STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL ADDICOTT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-0043FE
	)	
ROBERT NIEMAN,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on June 17 and 18, 2004, in Miami, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings

APPEARANCES

For Petitioner: Stuart R. Michelson, Esquire
Law Office of Stuart R. Michelson
200 Southeast 13th Street
Fort Lauderdale, Florida 33316

For Respondent: Robert Nieman, pro se
9731 Southwest 12th Street
Pembroke Pines, Florida 33026

STATEMENT OF THE ISSUES

The basic issues in this case are whether Petitioner, Michael Addicott, is entitled to recover attorney's fees and costs from Complainant/Respondent, Robert Nieman, as provided in

Section 112.317(8) Florida Statutes, and, if so, the amount of such attorney's fees and costs.

PRELIMINARY STATEMENT

On November 19, 2003, Addicott filed his fee petition in this cause, requesting an award of attorney's fees and costs pursuant to Section 112.317(8) Florida Statutes, against Nieman. Section 112.317(8), Florida Statutes, allows such an award when a complaining person files a complaint with the Ethics Commission "with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation." In June of 2002, Nieman filed a complaint against Addicott with the Ethics Commission, and in September of 2002 Nieman filed an amended ethics complaint against Addicott. The fee petition in this case asserts that some of the allegations in Nieman's original and amended complaints against Addicott were made "with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation."

In due course, the fee petition was referred to the Division of Administrative Hearings to conduct an evidentiary hearing. At the final hearing in this case, Addicott testified on his own behalf and also called the following witnesses:

Carol Morris, Samuel S. Goren, Esquire, Dr. James Vardalis, and Leo Santiello. Addicott also published the deposition of Nieman as well as the depositions of Judy Cuenca and Bo Jackson. Addicott offered ten exhibits. Addicott's Exhibit A-10 was rejected. The remaining Addicott exhibits were received in evidence.

Nieman testified in his own behalf and called the following witnesses: Neil Leff, Samuel Feinman, and Rosemary Wascura. Nieman offered 17 exhibits. Nieman's Exhibits N-02, N-07, N-12, N-13, N-15, and N-17 were rejected. The remaining Nieman exhibits were received in evidence.

At the conclusion of the evidentiary hearing the parties requested and were allowed 40 days from the filing of the hearing transcript within which to file their respective proposed recommended orders. The last volume of the transcript was filed on July 29, 2004. Thereafter, both parties filed proposed recommended orders containing proposed findings of fact and conclusions of law. The proposals submitted by the parties have been carefully considered during the preparation of this Recommended Order.

FINDINGS OF FACT

Nieman's ethics complaints against Addicott

1. On or about June 14, 2002, Robert Nieman ("Nieman") filed a complaint with the Florida Commission on Ethics ("Ethics

Commission") against Michael Addicott ("Addicott"). At that time Nieman was a police officer of the Town of Golden Beach who was in a work status of suspended with pay, pending investigation of allegations that Nieman had engaged in some form of misconduct. At the time the subject complaint was filed, Addicott was the Mayor of the Town of Golden Beach. At all times material to this case, Addicott has been the Mayor of the Town of Golden Beach or has been a candidate for the office of Mayor.

2. Nieman's June 14 complaint to the Ethics Commission contained four numbered paragraphs. Each numbered paragraph described a separate incident involving alleged conduct by Addicott that Nieman believed was inappropriate and that Nieman believed should be investigated by the Ethics Commission. The only one of those paragraphs that appears to be relevant and material to the issues in this case is paragraph 2, in which Nieman alleged the following:

> Mayor Addicott's son had a hit and run accident within the Town's jurisdiction; hitting and knocking down a concrete light pole. When the criminal accident was being investigated and the son approached about the crime, the Mayor's wife, who was a Councilperson at the time, badgered and tried to intimidate the officers (myself included. I was a sergeant at the time), raising her voice and stating that we were "picking on her son." She interfered with our investigation of the vehicle. The son later admitted to the incident and after

> discussions with the then Chief by Mr. and Mrs. Addicott, no further action was taken by the Golden Beach Police Department.

3. On or about September 20, 2002, Nieman filed an amendment to his original Ethics Commission complaint against Addicott. The amendment appears to have been in response to a request by the Ethics Commission for additional information about the allegations in Nieman's June 14 complaint. The amendment to the complaint was also arranged in four separate numbered paragraphs, each providing additional information about essentially the same four events that were described in the original complaint of June 14. Two of the numbered paragraphs in the amended complaint appear to be relevant and material to the issues in this case. The primary subject matter of paragraph 1 concerns allegations that one of Addicott's sons, Aaron Addicott, received special treatment by being paid for hours when he did not report to work as a lifeguard. However, the last sentence of paragraph 1 of the amended complaint alleges the following new event not alleged in Nieman's original complaint: "The lifeguard [Addicott's son] was hired when the Mayor [Addicott] was in office." And paragraph 2 of Nieman's amended Ethics Commission complaint added the following allegations about the automobile accident episode.

> With regard to the auto accident, both the Mayor and the former Councilperson, his wife, used their position to have the

> accident ignored, Mrs. Addicott responded to the scene of the accident and Mrs. Addicott directly told the police department not to take any action and that they better let up on her son. Both the Mayor and Mrs. Addicott discussed the matter with the former Police Chief and told him not to interfere. The Chief was later forced to resign. As the Mayor was running for election at the time, it benefited him by his son not being arrested for leaving the scene of an accident. This is the same son who is the absentee lifeguard. Also, no reimbursement was received from the Mayor, his wife or son for the damage to the Town's property.

The subject matter scope of the fee petition

4. The Fee Petition in this case asserts, in general terms, that Nieman acted with malice by filing complaints against Addicott with knowledge that the complaints contained one or more false allegations, or with reckless disregard as to whether the complaints contained false allegations. The Fee Petition does not assert that all of the allegations in Nieman's complaints against Addicott were known to be false or were made with a reckless disregard as to whether the allegations were false. Rather, only two of the events alleged in Nieman's complaints are specified in the fee petition as being events about which Nieman knowingly made false allegations or about which Nieman made statements with a reckless disregard as to whether the allegations were false. The paragraphs of the Fee Petition which describe those two specific events appear at

paragraphs 6, 7, 8, and 9 of the Fee Petition, which read as follows:

> 6. One of the factual underpinnings of Nieman's Complaint is that Petitioner [Addicott] interfered with a police investigation into an automobile accident involving Aaron Addicott, Petitioner's son. Nieman admitted that he had no personal knowledge regarding this allegation, and that he was not personally involved in the investigation. Incredibly, Nieman admitted that the accident took place before Addicott was elected Mayor! *** This is certainly a reckless, if not knowing, false allegation which is material to a violation of the Florida Ethics Code.
>
> 7. At the time of the alleged incident, Nieman was the Police Chief of the Town of Golden Beach, and certainly had access to all the necessary records to verify his allegations, and therefore knew or should have known that his allegations were false.
>
> 8. Nieman also alleged that Mayor Addicott hired his son, Aaron Addicott, to be a Town of Golden Beach part-time lifeguard, which was in violation of the Florida Ethics Code. However, Nieman admitted that he had no personal knowledge regarding the Petitioner's involvement in the hiring of his son. *** In fact, Addicott had NO involvement in hiring his son, nor does the Golden Beach Town Charter recognize that the town Mayor need have any involvement in hiring lower level town employees, such as part-time life guards.
>
> 9. At the time of the filing of the Complaint [with the Ethics Commission], Nieman's allegation that Petitioner hired his son was made with the knowledge that it was false, or at the very least with reckless disregard as to whether it was true, as is evidenced by Nieman's own

admission that he had no personal knowledge of the alleged violation.

Aaron's employment as a lifeguard

5. Section 4.01 of Article IV of the charter of the Town of Golden Beach sets forth the powers and duties of the mayor. Subsection (b) of that section describes the "administrative duties" of the mayor, which include:

> (1) The mayor shall nominate a town manager who shall be appointed by resolution of the council.
>
> (2) The mayor, together with the town manager, shall carry out all administrative duties as provided by the charter, ordinance or resolution of the council.
>
> (3) The mayor shall approve all written orders, administrative policies and acts of the town manager.
>
> (4) The mayor shall upon recommendation of the manager appoint and when deemed necessary, discipline, suspend or remove town employees. (Emphasis added.)
>
> (5) The mayor shall upon the recommendation of the manager appoint department heads to administer the government of Golden Beach. Appointments and terms of employment shall be approved by resolution of the council. Department heads shall carry out the administrative orders of the manager and the mayor and may be disciplined, suspended or removed by the mayor as may be recommended from time to time by the manager. A department head may appeal the decision of the mayor to the personnel board in the same manner as an employee.

6. Prior to the date on which Addicott became mayor of the Town of Golden Beach, two of his sons (Benjamin and Aaron) sometimes worked for the Town in the capacity of "fill-in" lifeguards. During that same time period, a number of other people, most of whom had regular jobs as lifeguards in nearby communities, would also work for the Town of Golden Beach in the capacity of "fill-in" lifeguards. Although all of the people who worked for the Town as "fill-in" lifeguards were paid for the time they worked, none of those people were regular employees of the Town with regular scheduled work hours. Rather, all of the people who worked as "fill-in" lifeguards worked on an "as needed" basis.

7. At some time in March of 1999, shortly after Addicott became the mayor of the Town, Aaron Addicott, was placed on the Town payroll in some sort of regular weekend part-time lifeguard position, in which his work as a lifeguard was primarily on Saturday and Sunday. This was a change in the terms and conditions under which Aaron Addicott performed lifeguard services for the Town. The specific nature of the change in March of 1999 is not contained in the record of this case, but it appears that following that change, Aaron Addicott was, essentially, the Town's weekend lifeguard, and another lifeguard worked the other five days of the week. Following the change in Aaron Addicott's terms and conditions of employment in March of

1999, Aaron Addicott's work as a lifeguard continued to be on Saturday and Sunday, with the exception of occasional days when he filled-in for the regular lifeguard when the regular lifeguard was unable to work.

8. On or about August 26, 1999, at a time when Michael Addicott was serving as mayor of the Town of Golden Beach, an interoffice memo reading as follows was sent to him by Rosemary J. Wascura, who was then the Interim Town Manager:

> To: Mayor Michael Addicott
>
> From: Rosemary J. Wascura, Interim Town Manager
>
> Date: August 26, 1999
>
> Re: Appointment of Lifeguards
>
> 102-99
>
> Following our recent conversation regarding the appointment of Lifeguards, please see below the following recommendation:
>
> 1. That effective September 1, 1999 John Fialowsky be hired as the Town's full-time Lifeguard. Compensation is $13.00 per hour and his hours are Monday and Tuesday 7:00 am. - 7:00 pm., and Wednesday, Thursday and Friday 7:00 am. - 2:00 pm.
>
> 2. That effective September 1, 1999 Aaron Addicott be hired as the Town's part-time Lifeguard. Compensation is $9.25 per hour and his hours are Saturday and Sunday 7:00 am. - 7:00 pm., and Wednesday, Thursday and Friday 2:00 pm. - 7:00 pm.

[_] APPROVED

[_] NOT APPROVED

_____
Michael Addicott
Mayor

9. Mayor Addicott placed a check mark in the "approved" box and then signed the interoffice memo quoted above and returned it to Ms. Wascura on or before the effective date mentioned in the memo. By approving and signing the recommendation, Mayor Addicott hired his son as "the Town's part-time Lifeguard," which was a new position of employment that had not previously existed at the Town of Golden Beach. Notwithstanding the job title of "part-time lifeguard," the position Aaron Addicott was hired to fill in August of 1999 was a full-time position of employment in which he was scheduled to work a total of five days per week for a total of 39 hours per week.

10. In both March of 1999 and in August of 1999, the effective hiring authority was vested in the mayor of the Town of Golden Beach. Such being the case, the final decision to hire Aaron Addicott on both of the occasions in 1999 described above was made by Mayor Addicott.

Aaron's motor vehicle accident

11. Very shortly before the election at which Addicott was elected mayor of the Town of Golden Beach, Aaron Addicott was involved in a one-vehicle motor vehicle accident in which the vehicle driven by Aaron Addicott struck a light pole and knocked the light pole down. The location of the accident was a block or less from the Addicott home. Shortly after the accident, Aaron Addicott left the scene of the accident and drove the short distance to the Addicott home. Nieman saw the accident happen, and shortly thereafter, police officers of the Town of Golden Beach, including Sergeant Nieman, arrived at the Addicott home and attempted to conduct an investigation of the accident that Aaron Addicott had just been involved in. Mrs. Addicott, the wife of the soon-to-be mayor and the mother of Aaron, refused to cooperate with the efforts of the police officers to investigate the accident and ordered the police officers to leave the premises of the Addicott home. Mrs. Addicott also chastised the police officers for picking on her son and demanded that they leave her son alone.

12. Although Aaron Addicott at first denied involvement in the motor vehicle accident, a few days after the accident he went to the police station in the Town of Golden Beach and acknowledged his involvement in the accident. Aaron Addicott was never charged with any civil or criminal violation arising

from the accident or from his act of leaving the scene of the accident.

13. Another police officer told Nieman that Mr. and Mrs. Addicott (Aaron's parents) had met with the Chief of Police of the Town of Golden Beach shortly after the accident. Nieman does not appear to have conducted any further inquiry to confirm the information that Mr. and Mrs. Addicott had met with the Chief. Nieman believed that Aaron should at least have been charged with the violation of leaving the scene of an accident. When no charges were forthcoming, Nieman formed the opinion that Mr. and Mrs. Addicott, during the meeting he believed they had with the Chief, had "used their position[s] to have the accident ignored" and had told the Chief "not to interfere."

14. The Town of Golden Beach did not receive any reimbursement for the damage to the light pole caused by Aaron's motor vehicle accident from Aaron Addicott or from either of Aaron's parents.[1]

15. From time to time when Aaron Addicott was scheduled to be working as a Town lifeguard, he would be absent from work and the town manager would receive complaints that Aaron was not working when he should be working. This is the same Aaron Addicott who was involved in the motor vehicle accident described above.

The actual knowledge issue

16. With regard to the factual allegations at issue here, at the time of making those allegations Nieman did not have actual knowledge that any of those allegations were false.[2]

The reckless disregard issues

17. With regard to the factual allegations at issue here, at the time of making those allegations Nieman did not make any of the subject allegations with a "reckless disregard" as to whether they were true or false. Quite to the contrary, Nieman did not at any time entertain any "serious doubts as to the truth" of his allegations. Similarly, Nieman did not at any time have any "high degree of awareness" of the "probable falsity" of the subject allegations.[3]

Attorney's fees and costs

18. The real party in interest; i.e., the entity that will be the beneficiary of any award of attorney's fees and costs in this proceeding, is the Town of Golden Beach. That is because it is the Town that retained and agree to pay for legal representation of Mayor Addicott in both the defense of the underlying Ethics Commission complaint and in the prosecution of this fee petition. The Town retained the law offices of Stuart R. Michelson. As of June 17, 2004, the date on which the final hearing in this case began, Mr. Michelson's law offices had submitted three bills to the Town. Those bills cover costs and

attorney's fees incurred from July 2, 2002, through June 4, 2004. Those bills itemize a total of 59.70 hours of attorney's services, for which the Town was billed $10,650.00.

19. The three bills discussed immediately above also itemize a total of 5.60 hours of law clerk services, for which the Town was billed $420.00.

20. The three bills discussed immediately above also itemize a total of $1,402.54 of costs. The types of costs itemized include such things as in-house photocopy costs, Fed-Ex and similar express mail charges, facsimile charges, postage charges, long distance telephone charges, and some miscellaneous travel-related charges such as car rental, parking, air fare, and gasoline. The itemized costs also include at least one "miscellaneous services charges/fee" in the amount of $12.50 and one in-house photocopying charge in the amount of $447.50.

21. With regard to the three bills discussed above, there was no testimony under oath that any of the services itemized in the bills had actually been performed. There was no testimony under oath that the bills were accurate. There was no testimony under oath explaining any details about the nature of the services performed or explaining why, or whether, the services were reasonable, necessary, or appropriate. There was no testimony under oath stating whether all of the services and costs itemized in the three subject bills relate only to the fee

petition and the underlying ethics complaint in this proceeding, or whether some of the itemized services and costs relate to other similar litigation matters in which the Town has a beneficial interest that were pending at the same time.[4]

22. An expert witness was retained to express legal opinions on two basic issues: (1) an opinion as to the issue of whether Addicott is entitled to an award of attorney's fees and costs against Nieman pursuant to Section 112.317(8), Florida Statutes, and, if entitled, (2) an opinion as to the reasonable amount of such an award. The Town agreed to pay the expert witness for his services in this case on an hourly basis. The agreed upon hourly rate for the services of the expert witness is either $200.00 per hour or $225.00 per hour.[5]

23. The expert witness does not know how many hours he spent preparing for and presenting his expert opinions in this case.[6]

24. The expert witness reviewed and testified about a few details of the costs itemized on the three bills discussed above, but he never clearly expressed any opinion as to whether the costs itemized on the three bills are reasonable or unreasonable.[7]

25. The expert witness testified to several expert legal opinions regarding the manner in which the present language of Section 112.317(8), Florida Statutes, should be construed,

interpreted, and applied. He also opined as to the extent to which cases decided under the old language of Section 112.317(8), Florida Statutes, were useful in determining entitlement to attorney's fees and costs under the current version of Section 112.317(8), Florida Statutes.[8]

26. The expert witness also testified about how many hours it would have been reasonable for the attorneys for Addicott to have worked from June 4, 2004, through the end of the first day of the final hearing in this case, which was June 17, 2004. There is not, however, any testimony as to how many hours of attorney services were actually performed during the period from June 4 through June 17, 2004.

27. In both the defense of the underlying ethics complaints against Addicott and in the preparation and the prosecution of the fee petition in this case, services billed at an hourly rate have been performed by three lawyers in the law firm representing Addicott; specifically, Mr. Michelson (a partner), Mrs. Michelson (a partner), and Mr. Birch (an associate attorney). Reasonable and typical hourly rates that are charged for the types of attorney services that were performed in the course of the subject cases are as follows:

Mr. Michelson	$200.00 per hour
Mrs. Michelson	$200.00 per hour
Mr. Birch	$135.00 per hour

28. In both the defense of the underlying ethics complaints against Addicott and in the preparation and the prosecution of the fee petition in this case, services billed at an hourly rate also have been performed by law clerks employed by the law firm representing Addicott. A reasonable and typical hourly rate that is charged for services of a legal nature performed by law clerks in cases of this nature is $75.00 per hour.[9]

29. Following the conclusion of the administrative hearing before the Division of Administrative Hearings in this case, in the normal course of events, the attorneys representing Addicott will need to spend a number of additional hours before their work on this matter is finished. Post-hearing tasks include such matters as preparation of proposed recommended orders, preparation of exceptions to the recommended order or preparation of responses to exceptions filed by an opposing party, preparation of memorandums related to exceptions, and perhaps an appearance before the Ethics Commission to present oral argument prior to issuance of the Final Order.[10]

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

31. The first issue that requires attention is the issue of the scope of the subject matter at issue in this case. In the underlying ethics complaints, Nieman included factual allegations about four specific events. The Fee Petition in this case specifically mentions Nieman's allegations about only two of those events. Addicott argues that all of the allegations made by Nieman in the ethics complaints against Addicott are at issue in this case. The undersigned is of the view that the only factual allegations in the ethics complaints that are at issue here are the ones that are specifically mentioned in the Fee Petition at paragraphs 6, 7, 8, and 9 of the Fee Petition.[11] The full text of those four paragraphs appears in the findings of fact, above. The essence of the factual allegations at issue here are assertions by Nieman that Addicott interfered with a police investigation of an automobile accident involving Addicott's son and assertions that Addicott hired his son as a part-time town lifeguard.

32. Section 112.317(8), Florida Statutes, reads as follows:

> (8) In any case in which the commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee by filing the complaint with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part, the complainant shall be liable

> for costs plus reasonable attorney's fees incurred in the defense of the person complained against, including the costs and reasonable attorney's fees incurred in proving entitlement to and the amount of costs and fees. If the complainant fails to pay such costs and fees voluntarily within 30 days following such finding by the commission, the commission shall forward such information to the Department of Legal Affairs, which shall bring a civil action in a court of competent jurisdiction to recover the amount of such costs and fees awarded by the commission. (Emphasis added.)

33. The language of Section 112.317(8), Florida Statutes, has read as quoted above since 1995. Prior to 1995, the statutory predicate for awarding attorney's fees and costs against a person who filed a complaint with a malicious intent to injure the reputation of the person complained against was worded somewhat differently. Because of the amendments to the statutory language, appellate court decisions interpreting and applying the earlier version of the statute are not especially helpful to ascertaining the correct interpretation and application of the underscored portion of the current language of the statute.[12]

34. By way of background, as well as to put the subject statutory language in its relevant historical context, it is useful to consider the line of judicial decisions regarding defamatory statements about public figures that began with the case of New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964). There the Court for the first time concluded that in libel actions by public officials in state courts "the rule

requiring proof of actual malice is applicable." New York Times at 727. The Court also stated, after noting that that there was evidence that the Times had published the information in question in that case without checking its accuracy against the news stories in the Times' own files, that "negligence in failing to discover the misstatements . . . is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." New York Times at 288.

35. Shortly following the New York Times decision, the U.S. Supreme Court decided Garrison v. State of Louisiana, 379 U.S. 64, 85 S. Ct. 209 (1964), in which the Court followed and expanded upon what it had decided in New York Times. The Garrison decision included the following:

> We held in New York Times that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. The reasons which led us so to hold in New York Times, 376 U.S., at 279--280, 84 S.Ct. at 724--726, apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since '* * * erroneous statement is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to

> survive' * * *,' 376 U.S., at 271--272, 84 S.Ct. at 721, only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' New York Times Co. v. Sullivan, 376 U.S., at 270, 84 S.Ct., at 721. (Emphasis added.)

36. In St. Amant v. Thompson, 390 U.S. 727, 88 S. Ct. 1323 (1968), the Court explicated further on its thoughts as to what types of conduct constituted a "reckless disregard" for whether published statements were false, and on what circumstances might indicate evidence of such a "reckless disregard." The explications in St. Amant include the following:

> Purporting to apply the New York Times malice standard, the Louisiana Supreme Court ruled that St. Amant had broadcast false information about Thompson recklessly, though not knowingly. Several reasons were given for this conclusion. St. Amant had no personal knowledge of Thompson's activities; he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts; he gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no responsibility

for the broadcast because he was merely quoting Albin's words.

These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson. 'Reckless disregard,' it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In New York Times, supra, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a 'high degree of awareness of * * * probable falsity.' 379 U.S., at 74, 85 S.Ct., at 216. Mr. Justice Harlan's opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 153, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094 (1967), stated that evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such

> doubts shows reckless disregard for truth or falsity and demonstrates actual malice.
>
> It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendants testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

37. In St. Amant, at 732, the Court also included the following regarding the determinations that must be made by the finder of fact:

> The defendant in a defamation action brought by a public figure cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the

> publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found when there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

38. Our Florida appellate courts have taken note of the legal principles described in the cases mentioned above, and have followed them in deciding whether defamatory statements were made with a "reckless disregard" for the truth. In Demby v. English, 667 So. 2d 350 (Fla. 1st DCA 1996), in a defamation case brought by a public officer, the court stated:

> "[T]he constitutionally protected right to discuss, comment upon, criticize, and debate, indeed, the freedom to speak on any and all matters is extended not only to the organized media but to all persons." Nodar v. Galbreath, 462 So.2d 803 (Fla.1984). The First Amendment privilege of fair comment is not absolute. To prevail at trial, a plaintiff must establish not only the falsity of the claimed defamation, but also demonstrate through clear and convincing evidence that the defendant knew the statements were false or recklessly disregarded the truth. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See McDonald v. Smith, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985) (holding that Petition Clause does not require states to expand this privilege into

> an absolute one.) Reckless disregard is not measured by whether a reasonably prudent person would have published or would have investigated before publishing; the plaintiff must show the defendant "in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) (Emphasis added.)

39. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

40. The Florida courts have also recognized that: "A false statement of fact is absolutely necessary if there is to be a recovery in a defamation action." Friedgood v. Peters Publ'g Co., 521 So. 2d 236, 242 (Fla. 4th DCA), rev. denied, 531 So. 2d 1353 (Fla. 1988), cert. Denied 488 U.S. 1042, 109 S. Ct. 867, 102 L.Ed.2d 991 (1989). See also Zorc v. Jordan, 765 So. 2d 768 (Fla 4th DCA 2000).

41. The underlying rationale for all of the conclusions reached in the line of cases that begins with New York Times and includes Garrison, St. Amant, Demby, and a host of other similar cases is that those conclusions are compelled by constitutionally protected rights to "freedoms of expression" that have a need for "breathing space" if they are to survive. Today those rights are no less important, and are no less protected by the same Constitution, than they were when the cases discussed above were decided. Accordingly, the conclusions reached in New York Times, Garrison, St. Amant, Demby, and a host of other similar cases are applicable to the interpretation of the statutory language upon which Addicott relies for the relief sought in this case. The unavoidable requirement that such decisions must be followed unless and until such time as they may be modified by the U. S. Supreme Court is eloquently explained in Faxon v. Michigan Republican State Central Committee, 244 Mich. App. 468, 624 N.W.2d 509 (2001).[13]

42. For convenient reference, the core of that statutory language is repeated. The statutory predicate for the relief sought here is the filing of a complaint against a public officer or employee with the Ethics Commission " . . . with a malicious intent to injure the reputation of such officer or employee by filing the complaint with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part."

43. Because it is most quickly disposed of, attention is directed first to the "with knowledge" portion of the statutory language. In order to prevail on the grounds that Nieman filed a complaint "with knowledge that the complaint contains one or more false allegations," Addicott must show by "clear and convincing evidence" that Nieman knew the statements at issue were false at the time the statements were made. The evidence in this case is insufficient to meet the required standard. While some of the evidence in this case would tend to support a finding that, at the time he made the statements at issue, Nieman did not have very much information one way or the other regarding the accuracy of some of his statements, there simply is no clear and convincing evidence that at the time of making those statements Nieman knew that any of the statements were false.

44. Directing attention now to the portion of the statutory language that imposes liability for filing a complaint "with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part," it is first noted that not every false allegation in a complaint filed with the Ethics Commission provides a basis for liability under Section 112.317(8), Florida Statutes. Rather, the only false allegations that provide a basis for liability are "allegations of fact material to a violation of this part [Part III of Chapter 112, Florida Statutes]." By way of example Nieman's allegations regarding the conduct of Mrs. Addicott are not material to a violation of Part III of Chapter 112 by Mr. Addicott. Therefore, such allegations, even if false and even if made with a reckless disregard for whether they were true or false, cannot be the basis for an award of costs and attorney's fees under Section 112.317(8), Florida Statutes, because they were not material to any allegation that Mr. Addicott had committed a violation of the ethics laws.

45. With regard to other allegations made by Nieman, in order to prevail on the grounds that Nieman filed a complaint "with reckless disregard for whether the complaint contains false allegations of fact," Addicott must show by "clear and convincing evidence" that Nieman made those allegations with a "reckless disregard," as that term has been described and defined in the

cases discussed above. The evidence in this case is insufficient to meet the required standard. Rather, as noted in the findings of fact, Nieman did not at any time entertain any "serious doubts as to the truth" of his allegations. Similarly, Nieman did not at any time have any "high degree of awareness" of the "probable falsity" of the subject allegations. Further, although on the facts in this case it might be concluded that Nieman was negligent in failing to inquire further before making some of his allegations, "negligence in failing to discover the misstatements . . . is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." New York Times at 288. There is simply no clear and convincing evidence that, at the time he made the allegations at issue here, Nieman acted with a reckless disregard of the type described in the applicable case law. In this regard it is significant to note that the greater weight of the evidence is to the effect that the vast majority of Nieman's allegations at issue here were true or were very close to the truth. On the few factual issues in which the evidence is insufficient to show affirmatively that a specific allegation was true, it is significant to note that there is no clear and convincing evidence that any such allegation was false. Further, at the time he made all of the factual allegations at issue here, all of the allegations were either supported by at least some hearsay evidence known to Nieman, or were inferences

that could logically be drawn from the information known to Nieman. In reaching this conclusion, the undersigned has not overlooked Addicott's arguments to the effect that, with regard to some of the allegations, Nieman testified in deposition and at the final hearing that he did not have "any evidence" of some of the allegations at issue here. These admissions by Nieman must be evaluated in the context in which they occurred. When evaluated in context, it appears to the undersigned that on those occasions when Nieman testified that he did not have "any evidence," Nieman was attempting to communicate the idea that he did not have any first hand evidence of the allegation inquired about. It is clear from other statements by Nieman that on such occasions he was not admitting that he had no information at all. Rather, he testified that he was aware of hearsay evidence that supported his allegations.

46. For the reasons set forth above, it must be recommended that the relief sought in the Fee Petition be denied. Such being the case, it would serve no useful purpose to discuss at length the issues regarding the reasonableness of the amounts of the costs and attorney's fees sought in this case, because it is being recommended that they not be awarded. Nevertheless, for the guidance of future parties in future cases a few brief comments are offered.

47. The undersigned has serious doubts as to whether under Section 112.317(8), Florida Statutes, in is appropriate to include services performed by law clerks and similar para-legal personnel as "attorney's fees." While courts are authorized by Section 57.104, Florida Statutes, to treat some services performed by law clerks and other para-legal personnel as "attorney's fees," that statutory authorization is limited by its terms to fees "determined or awarded by the court." Neither the Division of Administrative Hearings nor the Florida Commission on Ethics is a "court." And even if it were to be concluded that Section 57.104, Florida Statutes, was applicable to a case of this nature, the evidence in this case is insufficient to show that the law clerk services billed for in this case were services of the type contemplated by Section 57.104.

48. The undersigned has serious doubts as to whether, in a case of this nature, the expert witness fees paid to an attorney who testifies in support of the Petitioner's claim for attorney's fees is an appropriate cost to be taxed even in a case in which the fee petitioner prevails. A primary basis for such doubts is explained at length in a "Final Order Granting Motion for Rehearing and Supplementing Final Order of December 19, 2003," issued on January 7, 2004, in Bryan Yamhure and Henry Yamhure v. Department of Agriculture and Consumer Services, DOAH Case No.02-4003RX. In Yamhure the administrative law judge explained that

the taxing of such costs is discretionary and that only in exceptional cases should attorneys expect to be compensated for testifying as to the reasonableness of another attorney's fees. A further reason for which the taxing of such costs would be inappropriate in this case even if the Petitioner had prevailed is that the expert witness never got closer than a vague "guesstimation" of how many hours he devoted to preparing and expressing his opinion. It is simply unfair to tax costs without some reliable specific evidence regarding the precise amount of the cost and the basis for arriving at that precise amount. It is also noted that the amount of costs sought for the expert witness services of Mr. Goren are simply unreasonable. Depending on which of the vague, imprecise, and inconsistent testimony one uses to make the calculation, Addicott is seeking reimbursement for Mr. Goren's services in an amount that ranges from $5,000.00 (25 hours x $200.00 per hour) to $7,875.00 (35 hours x $225.00 per hour). It is simply unreasonable to spend $5,000.00 or more to obtain an opinion as to whether approximately $11,000.00 of attorney's fees are reasonable fees.

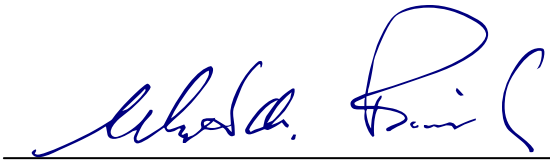
49. The undersigned also has serious doubts as to whether, if the Petitioner had prevailed in this case, the evidence regarding attorney's fees in this case would have been sufficient to support an award of attorney's fees in any amount. Among the reasons for these doubts is the fact that nowhere in the record

of this case is there any testimony that the services itemized in Addicott Exhibit 1 were actually performed, that the bills in that exhibit are accurate, that all of the services were reasonably necessary, or that all of the services related solely to the Nieman ethics complaint against Addicott or to the Addicott fee petition against Nieman. To the contrary, some of the services itemized in Addicott Exhibit 1 appear to have been unnecessary and some of the itemized services appear to be for time spent on matters other than the Nieman ethics complaint against Addicott or the Addicott fee petition against Nieman. And as a final matter on this point, it is noted that although the issues in this case involve fewer than half of the allegations in Nieman's ethics complaint against Addicott, there is no evidence as to which of the itemized legal services related to matters at issue here and which related to factual allegations that are not at issue here.

RECOMMENDATION

On the basis of the foregoing findings of fact and conclusions of law, it is RECOMMENDED that a Final Order be entered dismissing the Petition in this case and denying all relief sought by the fee Petitioner, Michael Addicott.

DONE AND ENTERED this 4th day of November, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of November, 2004.

ENDNOTES

1/ It is possible that the Town of Golden Beach received some reimbursement for the damage to the light pole from the insurance company that insured the motor vehicle Aaron Addicott was driving at the time of the accident. But whether the insurance company made any payment is irrelevant to the issues at hand here, because Nieman never made any statement about the insurance company that is at issue in this case.

2/ Nieman firmly, clearly, and without equivocation or hesitation, repeatedly denied having any such knowledge. Nieman's denials in this regard have been found to be credible and convincing. There is no clear and convincing evidence that Nieman knew, at any material time, that one or more of the subject allegations was false.

3/ The findings of fact in this paragraph are mixed questions of law and fact, which is why substantially identical statements are also included in the conclusions of law. By way of clarification it is also noted that the finding that Nieman did not act with "reckless disregard" contemplates the use of the term "reckless disregard" as it has been described and defined

in New York Times v. Sullian, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny.

4/ In this regard it is important to note that the brief descriptions of some of the attorney's services itemized in the three bills appear to be for services related to matters other than Nieman's ethics complaint against Addicott and Addicott's fee petition against Nieman. Bills for attorney's services performed in other matters cannot properly be charged to Nieman.

5/ At pages 44-45 of the hearing transcript, the expert witness testifies that he is being compensated at the rate of $200.00 per hour. At pages 85-86 he testifies that he is being compensated at the rate of $225.00 per hour. It cannot be determined from the record in this case which, if either, of the hourly rates is correct.

6/ When asked "what are your fees for your time in this matter?", the expert witness answered, at pages 85-86, "To be truthful, I didn't look, but I'm assuming, for discussion, that I'm probably in the neighborhood of between 25 and 35 hours of time." A bit further down the expert witness adds: "We're probably looking at between 25 and 30 hours of time." This type of imprecise, vague, and uncertain testimony which is also internally inconsistent from one page to the next is not the type of evidence on which cost awards can be properly based. Evidence of this type is simply too unreliable and unpersuasive upon which to make any findings of fact. Furthermore, any findings of fact made upon the basis of evidence so lacking in trustworthiness would be nothing better than some form of "guesstimation" unsupported by even persuasive competent substantial evidence, much less the "clear and convincing evidence" that is required in cases of this nature.

7/ See pages 110-111 of the hearing transcript.

8/ These expert legal opinions have been found to be unpersuasive. For reasons discussed in the conclusions of law, the appellate court cases decided under the pre-amendment version of Section 112.317(8), Florida Statutes, are of little help in interpreting and applying the current version of the statute.

9/ While there is record evidence regarding the reasonable and typical hourly rate that is charged for the services of law clerks, there is no record evidence as to the hourly cost of services performed by law clerks. For reasons discussed in the

conclusions of law, the cost of such services may be more important that the amounts that are charged for the services.

10/ It serves no useful purpose to attempt to estimate how many hours of attorney time will be spent in post-hearing activities. See Kaminsky v. Lieberman, 675 So. 2d 261 (Fla. 4th DCA 1996), in which the court, noting that "[a]s a matter of basic fairness, the interested parties should be neither shortchanged nor over-charged for the sake of administrative expediency," held that the Ethics Commission must provide a hearing to afford the Petitioner an opportunity "to establish fees and costs which were incurred after the last day of the hearing."

11/ The allegations of the Fee Petition clearly put Nieman on notice that Addicott was seeking attorneys fees and costs on the grounds that Nieman's statements about two specific matters had been made with malice. The Fee Petition did not put Nieman on notice that Addicott was contending that any other statements by Nieman were made with malice. It would be contrary to fundamental notions of due process and fair play to subject Nieman to liability for, and to require him to defend against, assertions that he also made other malicious statements that are not specifically mentioned in the Fee Petition. The material allegations of the Fee Petition that put Nieman on notice as to which of his specific allegations are alleged to have been made with malice appear at paragraphs 6, 7, 8, and 9 of the Fee Petition, which are quoted in the findings of fact. This view of the scope of this proceeding is also supported by the portion of Florida Administrative Code Rule 34-5.0291(2) which states, with regard to a petition seeking costs and attorney's fees under Section 112.317(8), Florida Statutes: "Such petition shall state with particularity the facts and grounds which would prove entitlement to costs and attorney's fees." (Emphasis added.)

12/ Prior to the current version of Section 112.317(8), Florida Statutes, the relevant portion of the statutory language read as follows:

> (8) In any case in which the commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee and in which such complaint is found to be frivolous and without basis in law or fact, the complainant shall be liable for costs

> plus reasonable attorney's fees incurred by the person complained against. (Emphasis added.)

It would appear from the underscored portion of the pre-1995 language quoted above that the criteria for an award of attorney's fees and costs under that language were intended to be similar to the criteria for awards of attorney's fees and costs set forth in such statutory provisions as Sections 57.105, (authorizing award of fees and costs when claim "not supported by the material facts" or "not . . . supported by the application of then-existing law"),120.569(1)(e), (authorizing award of fees and costs for documents filed "for any improper purposes" or "frivolous purpose") and 120.595(1)(b), Florida Statutes (authorizing award of fees and costs for participating in a proceeding "for an improper purpose" or a "frivolous purpose"). In Couch v. Commission on Ethics, 617 So. 2d 1119 (Fla. 5th DCA 1993), citing Taunton v. Tapper, 396 So. 2d 843 (Fla. 1st DCA 1981), the court stated, with regard to the pre-1995 version of Section 112.317(8): "Section 57.105 appears to be the statute most analogous to section 112.317(8)." Under the pre-1995 version of Section 112.317(8), Florida Statutes, in order to avoid a determination that a complaint was frivolous, the person filing the complaint had to have some basis in law, as well as some basis in fact, for filing the complaint with the Ethics Commission. The current version of Section 112.317(8), Florida Statutes, omits any consideration of the legal sufficiency of the original complaint.

13/ The Faxon decision contains an interesting history, analysis, and criticism of the evolution of the law regarding defamation of public officials, beginning with cases pre-dating New York Times and continuing forward to the present. Of particular interest is the fact that, although they disagree with the wisdom of some aspects of New York Times and its progeny, the Faxon court emphasizes and implements its duty to follow those decisions whether it agrees with them or not.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.