immunity from suit by indicating that an employee should not be "named as a party defendant" except in very limited circumstances.[163] Further, by likening official immunity to federal qualified immunity in *Keck*, the Florida Supreme Court demonstrated

159. Green Leaf Nursery v. E.I. DuPont de Nemours & Co., 341 F.3d 1292, 1309 (11th Cir. 2003) (internal quotation marks omitted) (quoting Griggs v. Provident Cons. Disc. Co., 459 U.S. 56, 58 (1982)); *see also* Blinco v. Green Tree Servicing, LLC, 366 F.3d 1249, 1252 (11th Cir. 2004) (noting that where a case is declared frivolous by the court of appeals, the district court either relinquishes or sustains control of the case).

160. *See* Jones v. Cannon, 174 F.3d 1271, 1293 (11th Cir. 1999) (citing CSX Transp., Inc. v. Kissimmee Util. Auth., 153 F.3d 1283, 1286 (11th Cir. 1998)). These cases are based on a Florida Supreme Court decision, *Department of Education v. Roe*, indicating that sovereign immunity was simply an immunity from liability, not from suit. 679 So. 2d 756, 758–59 (Fla. 1996). The *Roe* decision has since been superseded by *Wallace v. Dean*, 3 So. 3d 1035, 1044 (2009). The development of sovereign immunity and official immunity as immunities from suit under Florida law should be binding on the Eleventh Circuit and result in the court recognizing a right to interlocutory appeals. *See* McMahan v. Toto, 311 F.3d 1077, 1079–81 (11th Cir. 2002) (holding that "Florida's offer of judgment statute . . . is applicable to cases . . . that are tried in the State of Florida even though the substantive law that governs the case is that of another state" (internal citation and footnote omitted)).

161. *Wallace*, 3 So. 3d at 1044. The *Wallace* court explained:

> As an initial point of departure, brief clarification is necessary concerning the differences between a lack of liability under established tort law and the presence of sovereign immunity. When addressing the issue of governmental liability under Florida law, we have repeatedly recognized that a duty analysis is *conceptually distinct* from any later inquiry regarding whether the governmental entity remains *sovereignly immune from suit* notwithstanding the legislative waiver present in [S]ection 768.28, Florida Statutes. Under traditional principles of tort law, the absence of a duty of care between the defendant and the plaintiff results in *a lack of liability, not* application of immunity from suit. Conversely, sovereign immunity may shield the government from an action in its courts (i.e., a lack of subject-matter jurisdiction) even when the State may otherwise be liable to an injured party for its tortious conduct.

Id. (first emphasis in original, second emphasis added, third emphasis in original) (footnotes and citations omitted).

162. FLA. STAT. § 768.28(9)(a) (2015).

163. *Id.*

that official immunity constitutes immunity from suit.[164] Indeed, Florida now allows immediate interlocutory appeals of non-final orders denying official immunity under Section 768.28(9), which is the same treatment given to qualified immunity.

This development in Florida law should allow an employee who has been sued under both Section 1983 and state law to take an interlocutory appeal if qualified immunity and official immunity are denied as to those claims. This protects the employee's substantive right to the immunity and promotes efficiency, as all immunities from suit can be decided at once at that stage of proceedings.

IX. THE USE OF SPECIAL INTERROGATORIES AND SPECIAL VERDICT FORMS

In representing a government employee, in either state or federal court, it is important to properly raise the immunity from suit at trial. Typically, immunity from suit is a question of law determined by the court—not by the jury.[165] It is possible, however, that some issues of fact would significantly affect the court's legal determination. For example, in a Section 1983 claim for excessive force in violation of the Fourth Amendment, a critical factual question may be whether or not a police officer continued to use force against a suspect after the suspect was subdued and handcuffed. It may be that the pre-handcuffing force would be protected by qualified immunity, but that any post-handcuffing force would not be. If there is a dispute of fact as to whether the post-handcuffing force occurred, then the jury must decide that factual question. In order to preserve the district court's ability to determine the legal question of immunity, however, it is imperative that special interrogatories be used as part of a special verdict form.[166]

It is important to remember that a jury may find that a false arrest or excessive force occurred in violation of the Fourth Amendment, but that qualified immunity may still protect the officer from suit because such

164. Keck v. Eminisor, 104 So. 3d 359, 366 (Fla. 2012).

165. *See, e.g.*, Cottrell v. Caldwell, 85 F.3d 1480, 1488 (11th Cir. 1996) ("We do not mean to imply, of course, that district courts should submit the issue of whether a defendant is entitled to qualified immunity to the jury. *Qualified immunity is a legal issue to be decided by the court*, and the jury interrogatories should not even mention the term." (emphasis added) (citations omitted)).

166. *Id.* at 1487–88 ("Where the defendant's pretrial motions are denied because there are genuine issues of fact that are determinative of the qualified immunity issue, special jury interrogatories may be used to resolve those factual issues. Because a public official who is put to trial is entitled to have the true facts underlying his qualified immunity defense decided, a timely request for jury interrogatories directed toward such factual issues should be granted. Denial of such a request would be error, because it would deprive the defendant who is forced to trial of his right to have the factual issues underlying his defense decided by the jury." (citations omitted)).

arrest or force did not violate clearly established law. Thus, the use of specific factual jury interrogatories that find whether certain specific facts occurred is crucial to preserving the court's ability to rule on this defense.

X. FINAL JUDGMENT INVOLVING THE EMPLOYEE

If the case proceeds through trial, and if immunities from suit raised on behalf of the employee are not recognized, a judgment may be entered against the employee. It is important to counsel the employee regarding this possibility at the beginning of the attorney-client relationship, as in limited circumstances the government would be unable to pay the judgment. These circumstances are described in Section 111.071, Florida Statutes.[167] In evaluating when an entity could pay a judgment under this section, it should be noted that final judgment is defined as "a judgment upon completion of any appellate proceedings."[168]

As for state claims, since Section 111.071 incorporates the limitations on payment of Section 768.28, the entity could not pay a judgment for an employee where, following all appellate proceedings, the employee is found to have acted in bad faith, with malicious purpose, or in wanton and willful disregard of life, safety, or property.[169] If such findings are not made, or if such judgment is successfully appealed or vacated, then no such impediment to payment of the judgment would exist, and the government entity could pay the judgment for the employee.

As for federal claims, the entity could pay the judgment unless the judgment indicates that the employee "caused the harm intentionally."[170] Thus, in situations where the employee was found to have intentionally caused the conduct, but not the harm, there is a basis for the entity to elect to pay the judgment if it wishes.[171]

167. *See* FLA. STAT. § 111.071(1)(a) (authorizing payment by municipalities and counties, as well as certain other government entities, of "[a]ny final judgment, including damages, costs, and attorney's fees, arising from a complaint for damages or injury suffered as a result of any act or omission of action of any officer, employee, or agent in a civil or civil rights lawsuit described in [Section] 111.07. If the civil action arises under [Section] 768.28 as a tort claim, *the limitations and provisions of [Section] 768.28 governing payment shall apply*. If the action is a civil rights action arising under 42 U.S.C. [Section] 1983, or similar federal statutes, payments for the full amount of the judgment may be made *unless the officer, employee, or agent has been determined in the final judgment to have caused the harm intentionally*." (emphasis added)).

168. *Id.* § 111.071(2).

169. *Id.* § 111.071(1)(a).

170. *Id.*

171. *Id.*

XI. CONCLUSION

In the end, the strong moral and legal commitment of a government entity to provide representation for its employees in the event of suit is usually in the best interests of everyone involved, including the public. It is important for the government attorney to undertake this representation in an ethical and effective manner, and for the attorney to understand the unique web of immunities, rules, and rights that apply to government employees who have been sued. This Article provides a framework for considering how to proceed in these cases. However, in no way is this Article dispositive, as each case and client is different and must be approached with professionalism and care.

Appendix I

CITY OF CORAL GABLES
OFFICE OF THE CITY ATTORNEY

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:

> The 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).

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(c). 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.

Appendix II

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 _____. 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. We 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 [insert official's name] as soon as possible. Again, you are free to consult private counsel before making your decision. If you have any questions whatsoever, please call [insert official's name] at [insert official's phone number].