

**BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY**

Meeting Date: November 17, 2015

Department: County Attorney

Bulk Item: Yes X No

Staff Contact/Phone #: Chris Ambrosio X3477

AGENDA ITEM WORDING: Approval of and authorization for the County Attorney to execute the conflict waiver letter dated October 26, 2015, authorizing Ira Libanoff, Esq., to represent the County in two lawsuits in which Berkley Regional Insurance Company (“Berkley”) is an adversarial party to the County.

ITEM BACKGROUND: The County’s outside construction law counsel Ira Libanoff, Esq., is the County’s counsel in the cases styled as Monroe County v. Construct Group Corp. and Berkley, Case No. 15-CA-000844-A001KW, and Construct Group Corp. v. Monroe County, Case No. 15-CA-000563-P. In those actions, Berkley is the surety that issued the payment and performance bond to Construct Group Corp. (CGC) and, along with CGC, Berkley is an adversarial party to Monroe County.

Libanoff and his law firm represent Berkley in the case styled as Hernandez Construction, LLC v. Berkley, Case No. 15-008273 CA 01, pending in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. The Hernandez matter does not involve the County or any County interest. Mr. Libanoff’s client in the Hernandez matter is the indemnitor on the bond issued by Berkley to Hernandez Construction. Berkley then tendered the defense of the claim to their client (the indemnitors), who then retained Mr. Libanoff to represent them since they have the duty to indemnify, defend and hold Berkley harmless from the claim by Hernandez Construction. Technically for litigation, Mr. Libanoff represent/defend Berkley, but they actually represent the indemnitors.

Under the Rules Regulating the Florida Bar, Rules of Professional Conduct, both the County and Berkley must consent and waive any conflict of interest in order for Mr. Libanoff to represent them simultaneously as being adversarial parties to each other, but in separate matters. Unless the County and Berkley provide their informed written consent, Libanoff will be prohibited from representing the County in the lawsuits involving the County and Berkley. Berkley has agreed to waive any conflict in regard to Mr. Libanoff’s representation of Berkley and also Mr. Libanoff’s representation of Monroe County in regard to its lawsuit against Berkley as part of the CGC lawsuits.

At this time, there is no reason to believe that Mr. Libanoff cannot competently and diligently represent the County in the circumstances and matters discussed above. There is no foreseeable risk to the County in having Mr. Libanoff represent the County in an adverse position and in conflict with Berkley in the CGC lawsuits.

PREVIOUS RELEVANT BOCC ACTION: None.

CONTRACT/AGREEMENT CHANGES: N/A.

STAFF RECOMMENDATIONS: Approval.

County of Monroe

The Florida Keys



BOARD OF COUNTY COMMISSIONERS

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Office of the County Attorney

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** Board Certified in City, County & Local Govt. Law

October 26, 2015

Ira Libanoff, Esquire
Ferencik Libanoff Brandt Bustamante and Goldstein, P.A.
150 S. Pine Island Road, Suite 400
Plantation, Florida 33324

Re: Waiver of Conflict of Interest arising out of representation of Berkley Regional Insurance Company and Monroe County.

Dear Mr. Libanoff:

As we discussed, Berkley Regional Insurance Company (Berkley) is the surety that issued the payment and performance bond to Construct Group Corp. and is an adversarial party to Monroe County in the cases styled as Monroe County v. Construct Group Corp. and Berkley, Case No. 15-CA-000844-A001KW, and Construct Group Corp. v. Monroe County, Case No. 15-CA-000563-P, both in which you and your firm Ferencik Libanoff Brandt Bustamante and Goldstein, P.A. ("FLBBG") represent Monroe County.

As you explained, you and FLBBG represent Berkley in the case styled as Hernandez Construction, LLC v. Berkley, Case No. 15-008273 CA 01, pending in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. Your client in the *Hernandez* matter is the indemnitor on the bond issued by Berkley to Hernandez Construction and Berkley then tendered the defense of the claim to your client (the indemnitors), who then retained you to represent them since they have the duty to indemnify, defend and hold Berkley harmless from the claim by Hernandez Construction. Thus, as you further explained while technically you represent/defend Berkley, you are actually representing the indemnitors.

You have advised me that Berkley has agreed to waive any conflict in regard to your representation of Berkley and also your representation of Monroe County in regard to its lawsuit against Berkley as part of the Construct Construction Corp. lawsuits. Pursuant to the Rules of the Florida Bar, both parties involved in any conflict situation must agree to waive the conflict.

Pursuant to the above, and in accordance with our discussions, this letter shall confirm that Monroe County, has agreed to waive any conflict of interest that may exist in regard to either you or FLBBG representing Monroe County in the case styled as Monroe County v. Construct Group Corp. and Berkley, Case No. 15-CA-000844-A001KW, or the case styled as Construct Group Corp. v. Monroe County, Case

Ira Libanoff, Esquire
October 26, 2015
Page 2

No. 15-CA-000563-P both pending in the Sixteenth Judicial Circuit in and for Monroe County, Florida, and you or FLBBG representing Berkley in the matter styled Hernandez Construction, LLC v. Berkley, Case No. 2015-008273 CA 01, pending in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida.

This waiver of conflict shall cover any and all claims and is provided pursuant to the applicable Rules Regulating the Florida Bar, Rules of Professional Conduct governing and covering conflicts of interest. This waiver of conflict of interest is retroactive to the date of filing of the all of the lawsuits referred to in the preceding paragraphs. Please execute this waiver and provide a copy of the fully executed copy to me.

Should you have any questions or if there is anything additional we need to discuss, please contact me.

The undersigned is authorized to execute this waiver of conflict of interest on behalf of Monroe County, Florida and hereby agrees to such waiver.

Sincerely,

Robert B. Shillinger, Esquire, County Attorney

Ira Libanoff, Esquire
Ferencik Libanoff Brandt Bustamante and Goldstein, P.A.
150 S. Pine Island Road, Suite 400
Plantation, Florida 33324

West's Florida Statutes Annotated

Rules Regulating the Florida Bar (Refs & Annos)

Chapter 4. **Rules** of Professional Conduct (Refs & Annos)

4-1. Client-Lawyer Relationship

West's F.S.A. **Bar Rule 4-1.7**

Rule 4-1.7. Conflict of Interest; Current Clients

Currentness

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

(c) Explanation to Clients. 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.

(d) Lawyers Related by Blood, Adoption, or Marriage. A lawyer related by blood, adoption, or marriage to another lawyer as parent, child, sibling, or spouse must not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing.

(e) Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and

to inform both the insured and the insurer regarding the scope of the representation. All other **Rules Regulating The Florida Bar** related to conflicts of interest apply to the representation as they would in any other situation.

Credits

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Jan. 23, 2003, effective July 1, 2003 (838 So.2d 1140); March 23, 2006, effective May 22, 2006 (933 So.2d 417); May 29, 2014, effective June 1, 2014 (140 So.3d 541).

Editors' Notes

COMMENT

Loyalty to a client

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific **rules** regarding certain conflicts of interest, see **rule** 4-1.8. For former client conflicts of interest, see **rule** 4-1.9. For conflicts of interest involving prospective clients, see **rule** 4-1.18. For definitions of "informed consent" and "confirmed in writing," see terminology.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See **rule** 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by **rule** 4-1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to **rule** 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a)(1) expresses that general **rule**. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a)(1) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must