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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
In the Court of Common Pleas for the Ninth Circuit

Jean Toal, Circuit Court Judge

Appellate Case No.: 2021-000174

Amy Kovach, ... Plaintiff

v.

Joshua S. Whitley and Karen Whitley, in her Individual Capacity, ... Respondents

And

Joshua S. Whitley..... Defendant/Counterclaimant

v.

Amy Kovach Plaintiff/Counterclaim Defendant

And

Joshua S. Whitley..... Defendant/Third-Party Plaintiff

v.

Rodney Thompson Third-Party Defendant

Of Whom Amy Kovach is the Petitioner.

APPENDIX – VOLUME II
(Record on Appeal Continued)

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STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF GENERAL SESSIONS
NINTH JUDICIAL CIRCUIT
INDICTMENT #s: 2014-GS-08-0266
2014-GS-08-01403

STATE OF SOUTH CAROLINA,)

VS.)

AMY KOVACH,)

Defendant.)

MOTION TO DISQUALIFY
ATTORNEY GENERAL

HARRY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

15 JAN 20 PM 4:20

FILED

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Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.¹

The Defendant, Amy Kovach (hereinafter "Mrs. Kovach"), by and through her undersigned counsel, submits the following as and for her Motion to Disqualify the Attorney General Alan M. Wilson and his office (collectively, the "Attorney General") from prosecuting the above-listed indictments arising from the 2012 Berkeley County School District bond referendum. The Attorney General should be disqualified because he (1) is engaged in a campaign to both prosecute Mrs. Kovach and undermine her statutory right to have the Berkeley County School Board (the "BCSD") indemnify her for attorney fees and costs arising from the prosecution, thereby violating the Rules of Professional Responsibility that govern the legal profession and Mrs. Kovach's constitutional rights; (2) is on the advisory board of Santee Cooper, a governmental entity that supported the Bond Referendum, and therefore he has a conflict of interest in this matter; and (3) had SLED conduct an examination of Mrs. Kovach's

¹ Young v. United States ex rel. Vuitton Et Fils S.A., 481 U.S. 787, 814 (1987).



computer in the face of a filed motion for protective order claiming attorney-client privilege, and then misstated to the Court that SLED had not done so. Mrs. Kovach submits that a local solicitor should take over the prosecution from the Attorney General.

BACKGROUND

This case arises from a complaint made by the leadership of the Berkeley County Republican Party to the Attorney General, himself a Republican. See SLED Investigative Report dated July 25, 2013 (excerpted and without attachments at Exhibit 1²), at page 1 ("Attorney Josh Whitley contacted the SCAGO and provided documents, newspaper articles, and emails detailing the alleged violations."). "Whitley alleged BCSD employees, specifically Superintendent Doctor (Dr.) Rodney Thompson, Deputy Superintendent Archie Franchini, and Director of Communications Amy Kovach, worked on the [2012 Yes4Schools bond referendum] campaign during business hours and used district resources." Id. at 1-2. The purpose of the referendum was to raise funds to renovate and build public school facilities in Berkeley County. Voters approved the ballot measure in November 2012.

Santee Cooper was a strong supporter of the referendum campaign, contributing \$15,000 on October 9, 2012 (Exhibit 2), as well as an employee, Laura Varn, to serve as Co-Chair of the campaign, see Memorandum of Interview with Laura Varn on May 9, 2013 (excerpted at Exhibit 3). Santee Cooper staff member Phil Sails also worked as a photographer for the Campaign. See Memorandum of Interview with Kris Mathews on May 29, 2013 (Exhibit 4). Santee Cooper is a publicly owned entity established by statute. See S.C. Code Ann. §§ 58-31-

² The Exhibits are contained in the Appendix of Exhibits to Motion to Disqualify Attorney General, filed along with this Motion.

10 et seq. The Attorney General is a member of the advisory board of Santee Cooper. See S.C. Code Ann. § 58-31-20(D).

Upon receiving Whitley's complaint, the Attorney General immediately directed SLED to investigate his allegations. See Letter from John W. McIntosh dated January 17, 2013 (Exhibit 5). Thereafter SLED began interviewing people involved in the Yes4Schools Campaign, including Mrs. Kovach and Ms. Varn. Of course, elected officials and school district employees support school bond referendums all the time in South Carolina. See Appendix of Media Reports of Bond Referenda Support, filed January 20, 2015. It is unknown whether the Attorney General has investigated any of these other individuals, but there is no indication that he has.

On March 7, 2013, Mrs. Kovach wrote to the BCSD asking it to pay her attorney fees and costs related to the investigation, as it is required to do by statute (S.C. Code Ann. § 59-17-110) and the BCSD policy manual. See Letter from Amy Kovach dated March 7, 2013 (Exhibit 6). The BCSD began paying Mrs. Kovach's fees.

On February 11, 2014, the Attorney General presented a Berkeley County Grand Jury with an indictment charging Mrs. Kovach with violating S.C. Code Ann. § 8-13-1346 through her involvement in the Yes4Schools campaign (the "Election Indictment"). The Election Indictment states:

That Amy Kovach did, in Berkeley County, on or about the period between August 1, 2012 and November 6, 2012, use and authorize the use of public funds, property, or time to influence the outcome of an election to wit:

While employed as Communications Director by the Berkeley County School District, Amy Kovach did use public funds to pay for the creation of a campaign video and the production of other campaign material, did draft and disseminate speeches during her public employment intended to persuade the voting public, and did perform various other acts using public resources and time, all of which promoted and supported a yes vote as to the school board referendum

held on November 6, 2012, and all of which was in violation of 8-13-1346 of the S.C. Code of Laws as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Exhibit 7. The Grand Jury true billed the Election Indictment. Mrs. Kovach immediately was put on administrative leave with pay from her position with BCSD. Laura Varn, herself an employee of a public entity, was not indicted, despite having been paid by Santee Cooper to serve as co-chair of the Yes4Schools Campaign.

The BCSD asked A. Victor Rawl, Sr., a retired South Carolina Circuit Judge, to investigate and provide a legal opinion as to:

- (1) Whether, based on the information available to the board at this time, the conduct of Ms. Kovach as outlined in the indictment constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110; and
- (2) If you conclude that Ms. Kovach was acting "in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110, in regard to the issues referenced in the indictment, whether the board is precluded from appearing and defending Ms. Kovach under the statute simply by virtue of the fact that she has now been indicted?

Letter from A. Victor Rawl, Sr., dated May 2, 2014 (without attachments at Exhibit 8). As to the first question, Judge Rawl responded that Mrs. Kovach was acting in good faith and within the scope and course of her employment. Specifically, he found "absolutely no personal or financial benefit" to Mrs. Kovach in the "some forty pounds of emails and documents" he had reviewed. Id. at 2.

Judge Rawl referred the second question to Professor John Freeman, Esquire, a recognized expert in the field of statutory construction and corporate governance. Professor Freeman began explaining his opinion by noting that "A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of impropriety," citing United States v. Stein, 541

F.3d 130, (2d Cir. 2008), wherein the Second Circuit held that the government's attempts to bar KPMG from paying the legal fees of former employees indicted for tax fraud violated their Sixth Amendment rights. Letter from John Freeman dated April 22, 2014, at 2 (**Exhibit 9**). Professor Freeman also noted that

South Carolina's public policy strongly favors indemnity being extended to employees who have acted within the scope of their employment and in good faith. Thus, under South Carolina corporate law, S.C. Code Ann. § 33-31-851 (a), indemnification is allowed in some cases in favor even of criminally-convicted officers, trustees, employees, or agents. Indemnification is flatly prohibited only where there is an adjudication that the officer, trustee, employee, or agent is liable to the company or where an improper personal benefit was received by the person seeking indemnification. S.C. Code Ann. § 33-31-851(d). See S.C. Code § 33-31-851(c) ("The termination of a proceeding by ... conviction . . . is not, of itself, determinative that the director did not meet the standard of conduct described in this section."). The corporate law "standard of conduct" set forth in Section 33-31-851(a) requires that the entity be able to conclude the officer, trustee, employee, or agent acted in good faith and reasonably believed his or her conduct was in the entity's best interest. That factual predicate for indemnification in the corporate setting is very similar to the one established by S.C. Code § 59-17-110.

Id. at 2-3 (emphasis in original).

Professor Freeman concluded that the BCSD is not precluded from providing a defense for Mrs. Kovach because she was indicted, and that the BCSD has a duty to provide a defense for her under Section 59-17-110. Id. at 2. Professor Freeman addressed two Attorney General's Opinions, one from 1995 and one from 1997, which state that a school board may not pay for the defense of an employee in a criminal proceeding. Professor Freeman stated first that an Attorney General's Opinion "has no force of law." Id. at 3. Professor Freeman also stated that the Attorney General's Opinions are "obviously and egregiously wrong because [they] contradict[] the plain language" of Section 59-17-110. Id.

The BCSD made Judge Rawl's and Professor Freeman's opinions public at a board meeting, and has paid legal bills it has received from counsel for Mrs. Kovach and Mr. Franchini.

On or about August 4, 2014, SLED seized various materials from the offices of the BCSD, including Mrs. Kovach's computer. Mrs. Kovach's counsel immediately objected to any review of the computer, and moved for a protective order "prohibiting the State from reviewing the seized materials unless and until there is an appropriate order setting forth an extraction-and-review procedure that protects privileged and work product materials." Motion for Protective Order filed August 6, 2014 (Exhibit 10). While the Motion was pending, in total disregard of Mrs. Kovach's privilege claim, SLED conducted an examination of her computer. See Case Management History (Exhibit 11) (showing that the computer was searched beginning August 29, 2014). At a hearing on October 28, 2014, Assistant Deputy Attorney General Allen Myrick stated "While this motion is -- has been waiting to be ruled on, SLED has not moved forward on conducting this examination." October 28 Transcript pp. 5-6 (Exhibit 12). Of course, SLED had begun its examination two months earlier.

On September 9, 2014, the Attorney General obtained a second indictment of Mrs. Kovach, this time based on allegations of forgery:

That Amy Kovach did, in Berkeley County, on or about November 2013, commit the crime of Forgery, in that she did falsely make, forge, or counterfeit, cause or procure to be falsely made, forged or counterfeited of a writing or instrument, and did utter or publish as true a false, forged, or counterfeited writing or instrument of writing. To Wit: During November 2013, Amy Kovach created a false, backdated invoice, purporting to be from the Berkeley County School District to the "Yes for Schools" campaign, in an attempt to establish that she had intended to have public funds repaid to the County which had been spent on materials in support of a bond referendum election campaign, this in an amount less than \$10,000 (\$259.20), and in violation of §16-13-10(A) and (B)(2) of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Exhibit 13 (the "Forgery Indictment"). In obtaining the Forgery Indictment, the Attorney General generated new ammunition for its attack on Mrs. Kovach's statutory right to indemnification.

On October 14, 2014, the Attorney General wrote to BCSD's counsel, copying the board members directly, urging the BCSD to stop paying legal fees based on the Attorney General's Opinions Professor Freeman had already addressed and discredited, and threatening to sue to recover the fees already paid. See Letter from John W. McIntosh dated October 14, 2014 (**Exhibit 14**). BCSD counsel immediately responded, correcting factual errors in the Attorney General's letter, and providing Judge Rawl's and Professor Freeman's written opinions. See Letter from Kathryn Long Mahoney dated October 14, 2014 (**Exhibit 15**).

Mrs. Kovach consulted legal experts to provide opinions about the Attorney General's conduct with regard to her statutory right to fees. Professor Nathan Crystal, a recognized expert in the field of Attorney Professional Responsibility, agrees with Professor Freeman that the Attorney General's interpretation of § 59-17-110 is wrong. See Affidavit of Nathan M. Crystal dated December 15, 2014, ¶¶ 13-18. With regard to the Attorney General's letter to BCSD board members and its counsel, Professor Crystal concludes:

In my opinion the Attorney General of South Carolina is interfering with Ms. Kovach's Right to Counsel under the Sixth and Fourteenth Amendments and with her statutory right to indemnification under S.C. Code §59-17-110. In my opinion such conduct violates Carolina Rule of Professional Conduct (SCRPC) 3.8 and its comments and amounts to conduct prejudicial to the administration of justice under SCRPC 8.4(e). In addition, the Attorney General has engaged in other improper conduct in this proceeding, including representation that involves a conflict of interest. In my opinion such conduct warrants disqualification of the Attorney General's office from prosecution of Ms. Kovach.

Id. at ¶ 4. Professor Crystal notes also that the October 14 letter from John McIntosh, in which he copied BCSD board members on a letter to BCSD counsel, "raises a question of possible violation of SCRCP 4.2." Id. ¶ 21.

Dr. Gregory B. Adams, another recognized expert in the field of Attorney Professional Responsibility, opines "that the persistent, ongoing professional misconduct by [the Attorney General] in connection with the prosecution of these criminal charges, violates the constitutional rights of the defendant, Amy Kovach, especially her rights to counsel and due process, and warrants the disqualification of the Attorney General as prosecutor." Affidavit of Expert Opinion of Dr. Gregory B. Adams, dated January 19, 2015, ¶ I.

The Attorney General continues to undermine Mrs. Kovach's statutory right to indemnification: On December 9, 2014, the BCSD bowed to pressure from the Attorney General and voted to suspend payment of Mrs. Kovach's attorney fees related to the Forgery Indictment. See Post & Courier, Berkeley schools halt payment of Amy Kovach's legal fees on felony charge, Dec. 10, 2014 (Exhibit 16).

DISCUSSION

1. **The Attorney General Should be Disqualified Because he Violated the Rules of Professional Responsibility and Mrs. Kovach's Sixth Amendment Right to Counsel.**

In Berger v. United States, the United States Supreme Court explained the duties of a prosecutor, in that case the United States Attorney:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he

may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88 (1935). The same principals apply to a state attorney general serving as a prosecutor: he also "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* "Prosecutors who overreach undermine 'confidence, not only in [their] profession, but in government and the very ideal of justice itself.'" Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand. L. Rev. 45, 59-60 (1991).

Comment [1] to Rule 3.8 of the South Carolina Rules of Procedural Conduct ("SCRPC") makes the same point: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice" SCRPC 8.4(e) states: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Citing Comment [1] to SCRPC 3.8, the South Carolina Supreme Court stated in State v. Quattlebaum: "Prosecutors are ministers of justice and not merely advocates. . . . A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics." 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000).

Here, the Attorney General has committed professional misconduct and violated the Sixth Amendment by prosecuting Mrs. Kovach while at the same time undermining her statutory right to have the BCSD provide her a defense.

In United States v. Stein, Assistant United States Attorneys investigating fraudulent tax shelters pressured the accounting firm KPMG to condition the payment of legal fees for its employees on whether the employee cooperated with the government. 541 F.3d 130, 137-39 (2d Cir. 2008). KPMG bowed to this pressure in order to avoid indictment itself. Id. at 138-39. KPMG fired at least one employee for exercising her Fifth Amendment rights. Id. at 139. When employees were indicted, KPMG stopped paying their legal fees. Id. at 139-40.

The indicted KPMG employees moved to dismiss the indictments based on the government's interference with KPMG's advancement of legal fees. Id. at 140. The district court granted the motion, finding that the prosecutors' conduct "shock[s] the conscience." Id. at 142. The Second Circuit affirmed, holding that "the Sixth Amendment prohibits the government from impeding the supply of defense resources (even if voluntary or gratis), absent justification."³ Id. at 156.

The Attorney General is doing to Mrs. Kovach what the Government did to the defendants in Stein: impede her supply of defense resources. The facts here are even more compelling than those in Stein in that Mrs. Kovach has a statutory right to have the BCSD provide a defense. As in Stein, the Attorney General's conduct shocks the conscience.

Nor is this the first time South Carolina courts have addressed a prosecutor's interference with a defendant's Sixth Amendment rights. In State v. Ouattlebaum, the Supreme Court of South Carolina reversed a conviction and disqualified the Eleventh Circuit Solicitor's Office from re-prosecuting where a deputy solicitor in that office violated the defendant's Sixth Amendment right to counsel. 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000). In that case, the

³ "Justification" was described as situations where payments to counsel demonstrate the existence of a criminal conspiracy, or possibly where the payments demonstrate a scheme to "circle the wagons" against a criminal prosecution. Stein, 541 F.3d at 156-57. No such justification exists here.

deputy solicitor had eavesdropped on a privileged conversation between the defendant and his attorney. After concluding that this conduct violated the Sixth Amendment and required reversal and disqualification, the Court addressed the issue whether the solicitor's office should also have been disqualified "to protect the integrity of the judicial system." *Id.* at 449, 527 S.E.2d at 109.

Concluding that it should, the Court wrote:

Although we have disqualified the Eleventh Circuit Solicitor's Office from prosecuting appellant, we address appellant's second assertion because of its importance to judges, attorneys, criminal defendants, and indeed all citizens of this state. Every South Carolinian has a vital interest in the fair administration of justice. This Court bears the ultimate responsibility for maintaining judicial integrity and high standards of professional conduct among the members of the bar, and for protecting and defending the constitutional rights of the accused.

The integrity of the entire judicial system is called into question by conduct such as that engaged in by the deputy solicitor and investigating officers in this case. Prosecutors are ministers of justice and not merely advocates. See Rule 3.8, cmt., Rules of Professional Conduct. A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics. The participation at trial of a prosecutor who has eavesdropped on the accused and his attorney tarnishes us all. We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice.

Id., 527 S.E.2d at 109.

A prosecutor should be disqualified if his misconduct creates even the appearance of impropriety.

The Court's ultimate consideration must be public confidence in the administration of justice, that "justice must satisfy the appearance of justice." United States v. Johnston, 690 F.2d 638 (7th Cir. 1982); General Motors Corp. v. City of New York, 501 F.2d 639, 649 (2d Cir. 1974). As the Supreme Court stated, federal courts have an obligation to ensure "that legal proceedings appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692, 1697, 100 L. Ed. 2d 140 (1988).

United States v. Dyess, 231 F. Supp. 2d 493, 498 (S.D. W. Va. 2002) (disqualifying entire prosecutor's office); see also City & Cnty. of Denver v. Cnty. Ct., 37 P.3d 453 (Colo. Ct. App. 2001) (disqualifying entire city attorney's office solely because of the appearance of impropriety,

even though the Colorado Rules of Professional Conduct make no specific mention of "the appearance of impropriety"). The Attorney General's violations of the Rules of Professional Responsibility and his violation of Mrs. Kovach's Sixth Amendment rights more than satisfy the "appearance of impropriety" standard here. See State v. Gonzales, 2005-NMSC-025, ¶ 28, 138 N.M. 271, 278-79, 119 P.3d 151, 158-59 (2005) (stating that when considering whether to disqualify a prosecutor, a court should first "determine whether prosecution by a member of the district attorney's office is inconsistent with a particular standard of professional conduct, justifying disqualification of that person"). Cf. Ingle v. State, 746 N.E.2d 927, 935 (Ind. 2001) (declining to disqualify a prosecutor where there was no indication he violated any ethical duties).

Although the Rules of Professional Responsibility state that a prosecutor must "see that the defendant is accorded procedural justice," and the ABA Standards for Criminal Justice make clear that "[t]he duty of the prosecutor is to seek justice, not merely to convict" (Standard 3-1.2(c), The Function of the Prosecutor), the Attorney General is intent on convicting Mrs. Kovach at any cost, without regard to whether he is doing justice. By undermining Mrs. Kovach's statutory right to have the BCSD provide her a defense in the face of two (now three) opinions of respected legal experts, the Attorney General has shown that this is no mere prosecution subject to the measured application of prosecutorial discretion. The Attorney General will use any means necessary to obtain a conviction. The public should be terrified by this abuse of prosecutorial power. It shows that the Attorney General has little respect for the Rules of Professional Responsibility and citizens' statutory and constitutional rights. As Professor Freeman wrote, in an opinion he provided without compensation as a public service, "A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of

impropriety." Exhibit 9 at 2. The appearance of impropriety standard is easily met by the Attorney General's misconduct.

2. The Attorney General Should be Disqualified Because he is Serving Both as Prosecutor and as a Civil Attorney as to the Same Set of Facts.

Section 17-1-20 of the South Carolina Code, "Prosecuting officer shall not accept fees or rewards, nor act in a civil case as counsel for either party," states:

No prosecuting officer shall receive any fee or reward from or in behalf of a prosecutor for services in any prosecution or business to which it is his official business to attend, nor be concerned as counsel or attorney for either party in a civil action depending upon the same state of facts.

(Emphasis added). The Supreme Court of South Carolina has described this statute as "essential for the protection of the public interest." In re Jolly, 269 S.C. 668, 670, 239 S.E.2d 490, 491 (1977).

In Jolly, the prosecutor represented a mother and her children in a civil suit against a person who was also the defendant in a reckless homicide case prosecuted at his direction. Id. at 669, 239 S.E.2d at 491. The Court rejected the prosecutor's argument that he did not violate the statute because an assistant solicitor actually prosecuted the case, noting that this "does not absolve [the prosecutor] in view of the authority possessed by [him] to control the official acts of the Assistant Solicitor." Id. at 670, 239 S.E.2d at 491.

Here, the Attorney General has threatened a civil action to stop indemnification and recover fees paid toward Mrs. Kovach's defense. See Exhibit 14. He has successfully pressured the BCSD to stop paying fees as to the Forgery Indictment. He is acting in two incongruous roles: that of criminal prosecutor taking action on behalf of the State, and that of a civil attorney for the State seeking reimbursement of public funds expended in the defense of the prosecution. The Attorney General is violating Section 17-1-20 of the South Carolina Code because he is

serving as a "prosecuting officer . . . concerned as counsel [for the State] in a civil action depending upon the same state of facts."

3. The Attorney General Should be Disqualified Because he Sits on the Board of Santee Cooper.

The Model Rules of Professional Conduct state that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," and a concurrent conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." Rule 1.7(a)(2); see also Rule 1.11(d)(1) (stating that a lawyer currently serving as a public officer or employee . . . is subject to Rule[] 1.7"). Thus, disqualification is appropriate where (i) a co-defendant has a personal relationship with the prosecutor's office, Fregoso v. Kramer, Case No. CV 08-01115-GW (CT), 2008 U.S. Dist. LEXIS 109225, at *9 (C.D. Cal. Nov. 26, 2008), adopted in 2009 U.S. Dist. LEXIS 31479 (C.D. Cal. Apr. 10, 2009); (ii) the prosecutor's brother is a complaining witness, People v. Doyle, 159 Mich. App. 632, 648, 406 N.W.2d 893, 900, rev'd on other grounds in 161 Mich. App. 743, 411 N.W.2d 730 (1987), and (iii) a witness to the crime is a prosecutor in the District Attorney's office that is prosecuting the case, People v. Conner, 34 Cal. 3d 141, 148, 193 Cal. Rptr. 148, 151, 666 P.2d 5, 8 (1983). In Conner, the court stated that a prosecutor has a conflict "whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner." Conner, 34 Cal. 3d at 148, 193 Cal. Rptr. at 151, 666 P.2d at 8. The South Carolina Supreme Court has also recognized that a conflict in the prosecutor's duties may warrant disqualification. See State v. Hunter, 313 S.C. 53, 55, 437 S.E.2d 41, 42 (1993) (rejecting a due process challenge to denial of a motion to disqualify a prosecutor because "[t]he fact that the prosecutor advises the police department in

matters which may ultimately be prosecuted does not create any type of conflict in the duties of the prosecutor's office").

Here, there is a conflict in that the Attorney General is on the advisory board of Santee Cooper, a public entity that itself is much more culpable than Mrs. Kovach because it provided \$15,000 in public funds and the time of public employees, Laura Varn and Phil Sails, to support the Yes4Schools Campaign. The criminal statute on which the Election Indictment is based, S.C. Code Ann. § 8-13-1346 states: "a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure." A "referendum" is defined in the Ethics Act as a type of "ballot measure." See S.C. Code Ann. § 8-13-1300(2). Thus, Santee Cooper has violated the statute under which Mrs. Kovach is charged. And under the Attorney General's interpretation of the statute,⁴ Yes4Schools co-chair Laura Varn and Phil Sails are equally or more culpable than Mrs. Kovach as they have utilized public time (their time, for which they were paid by Santee Cooper) "to influence the outcome of an election." S.C. Code Ann. § 8-13-1346(a). Even if the Attorney General's conflict is not a traditional conflict on its own compelling disqualification, it is another unseemly fact creating an appearance of impropriety. He is on the board of a public entity that supported the bond referendum for which he is prosecuting Mrs. Kovach. He has specifically targeted her and ignored Santee Cooper and its' employees conduct. Nor is there any indication he has investigated any of the elected officials or school board employees that publicaly have supported school bond referenda

⁴ Mrs. Kovach disagrees with the Attorney General that a school bond referendum is an "election" because the Ethics Act definitions state that it is not an election. Compare S.C. Code Ann. § 8-13-1300(9) (defining an election without including a referendum or ballot measure) with id. § 8-13-1300(2) (defining a ballot measure as including a referendum or "measure submitted to voters for their approval"). However, the Court recently agreed with the Attorney General's interpretation. See Order Denying Defendant's Motion to Dismiss or Quash the Indictment, Nov. 3, 2014. The Attorney General cannot now argue that its interpretation applies only to Mrs. Kovach and not to Ms. Varn or Mr. Sails.

throughout the state. See Appendix of Media Reports of Bond Referenda Support, filed January 20, 2015. While Mrs. Kovach has absolutely no desire to see any other individual go through the debilitating humiliation of a criminal prosecution for actions taken solely for the benefit of schoolchildren, the glaring fact remains that many others similarly situated have been ignored.

4. The Attorney General Should be Disqualified for Disregarding Mrs. Kovach's Privilege Claim.

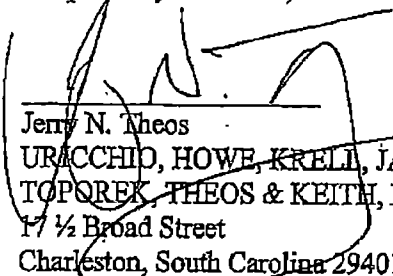
As discussed above, the Attorney General has "the responsibility of a minister of justice and not simply that of an advocate," which includes "specific obligations to see that the defendant is accorded procedural justice." Comment [1] to Rule 3.8, SCRPC. The Court should disqualify the Attorney General if his conduct creates the appearance of impropriety or undermines the integrity of the judicial system. See, e.g., Dyess, 231 F. Supp. 2d at 498; Quattlebaum, 338 S.C. at 449, 527 S.E.2d at 109.

Here, the examination of Mrs. Kovach's computer in total disregard of her privilege claim is another example of the Attorney General's abuse of power in this case. While her motion for a protective order was pending—a motion in which Mrs. Kovach asserted that the computer contained attorney-client communications and work product—the Attorney General had SLED examine her computer. See Exhibit 11. Later, the Attorney General misstated to the Court that no review had been done. See Exhibit 12. "Procedural justice" would have required, first, that the examination not be conducted, and second, that the examination that was conducted be truthfully disclosed to the Court.

CONCLUSION

For the reasons stated above, the Court should disqualify the Attorney General from prosecuting this case, and assign the prosecution to a local solicitor.

Respectfully submitted,



Jerry N. Theos
URACCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS & KEITH, P.A.
17 1/2 Broad Street
Charleston, South Carolina 29401

Chris Paton
CHRIS PATON LLC
40 Calhoun Street, Suite 411
Charleston, South Carolina 29401

Charleston, South Carolina
January 19, 2015

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) INDICTMENT #s: 2014-GS-08-0266
2014-GS-08-01403

STATE OF SOUTH CAROLINA,)
)
vs.) APPENDIX OF EXHIBITS TO
) MOTION TO DISQUALIFY
AMY KOVACH,) ATTORNEY GENERAL
)
Defendant.)

Exhibit 1 – Excerpt of SLED Investigative Report, July 25, 2013

Exhibit 2 – Santee Cooper Check for \$15,000

Exhibit 3 – Excerpt of Memorandum of Interview with Laura Varn, May 9, 2013

Exhibit 4 – Memorandum of Interview with Kris Mathews, May 29, 2013

Exhibit 5 – Letter from John W. McIntosh, January 17, 2013

Exhibit 6 – Letter from Amy Kovach to BCSD, March 7, 2013

Exhibit 7 – Indictment dated February 11, 2014

Exhibit 8 – Letter from A. Victor Rawl, Sr., May 2, 2014

Exhibit 9 – Letter from John Freeman, April 22, 2014

Exhibit 10 – Motion for Protective Order filed August 6, 2014

Exhibit 11 – Case Management History

Exhibit 12 – Excerpt of Motion Hearing Transcript, October 28, 2014

Exhibit 13 – Indictment dated September 9, 2014

Exhibit 14 – Letter from John W. McIntosh, October 14, 2014

Exhibit 15 – Letter from Kathryn Long Mahoney, October 14, 2014

Exhibit 16 – Post & Courier, "Berkeley schools halt payment of Amy Kovach's legal fees on felony charge," December 10, 2014

KLM
FILED
15 JAN 20 PM 4:20
KATHRYN P. BROOKS
CLERK OF COURT
BERKELEY COUNTY, S.C.

00472

EXHIBIT 1

00473

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

NIKKI R. HALEY
Governor



MARK A. KEEL
Chief

July 25, 2013

INVESTIGATIVE REPORT

TO: File : 31130011

FROM: Special Agent Ryan Kelly

RE: Violation of South Carolina Ethics Act
Misconduct in Office

Thompson, Rodney (Subject)
Kovach, Amy (Subject)
Franchini, Archie (Subject)

COUNTY: Berkeley

Introduction

On January 18, 2013, the South Carolina Law Enforcement Division (SLED) received a written request (Attachment 1) from Chief Deputy Attorney General John McIntosh to investigate alleged incidents of Misconduct in Office and Violation of the South Carolina Ethics Act by employees of the Berkeley County School District (BCSD) during the 2012 Yes4Schools bond referendum. According to documents (Attachment 2) provided by the South Carolina Attorney General's Office (SCAGO), Attorney Josh Whitley contacted the SCAGO and provided documents, newspaper articles, and emails detailing the alleged violations. Whitley alleged BCSD employees, specifically Superintendent Doctor (Dr.) Rodney Thompson, Deputy



An Accredited Law Enforcement Agency



P.O. Box 21398 / Columbia, South Carolina 29221-1398 / (803) 737-9000 / Fax (803) 896-7588

00474

Superintendent Archie Franchini, and Director of Communications Amy Kovach, worked on the campaign during business hours and used district resources. SLED Captain (Capt.) Ryan Neill assigned Special Agent (S/A) Ryan Kelly to conduct an investigation. State Ethics Commission Investigator (Inv.) Jim Bagnall was also assigned to conduct an investigation on behalf of the State Ethics Commission in concert with S/A Kelly.

Summary

On February 13, 2013, S/A Kelly and Inv. Jim Bagnall interviewed Josh Whitley and obtained a voluntary prepared statement (Attachment 3). Whitley provided the following information: He received complaints from teacher's aides, teachers and administrators regarding improper and illegal activities by Dr. Thompson, Dr. Franchini, Ms. Kovach and several Berkeley County School Board (BCSB) members. A public records request was made related to their campaign activities. He reviewed the records provided by the BCSD and was of the opinion that BCSD and BCSB members violated state laws.

On May 21, 2013, S/A Kelly and Inv. Bagnall again interviewed Josh Whitley and obtained a voluntary written statement (Attachment 4). Whitley provided the following information: He was the Chairman of the Berkeley County Citizens for Sustainable Education Committee. The committee's purpose was to oppose the 2012 BCSD bond referendum. He was never afforded equal opportunity to speak or present at rallies, meetings or open houses held on school property. He met with Dr. Thompson on October 2, 2012. Dr. Thompson was aware that he opposed the campaign.

On February 19, 2013, S/A Kelly and Inv. Bagnall interviewed BCSD Director of Communications Amy Kovach. Based on the interview, S/A Kelly prepared a Memorandum of Interview (Attachment 5) documenting the following information as provided by Kovach: She reported directly to Dr. Franchini. She was asked by the BCSB and Dr. Thompson to facilitate communication between the BCSD and the community. She provided data and public

EXHIBIT 2

00476



santee cooper

PO Box 2945101
Moncks Corner, SC 29451-2501
(843) 761-8000

OPERATING

Wells Fargo Bank, N.A.

DATE
10-09-2012

AR-154
537

CHECK NO
618792

VENDOR NUMBER
502724

Fifteen Thousand Dollars And Zero Cents

PAY TO THE
ORDER OF

BERKELEY CHAMBER OF COMMERCE
PO BOX 968
MONCK'S CORNER, SC 29451

PAY THIS AMOUNT

\$ 15,000.00

VOID AFTER SIX MONTHS

Suzanne H. Ritter

Lannie A. Carter

THE FACE OF THIS DOCUMENT HAS A MULTI COLORED BACKGROUND ON WHITE PAPER WITH A VOID FEATURE & AN ENDORSEMENT BACKER

santee cooper		VENDOR NUMBER	VENDOR TIN	CHECK DATE	CHECK NUMBER
		502724	57-0650070	10-09-2012	618792
INVOICE DATE	INVOICE/REF NUMBER	INVOICE DESCRIPTION	INVOICE AMOUNT	DISCOUNT AMOUNT	NET AMOUNT
09-17-2012	2012 Berkeley Chambe	2012 Economic Development Sponsorship -	15,000.00	0.00	15,000.00
					15,000.00

Modica, Hazel L - M603

***** NOTICE TO VENDORS/CUSTOMERS *****
If You Have Any Questions
Concerning This Check
Please Call (843) 761-4055

00477

EXHIBIT 3

00478

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

NIKKI R. HALEY
Governor



MARK A. KEEL
Chief

MEMORANDUM OF INTERVIEW

TO: File # 31130011
FROM: Special Agent Ryan Kelly
RE: Interview with Laura Varn on May 9, 2013
COUNTY: Berkeley

Name: Laura Varn

Address: [REDACTED]

Phone: [REDACTED]

DOB: [REDACTED]

SSN: [REDACTED]

Employer: Santee Cooper

On May 09, 2013, Special Agent (S/A) Ryan Kelly and S/A Albayalde, SLED, interviewed Laura Varn beginning at approximately 8:45 am at the Honeycomb Café located at 162 Seven Farms Dr., Daniel Island, SC. She provided the following information: She was a Co-Chair of the Yes4Schools campaign. She spoke with Berkeley County School District (BCSD) Superintendent Doctor (Dr.) Rodney Thompson over the telephone approximately two to three times during the campaign. The purpose of the phone calls was to discuss BCSD Chief



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00479

EXHIBIT 4

00480

STATE ETHICS COMMISSION

MEMORANDUM OF INTERVIEW

NAME: MR. Kris Mathews, Yes4Schools Committee Videographer

REPORT BY: JAMES T. BAGNALL

ADDRESS:

PHONE: [REDACTED]

DATE OF INTERVIEW: 5/29/2013

IN ATTENDANCE: S/A RYAN KELLY

EDWARD LOVE ESQ.

On May 29, 2013 Special Agent Ryan Kelly and I conducted a telephone interview with Mr. Kris Mathews in regard to videos for the 2012 Berkeley County, Yes4School campaign.

During the telephone interview, Mr. Mathews provided the following information:

- Mr. Mathews said that he filmed and edited the videos for the Yes4schools campaign. He stated that he filmed a campaign co-chair, Mrs. Pulling in the studio. Mr. Mathews said that he did not record any videos at the schools or take any still photographs.

- Mr. Mathews stated that videographer, Mr. Les Stringer also provided footage for the campaign video.

- Mr. Mathews said that Santee Cooper staff, Mr. Phil Sails provided still photographs for the campaign video.

EXHIBIT 5

00482



ALAN WILSON
ATTORNEY GENERAL

January 17, 2013

RECEIVED
JAN 18 PM 2:48
COMMISSION

Chief Mark Keel
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, SC 29221

Mr. Herbert R. Hayden, Jr.
Executive Director
State Ethics Commission
5060 Thurmond Mall, Suite 250
Columbia, SC 29210

RE: Berkeley County School District

Dear Chief Keel and Director Hayden:

We have received information that indicates potential numerous violations of the South Carolina Ethics Act, and other potential misconduct in office, regarding a \$350 million bond referendum in Berkeley County. We have been provided with a notebook, two CDs, and other information outlining these potential violations.

This is to request that each of you assign an agent to investigate the potential violations in your respective jurisdiction. Your assigned agent can contact Senior Assistant Deputy Attorney General Allen Myrick, and he will provide you with a copy of the notebook, the CDs and the other information that was provided to this office.

If you have any questions or concerns, please contact me.

Yours very truly,

John W. McIntosh
Chief Deputy Attorney General

CC: Allen Myrick, SADAG

JWM/ds

EXHIBIT 6

00484

March 7, 2013

Dr. Rodney Thompson
229 E. Main Street
Moncks Corner, SC 29461

Dear Dr. Thompson:

Pursuant to South Carolina Code of Law, Title 59, Chapter 17, Section 110, titled *Duty of school districts to defend actions or proceedings against their employees*; and, pursuant to Berkeley County School District Policy GAFA, August 2005, titled *Staff Protection*, I hereby submit in writing on this, the seventh day of March, 2013, my request for legal protection and indemnification in the matter of inquiries and investigation referencing the school improvement referendum.

By state law and district policy, the district is obligated to defend its employees in legal actions resulting from acts done or omitted in good faith in the course of employment.

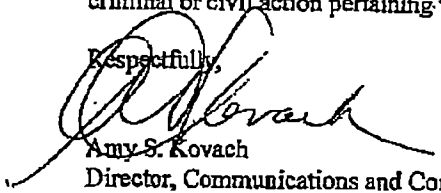
As a good faith employee, I have served to the best of my ability at the direction of the district administration and the Board of Education in the matter of the school improvement referendum, November 6, 2012. With full transparency, I presented to the Board and to the administration in public session on five (5) separate occasions detailed planning documents, information and updates regarding the activities of the volunteer campaign committee as the liaison of that committee back to the school district.

At no time was I informed, publicly or privately, not to continue to pursue working on behalf of the district in this matter, nor was I given direction indicating that my efforts were not supported by the Board of Education or the administration. The dates of public session presentation are as follows and available online for public viewing at www.berkeley.k12.sc.us.

1. Board of Education Meeting, April 24, 2012, Campaign Update and Overview;
2. Board of Education Meeting, June 29, 2012, Campaign Update and Review of Polling Data;
3. Board of Education Meeting, July 24, 2012, Campaign Review of Committee Status;
4. Board of Education Meeting, August 28, 2012, Campaign Update and Review of Committee Plans and Timing; and,
5. Board of Education Meeting, September 25, 2012, Introduction of Campaign Committee Presentation given by a representative of the Campaign Committee.

Thus, given that the Board of Education and the district administration was fully appraised and aware of all activity related to the school improvement referendum in a timely manner; and, that I provided all information publicly and in good faith with complete transparency; and, that at no time was I instructed or directed to cease or change the work as presented, I seek full protection and indemnification in any criminal or civil action pertaining to this issue.

Respectfully,



Amy S. Kovach

Director, Communications and Community Relations

00485

EXHIBIT 7

00486

WITNESSES

Charles Gheht, SLED

ARREST WARRANT NUMBER

Direct Presentment

ACTION OF GRAND JURY

True Bill

Thomas Mark J.

Foreperson of Grand Jury

Date: 2-11-14

VERDICT

Foreperson of Petit Jury

Date:

00487

Docket Number 2014-GS-08-00246

The State of South Carolina
County of Berkeley

COURT OF GENERAL SESSIONS

Term: February
2014

THE STATE

vs.

Amy Kovach,
DEFENDANT

Indictment for
Violation of Ethics Act:
Use of Public Funds to Influence
Election

SC Code: § 8-13-1346
CDR Code: 2985

After being fully advised as to my legal
rights, I hereby waive presentment to the
Grand Jury.

Defendant

I,
hereby appear in my own proper person
and plead guilty to the within indictment or
to

Defendant

Witness:

C.C.C. Pls. And G.

MARTY P. SHAW
CLERK OF COURT
BERKELEY COUNTY, S.C.

14 FEB 11 PM 1:00

FILED

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on February 2, 2014, the Grand Jurors of Berkeley County present upon their Oath:

USE OF PUBLIC FUNDS TO INFLUENCE ELECTION

That Amy Kovach did, in Berkeley County, on or about the period between August 1, 2012 and November 6, 2012, use and authorize the use of public funds, property, or time to influence the outcome of an election, to wit:

While employed as Communications Director by the Berkeley County School District, Amy Kovach did use public funds to pay for the creation of a campaign video and the production of other campaign material, did draft and disseminate speeches during her public employment intended to persuade the voting public, and did perform various other acts using public resources and time, all of which promoted and supported a yes vote as to the school bond referendum held on November 6, 2012, and all of which was in violation of 8-13-1346 of the S.C. Code of Laws as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ALAN WILSON (WAM)
ATTORNEY GENERAL

EXHIBIT 8

00489

A. Victor Rawl, Sr.
2835 Preakness Stakes, Charleston, SC 29414

(843) 766-7334
avrawl@aol.com

May 2, 2014

Dr. Kent Murray, Chairman
Berkeley County School District Board of Education
P.O. Box 608
Moncks Corner, SC 29461

Dear Dr. Murray:

I am writing you to comply with your request dated February 26, 2014. Please understand, my methodology is terse; therefore, I am attaching documents that I may refer to in this memorandum. You asked me the following:

- (1) Whether, based on the information available to the board at this time, the conduct of Ms. Kovach as outlined in the indictment constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110; and
- (2) If you conclude that Ms. Kovach was acting "in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110, in regard to the issues referenced in the indictment, whether the board is precluded from appearing and defending Ms. Kovach under the statute simply by virtue of the fact that she has now been indicted?

In answering question one, which I feel comfortable in so doing, I have reviewed some forty pounds of e-mails and documents submitted to me by Childs & Halligan, your attorneys. I have conducted lengthy conversations with Jerry Theos, attorney for Amy Kovach, and reviewed some of his materials. I have spoken with Jane Pulling. I have also tried to talk with Laura Varn, and was only able to speak to her attorney, Ben Hagood. I have intentionally not spoken to anyone else, as it would have entailed a very lengthy and continuous process. I note for the edification of yourself and the board that SLED and the Attorney General's office have purportedly reduced their investigation to a report that is unavailable to the school district or Ms. Kovach's defense attorney, Mr. Theos, at this time.

The standard for review to determine "acting within the course and scope of employment" is most clearly defined in the body of law surrounding the area of workers' compensation. The course and scope of employment is obviously controlled by the employment agreement the

00490

Board of Education entered into with Ms. Kovach. It is very clear to me in reviewing the material that her job description, a copy of which is attached, covers a very broad area of public information, coordination, outreach, education, and, of course, community involvement. You will see from the timeline attached that Ms. Kovach was very active in complying with her job description. It is clear to me that she has an outgoing, effervescent personality that compelled her to over-perform her responsibilities as outlined in her job description. It is also clear that she was extremely communicative, especially by e-mail, to everyone. The material clearly supports my decision that all of her actions were within the course and scope of her employment.

The next question, of course, is "good faith." In determining whether someone is acting in good faith, the standard is whether she was acting for her own benefit or for the benefit of her employer or someone else. In reviewing and discussing that standard, it is necessary to determine what, if any, personal benefit she derived from the activities outlined in the documentation. I can find absolutely no personal or financial benefit to her in the documentation. Questions have been raised concerning a video and payment for some banners and signs. These questions focus narrowly on a small number of selected documents without regard to the records or issues as a whole. The alleged video is clearly for the benefit of the school district, and not for her personal benefit. The alleged signs and banners may raise an issue of personnel matters or expenditure authority, but certainly in no way, shape, or form, are they an indication of personal benefit to her. Remember, it is her job to coordinate everything. She did her job.

The second question you asked me to provide a response to deals with a legal interpretation of South Carolina Code § 59-17-110. I did not feel comfortable for a myriad of reasons in responding to that question, and have taken the liberty of requesting that John Freeman, Esq., an expert in the field of statutory construction, as well as corporate governance, provide me with an opinion to give to you. I attach that opinion for the benefit of yourself and the board.

As you can see from the above-discussion, I clearly conclude as a matter of fact that Ms. Kovach's activities were clearly within the course and scope of her employment and clearly performed in good faith with her only concern being the benefit of and in the best interest of the Berkeley County School District. I will be more than happy to discuss, in person, my decisions, as well as give you and the board the ability to question me on the basis therefore.

Sincerely,

A. Victor Rawl
South Carolina Circuit Judge, Retired

Attachments (Kovach Job Description, Timeline, Letter from Freeman)

EXHIBIT 9

00492

JOHN P. FREEMAN
2329 Wilmo Avenue
Columbia, South Carolina 29205-3164

803-254-4667
753-9870
jfreemanuse@gmail.com

April 22, 2014

The Honorable A. Victor Rawl, Sr.
2835 Preakness Stakes
Charleston, SC 29414

Re: Berkeley County School District

Dear Judge Rawl:

Thank you for calling on me to assist in analyzing a legal issue that needs to be determined by the Berkeley County Board of Education. The issue concerns the Board's obligation to indemnify an employee, Mrs. Amy Kovach, who has been indicted for an alleged violation of S.C. Code § 8-13-1346. In this regard, S.C. Code § 59-17-110 requires that:

In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

You have advised me that you have diligently investigated the conduct of Mrs. Kovach as outlined in the indictment and have concluded based on your investigation that her conduct constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110. Based on that factual predicate, you have asked me to give you my legal opinion whether the Board is precluded from appearing and defending Mrs. Kovach under the statute simply by virtue of the fact that she has now been indicted.

As you know, I am a recognized expert in the field of entity governance, having taught Business Associations, Corporations, Agency and a host of related courses over a span of the 35 years during which I was a Professor of Law at USC Law School. I have lectured and testified as an expert many times about the duties, rights, and powers of entities and of their board members, officers, and agents. Among other professional activities, I served the South Carolina General Assembly as a reporter on the most recent South Carolina Corporate Code revision project. The

areas for which I was reporter included indemnification of corporate officers and directors. I have in the past advised entities and their board members about indemnification matters.

PROFESSIONAL OPINION

Based on my research and in light of your factual findings, it is my professional opinion that Mrs. Kovach's indictment does not preclude the board from appearing or defending the action in her behalf.

REASONS IN SUPPORT OF OPINION

A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of impropriety. A case in point is the Second Circuit's ruling in United States v. Stein, 541 F.3d 130, 137 (2d Cir. 2008). The government there sought to bar accounting firm KPMG from providing legal fees to former employees indicted for tax fraud. That action was held unconstitutional as a deprivation of Sixth Amendment rights. The court explained:

The government conceded at oral argument that it is in the government's interest that every defendant receive the best possible representation he or she can obtain. A company that advances legal fees to employees may stymie prosecutors by affording culpable employees with high-quality representation. But if it is in the government's interest that every defendant receives the best possible representation, it cannot also be in the government's interest to leave defendants naked to their enemies.¹

Furthermore, South Carolina's public policy strongly favors indemnity being extended to employees who have acted within the scope of their employment and in good faith. Thus, under South Carolina corporate law, S.C. Code Ann. § 33-31-851(a), indemnification is allowed in

¹ Here is additional background concerning Stein from Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: the Rise of Corporate White-collar Practices in Large U.S. Law Firms*, 53 *Ariz. L. Rev.* 1221, 1223 (2011):

On July 16, 2007, U.S. District Court Judge Lewis A. Kaplan entered a remarkable order. Federal prosecutors had investigated the giant accounting firm KPMG LLP ("KPMG") for allegedly marketing fraudulent tax shelters. The firm managed to avoid criminal charges, but 16 former partners and employees did not. In United States v. Stein, Judge Kaplan dismissed the indictment against 13 of the 16 individuals, finding that federal prosecutors had unconstitutionally induced KPMG to stop funding their individual defenses. As a result, although these defendants generally had substantial personal assets, they either lost their counsel of first choice (including lawyers from major law firms) or were financially unable to defend their cases as they would have had their legal expenses been entirely advanced or underwritten by KPMG. The court was incensed, calling this "intolerable in a society that holds itself out to the world as a paragon of justice." The Department of Justice . . . challenged the ruling. The defendants and their amici were represented in a closely watched appeal by some of the finest lawyers of the day, including counsel from the nation's largest law firms. On August 28, 2008, the U.S. Court of Appeals for the Second Circuit affirmed, finding that the government had violated the defendants' Sixth Amendment right to counsel.

some cases in favor even of criminally-convicted officers, trustees, employees, or agents. Indemnification is flatly prohibited only where there is an adjudication that the officer, trustee, employee, or agent is liable to the company or where an improper personal benefit was received by the person seeking indemnification. S.C. Code Ann. § 33-31-851(d). See S.C. Code § 33-31-851(c) ("The termination of a proceeding by . . . conviction . . . is not, of itself, determinative that the director did not meet the standard of conduct described in this section."). The corporate law "standard of conduct" set forth in Section 33-31-851(a) requires that the entity be able to conclude the officer, trustee, employee, or agent acted in good faith and reasonably believed his or her conduct was in the entity's best interest. That factual predicate for indemnification in the corporate setting is very similar to the one established by S.C. Code § 59-17-110.

I have reviewed the Attorney General's Opinion dated May 13, 1997, 1997 WL 323769 (S.C.A.G.). That Opinion holds:

[O]ur courts would conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings.

As you well know, an Attorney General's Opinion has no force of law. In this case it is wrong. Opinions rendered by the Attorney General do not trump statutory enactments. The 1997 Opinion relies on and reiterates the holding from a 1995 Opinion, that purported to find that "a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding." This opinion is obviously and egregiously wrong because it contradicts the plain language of, S.C. Code § 59-17-110. Again, the statute requires that:

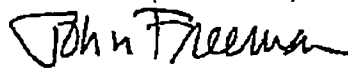
In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

In this case, an employee is being prosecuted in a criminal proceeding. You have determined, after making a reasonable investigation, that the employee acted in good faith and in the course of her employment. Under these circumstances, it is "the duty" of the school district to provide a defense to the proceeding on her behalf.

I hold the foregoing opinion concerning the Berkeley County Board of Education's duty to provide a defense on behalf of Mrs. Amy Kovach to a reasonable degree of professional certainty as an expert in the field of entity governance and employee indemnification rights.

I am rendering this legal opinion as a public service. No compensation, direct or indirect, in any form or fashion, has been or will be furnished to me in connection with this work.

Sincerely yours,

A handwritten signature in cursive script that reads "John P. Freeman". The signature is written in dark ink and is positioned above the printed name.

John P. Freeman

EXHIBIT 10

00497

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT
INDICTMENT NUMBER: 14-GS-08-0266

STATE OF SOUTH CAROLINA,)

versus)

AMY KOVACH,)

Defendant.)

MOTION FOR
PROTECTIVE ORDER

FILED
14 APR -6 PM 3:18
CLERK OF COURT
BERKELEY COUNTY, S.C.

The Defendant, Amy Kovach (hereinafter "Mrs. Kovach"), by and through her undersigned counsel, hereby moves this Court for an order protecting from disclosure materials covered by the attorney-client privilege and work product protections seized by the State. For the reasons stated below, a procedure involving a third-party review of the electronically stored evidence ("ESI") is necessary before the State conducts a review that will invade the privilege and work product protections.

On August 4, 2014, a search warrant was issued seeking "[a]ny and all computers, iPads, hard drives, external hard drives, and electronic storage devices used by Amy Kovach, Rodney Thompson and Archie Franchini during their employment with the Berkeley County School District." Attached as Exhibit A is a copy of the Search Warrant. Also on August 4, the Search Warrant was executed at the designated premises, the office of the Berkeley County School District, 0 Pulaski Street, Goose Creek, SC 29445. Various materials were seized. See Exhibit A. Additionally, the State has requested that Mrs. Kovach voluntarily provide the iPad which she has in her possession.

The materials seized and Mrs. Kovach's iPad contain privileged communications with Mrs. Kovach and her counsel, as well as work product. These materials are neither discoverable

nor reviewable by the State. See, e.g., Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 292-95, 692 S.E.2d 526, 529-30 (2010) (explaining the attorney-client privilege and work product protection); State v. Quattlebaum, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000) (reversing a conviction and disqualifying the Eleventh Circuit Solicitor's Office from re-prosecuting the defendant because a deputy solicitor eavesdropped on a privileged conversation between the defendant and his attorney).

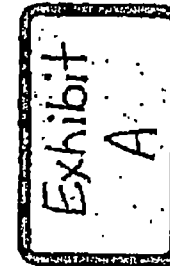
As the State now possesses non-discoverable, non-reviewable materials, and will possess more (Mrs. Kovach's iPad), a protective order is immediately necessary to halt the State's review of these materials. Mrs. Kovach proposes a procedure whereby the seized materials are provided to a third-party expert, capable of extracting the ESI from the seized devices for a privilege review prior to the State reviewing the materials.

Based upon the foregoing, Mrs. Kovach respectfully requests immediate issuance of a protective order prohibiting the State from reviewing the seized materials unless and until there is an appropriate order setting forth an extraction-and-review procedure that protects privileged and work product materials. Mrs. Kovach's counsel is willing to negotiate such an order with the State, or if the parties cannot agree, Mrs. Kovach respectfully requests that the Court issue such an order after hearing from all parties.

Respectfully submitted,


Jerry N. Theos
URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS & KEITH, P.A.
17 1/2 Broad Street
Charleston, South Carolina 29401

Charleston, South Carolina
August 6, 2014



STATE OF SOUTH CAROLINA

County of BERKELEY

SEARCH WARRANT

SLED Case # 31130011

Date August 4, 2014

Officer: Special Agent Ryan Kelly

2014

00500

E. MAIN

SLED Case # 31130011

RETURN

I received the attached Search Warrant _____, 2014, and
have executed it as follows:

On _____, 2014, at _____ o'clock _____ M, I searched
(the person) described in the warrant and
(the premises)

I left a copy of the warrant with _____
(Name of person searched or "at the place of search") with. Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

This inventory was made in the presence of _____

AND _____

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this the _____

day of _____, 2014 _____
(Signature of Officer Executing Warrant)

(L.S.)

STATE OF SOUTH CAROLINA

SEARCH WARRANT

COUNTY OF BERKELEY

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE
MUNICIPALITY OF Berkeley County.

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

Berkeley County School District, 229 East Main Street, Moncks Corner, SC 29461

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

Any and all computers, iPad, hard drives, external hard drives, and electronic storage devices used by Amy Kovach, Rodney Thompson and Archie Franchini during their employment with the Berkeley County School District.

This Search Warrant shall not be valid for more than ten days from date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to _____ within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of premises searched at the time of such search if practicable, and if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to prominent place on such premises.

Moncks Corner, S. C.
August 4, 2014.

 (L.S.)

Signature of Judge

SLED Case # 31130011

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF BERKELEY

Personally appeared before me, one S/A Ryan Kelly, SLED who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Any and all computers, iPad, hard drives, external hard drives, and electronic storage devices used by Amy Kovach, Rodney Thompson and Archie Franchini during their employment with the Berkeley County School District.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

Berkeley County School District, 0 Pulaski Street, Goose Creek, SC 29445

REASON FOR AFFIANTS BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

On January 21, 2013 the South Carolina Law Enforcement Division (SLED) received a written request from Chief Deputy Attorney General John McIntosh of the Office of the South Carolina Attorney General for an investigation into alleged misconduct in office and misuse of public funds by employees of the Berkeley County School District (BCSD) during the "Yes4Schools" Bond Referendum. On November 11, 2013 Amy Kovach stated during an interview she informed BCSD Superintendent Dr. Rodney Thompson in a November 2012 meeting she purchased election signs and banners with BCSD fund, wrote and dispersed election related material on BCSD computers, and financed the production of two videos with BCSD funds. One of the videos was a campaign video advocating for the Yes4Schools Bond Referendum. In that Deputy Superintendent Archie Franchini was Kovach's supervisor and Franchini refused to be interviewed by S/A Kelly. In that Franchini and Thompson communicated via electronic communication with Kovach during and after the election. It is believed, based on the training and experience of the affiant that the computer may contain data related to financial records, transactions, and expenditures; as well as email, lists, documents, other records, and or photographs which will pertain to this investigation.

Sworn to and Subscribed before me

this 4 day of August, 2013.
[Signature] (S.)
Signature of Judge

[Signature]
Affiant

Address SLED Low Country Regional Office.

108 Simmons Street, Walterboro, SC 29488

Phone (843) 782-3822

00503

SLED Case # 31130011

RETURN

I received the attached Search Warrant Aug 4, 2014, and have executed it as follows:

On Aug. 4, 2014, at 10:00 o'clock A M, I searched (the person) described in the warrant and (the premises)

I left a copy of the warrant with Ms. RIDDLE.
(Name of person searched or "at the place of search") with. Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

SAN DISK CRUISED GLIDE 8 GB EXTERNAL MEMORY DEVICE
 WHITE BLUETOOTH EXTERNAL MEMORY DEVICE w/ LANYARD
 KODAK EXTERNAL MEMORY DEVICE 4GB
 GREEN BLUETOOTH EXTERNAL MEMORY DEVICE
 DELL COMPUTER (THOMPSON)
 DELL COMPUTER BLUETOOTH ASSET # 88038 (FRANCHI) SANDISK CRUISED 2GB
 DELL EX. MEMORY DEVICE BLUETOOTH
 GREEN EX. MEMORY DEVICE
 DT101 GT 4GB BLUE EX. MEMORY DEVICE
 REGUS EXTERNAL MEMORY DEVICE
 SONY MICRO VDRIVE EXTERNAL MEMORY DEVICE
 SANDISK CRUISED EX. MEM. DEVICE
 SANDISK 2GB FACTORY SERVICES REPORT

This inventory was made in the presence of S/A KHUT, LT CHEN

AND _____

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this the _____

day of _____, 2014

(Signature of Officer Executing Warrant)

(L.S.)



Ryan Kelly

Special Agent
Low Country Region
(843) 782-3822 (Office)
(803) 452-6768 (Mobile)
Email: rkelly@sled.sc.gov

South Carolina Law Enforcement Division
P.O. Box 21398
Columbia, South Carolina 29221-1398



An Accredited Agency



00505

EXHIBIT 11

00506



CASE MANAGEMENT HISTORY

Page 1 of 1

AGENT:	Cave
SUPERVISOR:	Lewis
COUNTY:	Berkeley

CASE NUMBER:	7014-0112
VICTIM:	
SUBJECT:	Kovach

[illegible]

EXHIBIT 12

00508

STATE OF SOUTH CAROLINA)
-vs-)
AMY KOVACH,)
Defendant.)
TRANSCRIPT OF RECORD
October 28, 2014
Moncks Corner, South Carolina

BEFORE:

The Honorable Roger M. Young, Sr., Judge.

A P P E A R A N C E S:

Creighton Waters, Assistant Deputy Attorney General
Wayne Allen Myrick, Jr., Assistant Deputy Attorney
General
Attorneys for the State

Jerry N. Theos, Esquire
Chris Paton, Esquire
Attorneys for the Defendant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1 (October 28, 2014.)

2 THE COURT: All right. We're here on State
3 versus Amy Kovach, and this is 14-GS-08-0266.
4 Defendant's filed a motion to dismiss and some discovery
5 motions, but let's go ahead and deal with the motions to
6 dismiss first, so they're your motions, Mr. Theos.

7 MR. THEOS: Thank you, Judge. In addition,
8 we did file a motion for protective order, and if you
9 don't mind, I think that may be the quickest matter to
10 deal with.

11 THE COURT: All right.

12 MR. THEOS: I spoke with Mr. Myrick.
13 Previously I spoke to Mr. Adam Whitsett who is in-house
14 counsel for SLED. We thought we had an agreement related
15 to how -- related to the process that was going to be
16 followed pertaining to the iPads and electronic equipment
17 that was seized pursuant to the search warrant. I
18 believe that Mr. Myrick and I can now enter into an
19 agreement, and we had proposed a third party review the
20 e-mails and then determine what e-mail addresses related
21 to attorney-client privileged and protected information.

22 What Mr. Myrick tells me is that SLED will --
23 we've already provided the list, both on behalf of Ms.
24 Kovach as well as two other lawyers related to two other
25 individuals that were under investigation. We've all

1 provided a list. This is my motion, not theirs, though,
2 so what Mr. Myrick tells me is that SLED -- he is
3 agreeable that SLED will review -- will review our
4 listing of e-mail addresses, which are all attorneys or
5 paralegals within attorneys's offices, and that those
6 e-mails that pertain to those specific addresses, whether
7 they be e-mails to or from those addresses, that those
8 will be segregated. They will not be reviewed. They
9 will be accessed to the limited extent that is needed in
10 order to identify.

11 THE COURT: All right.

12 MR. THEOS: But they will not be reviewed,
13 and none of that will be shared with the Attorney
14 General's office. Have I accurately stated that?

15 MR. MYRICK: No, sir.

16 THE COURT: What's the problem with it?

17 MR. MYRICK: Only this, Your Honor: First of
18 all, I gave a filing to the Court's clerk this morning.
19 One: The Attorney General did not believe a privilege
20 exists with respect to the counsel for the school
21 district and communications with Ms. Kovach.

22 Second: The Attorney General's office does
23 not believe, the State of South Carolina does not
24 believe, that she has an expectation of privacy in
25 e-mails generated from a Berkeley County e-mail address

1 using a Berkeley County computer while sitting at a desk
2 paid for by Berkeley County.

3 THE COURT: Expectation of privacy isn't a
4 basis for attorney-client privilege. You either have it
5 or you don't. You have published it or you haven't.

6 MR. MYRICK: She has, in fact, published it.

7 THE COURT: If she called her attorney on the
8 telephone while she was at work, would that be considered
9 a publication or waiver by the State? Is that your
10 position?

11 MR. MYRICK: We're not talking about
12 telephones.

13 THE COURT: It's the same principle. Answer
14 the question. If she picked up the telephone while she
15 was at work, which is a publicly owned telephone, paid
16 for, provided for by the State, is it your position, if
17 she called her attorney, that that would be a waiver?

18 MR. MYRICK: I think it would depend on --

19 THE COURT: What?

20 MR. MYRICK: Whether or not there was written
21 policy as there is here, saying there is no privacy in
22 communications on Berkeley County equipment. It would
23 depend upon that. It would depend upon the existence of
24 extension maybe in a nearby office that could be picked
25 up by a third party unawares.

1 THE COURT: That's not the basis for waivers.
2 If somebody surreptitiously listens in on your
3 conversation, you still have a privilege. If you state
4 it in front of somebody else, then you have waived it,
5 but when somebody surreptitiously overhears your
6 conversation, that's not a basis for a waiver.

7 MR. MYRICK: Your Honor, moving past that
8 point, in the event that the defendant in this case
9 included third parties in those e-mail communications, I
10 think that would constitute publication, which would
11 destroy --

12 THE COURT: That's a different issue.

13 MR. MYRICK: So Your Honor's first point is
14 well made, but we don't know yet, Your Honor, who she
15 published these e-mails to, and we don't think that she
16 can claim the privilege with respect to people she
17 communicates with that aren't her lawyer.

18 Now, having said all that, the State has no
19 burning interest to read Mr. Theos's e-mails with his
20 client.

21 THE COURT: Okay.

22 MR. MYRICK: But after the execution of the
23 search warrant, Mr. Theos filed this motion for
24 protective order. While this motion is -- has been
25 waiting to be ruled on, SLED has not moved forward on

1 conducting this examination.

2 What I did propose, and the part Mr. Theos
3 got correct, was I believe -- I've been informed by SLED
4 that they can conduct this search. They can conduct this
5 search without going into the substance of the e-mails.

6 THE COURT: Okay.

7 MR. MYRICK: Further, they will not
8 communicate to the Attorney General's office the
9 substance of any e-mails that they happen to
10 inadvertently see when conducting the search, and they
11 won't discuss it with us, and what Adam Whitsett, general
12 counsel of SLED, has offered is he can present the
13 results of this search to this Court and the Court can
14 rule whether or not the privilege exists and excise, in
15 camera, any e-mails that the Court regards as privileged.

16 Of course we'd like the opportunity to be
17 heard again, if necessary.

18 THE COURT: All right. Is that satisfactory?

19 MR. THEOS: I thought that's what I said to
20 begin with, Your Honor, but with a slight twist.

21 THE COURT: I think the way he stated it,
22 maybe he implied that they agreed it was privileged, and
23 he is suggesting that they don't necessarily -- I gather
24 even communication between you and them, they might want
25 to take another swing as to whether or not it matters if

1 it's on a government owned computer, as to whether or not
2 that is a waiver, but they're suggesting that whatever
3 comes up as a result it be presented to the Court for in
4 camera review.

5 MR. THEOS: That it will be segregated. It
6 will be accessed in order to identify which e-mails those
7 are. Those would be segregated. They would not be
8 reviewed, but even if they are inadvertently reviewed, no
9 information will be passed along related to the Attorney
10 General's office, and then those e-mails will be
11 presented to the Court in camera, and if the AG wants to
12 pursue a claim that there has been a waiver of some sort
13 or the privilege doesn't apply, then we would be before
14 you or another judge.

15 Is that accurate?

16 THE COURT: Are we on the same page now?

17 MR. MYRICK: Yes, we are.

18 THE COURT: Okay. Good. So ordered. All
19 right.

20 What's next?

21 MR. THEOS: Your Honor, related to the motion
22 to dismiss -- and we handed up and filed and then
23 presented to you, and I copied Mr. Myrick a month or so
24 ago, both our motion and supplemental motion to dismiss.

25 Your Honor, the essence of our position and

EXHIBIT 13

00516

WITNESSES

S/A RYAN KELLY, SLED

[Signature] L.F. CHAMBERS
CHIEF
ARREST WARRANT NUMBER

Direct presentment

ACTION OF GRAND JURY

True Bill

[Signature]
Foreperson of Grand Jury

Date: 9-9-14

VERDICT

Foreperson of Petit Jury

Date:

00517

Docket Number 2014-GS-08- 01403

THE STATE OF SOUTH CAROLINA

County of Berkeley

COURT OF GENERAL SESSIONS

Term: 20__

THE STATE

vs.

Amy Kovach
DEFENDANT

Indictment for

FORGERY

SC Code: § 16-13-10

CDR Code: 3436

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I, _____
hereby appear in my own proper person
and plead guilty to the within indictment or
to

Defendant

Witness:

C.C.C. Pls. And G.S.

14 SEP -9 AM 11:21
CLERK OF COURT
BERKELEY COUNTY, S.C.

FILED *[Signature]*

[Signature]

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

INDICTMENT
FORGERY

At a Court of General Sessions, convened on 9/9/14 the Grand Jurors of Berkeley County present upon their oath:

That Amy Kovach did, in Berkeley County, on or about November 2013, commit the crime of Forgery, in that she did falsely make, forge, or counterfeit, cause or procure to be falsely made, forged or counterfeited of a writing or instrument, and did utter or publish as true a false, forged, or counterfeited writing or instrument of writing. To Wit: During November 2013, Amy Kovach created a false, backdated invoice, purporting to be from the Berkeley County School District to the "Yes for Schools" campaign, in an attempt to establish that she had intended to have public funds repaid to the County which had been spent on materials in support of a bond referendum election campaign, this in an amount less than \$10,000 (\$259.20), and in violation of §16-13-10(A) and (B)(2) of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ALAN WILSON (WAM)
SOUTH CAROLINA ATTORNEY GENERAL

EXHIBIT 14

00519



ALAN WILSON
ATTORNEY GENERAL

October 14, 2014

Kathryn Long Mahoney, Esq.
Childs & Halligan, P. A.
P. O. Box 11367
Columbia, SC 29211

RE: Attorneys' Fees in Criminal Matter

Dear Ms. Mahoney:

It is our understanding that on March 12, 2013 and May 13, 2014, the Berkeley County School Board authorized the use of public funds to pay the attorney fees for one or more Board officials who are the subject of a criminal investigation. This criminal investigation remains ongoing. One of these officials has been indicted on two separate occasions. Furthermore, we understand that public funds may be used to pay the attorney's fees for a non-employee witness in the pending criminal investigation.

Enclosed are prior opinions of this Office which conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings. These opinions (enclosed) conclude that such expenditures represent the use of public funds for a private purpose in violation of the South Carolina Constitution.

We would suggest that you carefully review these opinions and the legal authorities referenced therein. This Office is reviewing the possibility of legal action to recover the public funds expended for this purpose. Please advise as to the legal basis for such expenditures. It is difficult to understand how the Board concluded that these officials acted in good faith when the criminal investigation remains ongoing.

Yours very truly,

John W. McIntosh

John W. McIntosh
Chief Deputy Attorney General

CC: Berkeley County School Board Members, via email to:
Dr. Kent Murray, MurrayKe@bcscdschools.net
Mr. Phillip Obie, II, ObieP@bcscdschools.net
Ms. Shannon Lee, LeeShannon@bcscdschools.net
Ms. Kathy Schwalbe, SchwalbeKa@bcscdschools.net
Ms. Wilhelmina Moore, MooreW@bcscdschools.net
Mr. Frank Wright, WrightFr@bcscdschools.net
Mr. Jim Hayes, HayesJ@bcscdschools.net

Westlaw.

Page 1

1995 WL 606050 (S.C.A.G.)

Office of the Attorney General
State of South Carolina

*1 September 14, 1995

The Honorable Harold Gene Worley
Member, House of Representatives
P. O. Box 296
North Myrtle Beach, South Carolina 29582

Dear Representative Worley:

You have asked whether a county school superintendent can continue to serve upon indictment for common law misconduct in office. As I understand the situation, the underlying facts of the indictment allege that the superintendent unlawfully "rigged" or "fixed" bids in contravention of state law. The Indictment specifically charges the following facts:

[t]hat Gary Smith and Richard Heath, while public officers and public officials holding positions of public trust and having a duty of accountability to the people of Horry County and the State of South Carolina imposed by the common law and statutory laws upon public officers and assumed by them as a matter of law upon their entering public office, did in Horry County between September, 1993 and January, 1995 breach that duty in that Gary Smith and Richard Heath did knowingly, willfully, dishonestly and corruptly violate the procurement laws of the State of South Carolina and of the Horry County School District by "fixing bids" in the purchase of computers, thereby, damaging the integrity of the School District and the bidding process. Further, Gary Smith and Richard Heath did receive and accept gratuities of travel and lodging from favored vendors in violation of Section 8-13-720 of the State Ethics Act, all being against the peace and dignity of the State of South Carolina and the Common Law in such cases made and provided.

Article VI, Section 8 of the South Carolina Constitution (1895 as amended) provides in pertinent part:

[a]ny officer of the State or its political subdivisions, except members and officers of the Legislative and Judicial Branches, who has been indicted by a grand jury for a crime involving moral turpitude or who has waived such indictment if permitted by law may be suspended by the Governor, until he shall have been acquitted. In case of conviction the office shall be declared vacant and the vacancy filled as may be provided by law. (emphasis added)

This Office has often concluded that a county school superintendent is an officer. Op. Atty. Gen. August 9, 1991, affirming Op. Atty. Gen. April 5, 1991; Op. Atty. Gen. February 27, 1991. It makes no difference whether the superintendent is appointed or elected; he is still an officer. Thus, the question is whether the indictment charges a crime of moral turpitude. It is my conclusion that it does.

Here, the Indictment alleges the dishonest and corrupt "fixing of bids" in the purchase of computers for the school district. Moreover, the Indictment contends that there occurred a violation of S.C. Code Ann. Sec. 8-13-720, as part of the alleged misconduct in office. Section 8-13-720 proscribes any public official, public

member or public employee from soliciting or receiving "money in addition to that received by the public official, public member or public employee in his official capacity for advice or assistance given in the course of his employment as a public official, public member or public employee." In this instance, the Indictment charges that the superintendent received and accepted certain gratuities from favored computer vendors.

*2 As our Supreme Court has previously held, "moral turpitude" is defined as an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man Moral turpitude implies something immoral in itself, regardless of whether it is punishable by law as a crime....

State v. Horton, 271 S.C. 413, 414, 248 S.E.2d 263 (1978); Op. Atty. Gen., February 9, 1995. It does not appear that this Office has ever considered the issue of whether offenses involving the fixing of bids are crimes or moral turpitude.

However, in *O'Halloran v. DeCarlo*, 162 N.J.Super. 174, 392 A.2d 615 (1978), the Court held that a count in an indictment for "willfully and knowingly" conspiring "to pervert the due administration of the laws of the State of New Jersey pertaining to the requirements for public advertisement for bids and public bidding in public contracts" and "to violate the criminal laws of the State of New Jersey pertaining to the misconduct in office of public officials" constituted moral turpitude. The lower court, which the referenced decision affirmed, stated the public policy considerations underlying this conclusion as follows:

[t]his "partnership in criminal purposes" to violate the public bidding laws is in itself a fraud upon the State. The public's right to the benefits of public advertising and bidding were defeated, other contractors were cheated of their right to equal bidding opportunity, and the public was cheated of its right to have public officials conduct its affairs with propriety and in accordance with law. 156 N.J.Super. 249, 383 A.2d 769, 771 (1978). While the actual charge in these cases was a conspiracy to commit the offense, the result would undoubtedly be the same as to the substantive crime.

Moreover, the Indictment alleges a violation of the State Ethics Act wherein it is contended that the Superintendent accepted certain gratuities from vendors. Violation of a statute which proscribes the retention of fees or compensation in addition to those allowed by law has been held to constitute a crime of moral turpitude. In *State ex rel. Griffin v. Anderson*, 230 P. 315, 317 (Kan. 1924), for example, the Supreme Court of Kansas stated:

[w]e hold that the law forbidding a public officer to retain any reward other than that allowed by law for doing anything appertaining to his duties as such, both in its general scope and as applied to the situation here presented, involves turpitude, within the meaning of the phrase as used in the statute quoted.

In view of the foregoing, it is my opinion that the Indictment charges a crime of moral turpitude and thus the Governor is empowered to suspend the individual in question pursuant to his constitutional authority.

You have also asked whether the school board is authorized to retain an attorney to represent the superintendent in the foregoing prosecution, or to pay the costs of the superintendent's legal defense in those criminal proceedings. I am enclosing a copy of an opinion of this Office, dated February 15, 1985 which discusses at length the authority of a political subdivision to employ independent counsel to represent a particular member of the body. There, we specifically noted that a public body may not employ counsel or pay counsel with public funds as to matters in which the body is not directly interested or which involved a private purpose. Op. at p. 4. Express statutory authority is necessary for expenditure of public funds in criminal proceedings (e.g. public defender).

*3 By analogy, S.C. Code Ann. Sec. 1-7-50 only permits the State to pay for the defense of government employees in criminal actions if they acted in "good faith". Where, however, a grand jury has returned an indictment against a public official, this Office has concluded that Section 1-7-50 does not apply. We have previously stated:

... our Office has often taken the position that no defense will be provided where a judicial forum has made a finding of probable cause [which an indictment is] since this runs counter to the "good faith" finding specified in the statute. Under those circumstances, the employee is primarily responsible for selecting an attorney to provide a defense and for payment of any attorney fees and costs.

Letter from Nathan Kaminski, Executive Assistant for Administration, to Sally M. Walker, dated September 2, 1993. While Section 59-17-110 permits school districts to employ counsel in criminal proceedings for acts done in good faith in the course of employment, the grand jury here has found probable cause of "fixing bids", which would be clearly beyond the scope of a superintendent's duties. *People v. Mehlic*, 504 N.E.2d 1310.

Moreover, case law supports the idea that the payment of public funds for the defense of a public official in a criminal action is not an expenditure for a public purpose, but a private one. *Holtendorff v. Housing Authority of Los Angeles*, 250 Cal.App.2d 596, 58 Cal.Reptr. 886 (1967); *Bowling v. Brown*, 57 Md.App.248, 469 A.2d 896 (1984). See also, *Anderson v. Baehr*, 265 S.C. 153, 217 S.E.2d 43 (1975) [legislative findings of public purpose usually necessary]. In *Bowling v. Brown*, supra, the Court found that reimbursement of the town manager and town engineer for attorney expenses in defense against charges of official misconduct was not for a public purpose. The Court cited numerous authorities in support of this position:

[i]t is generally agreed that a municipality has no power to reimburse a town official for his expenses incurred in defending himself from charges of official misconduct. *Board of Chosen Freeholders v. Conda*, 164 N.J.Super. 386, 396 A.2d 613 (1978); see 3 McQuillen, *Municipal Corporations* (3d ed. 1973 rev.), § 12.137. The rationale behind the rule is that such an indebtedness against a city would constitute the application of money to an individual and not to a city purpose. See, e.g., *Chapman v. New York*, 168 N.Y. 80, 61 N.E. 108 (1901). The general rule in Maryland is that public funds of municipalities cannot properly be devoted to private uses, even when expressly authorized by the legislature. *City of Frostburg v. Jenkins*, 215 Md. 9, 136 A.2d 852 (1957); *Wilson v. Board of County Commissioners*, 273 Md. 30, 327 A.2d 488 (1974).

Continuing, the Court of *Bowling* recognized:

[a] New Jersey case presented a fact situation similar to that in the instant case. See *Township of Manalapan v. Loeb*, 126 N.J.Super. 277, 314 A.2d 81, aff'd per curiam 131 N.J.Super. 469, 330 A.2d 593 (1974). The case involved a complaint by a township for a declaratory judgment as to whether it was authorized to pay for legal expenses incurred by certain of its officers defending against an indictment handed down by a grand jury. A town committeeman had been charged with using a telephone credit card for personal calls and incurring expenses in excess of \$200.00 which was paid from township funds. The town mayor and town business administrator were charged with having knowledge of the improper use of the credit card and failing to take the necessary steps to see that the township was reimbursed for the amount of the calls. The indictment was dismissed against the mayor and administrator, and a jury found the committeeman not guilty. In spite of the favorable termination of the legal proceedings, the court in the declaratory judgment action held that the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment charging them with what amounted to official misconduct. 314 A.2d at 83 citing 56 Am.Jur.2d, *Municipal Corporations, Etc.*, § 208, at 266, and 64 C.J.S., *Municipal Corporations*, § 183, at 341. In reference to Defendants' "public purpose" argument in the present case, this Court adopts the words of the Manalapan court: "Here, under no circumstances can it be said that

the acts charged against ... [the town employees] in the indictment were for the benefit of the municipality."
314 A.2d at 82.
*4469 A.2d at 902.

In conclusion, it is our opinion that the Indictment charges an officer with a crime of moral turpitude and, thus the Governor may suspend in this instance. Secondly, it is also our opinion that a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding. The foregoing authorities clearly hold that such expenditures are not for a public purpose. It is for the protection of the public that our Constitution requires that public funds be spent for public purposes. Just as the Court recognized in the Manalapan case, referenced above, "under no circumstances can it be said that the acts charged ... in the indictment were for the benefit of" the public. Accordingly, there may not be an expenditure of public funds for the legal expenses or costs in the referenced criminal proceedings.

Sincerely,
Charles Molony Condon
Attorney General

1995 WL 606050 (S.C.A.G.)

END OF DOCUMENT

Westlaw.

Page 1

1997 WL 323769 (S.C.A.G.)

Office of the Attorney General
State of South Carolina

*1 May 13, 1997

The Honorable Tracy R. Edge
Member
House of Representatives
326A Blatt Building
Columbia, South Carolina 29211

Dear Representative Edge:

You note that in an opinion dated September 14, 1995, this Office concluded that a school district is without authority to pay a school board member's or an employee's expenses of representation in a criminal proceedings. You inquire as to "[w]hat legal remedies would be available when public funds continue to be expended for this unlawful purpose?"

Law / Analysis

In the September 14, 1995 opinion, we addressed the issue of "whether the school board is authorized to retain an attorney to represent [the school board officials or employees] ... in the foregoing prosecution, or to pay ... [their] legal defense in those criminal proceedings." We referenced therein an earlier opinion, dated February 15, 1985, wherein we opined that a public body may not employ counsel or pay counsel with public funds as to matters in which the body is not directly interested or which involved a private purpose. We also stated in the September 14, 1995 opinion that "[e]xpress statutory authority is necessary for expenditure of public funds in criminal proceedings (e.g. public defender)."

Referencing by analogy a state statute — Section 1-7-50 — which permits the State to pay for the defense of government employees if they acted in "good faith", we recognized that an indictment constituted a probable cause finding of criminal conduct and thus it represented the policy of this Office that "the employee is primarily responsible for selecting an attorney to provide a defense and for payment of any attorney fees and costs." Further, we noted that while Section 59-17-110 permits school districts to employ counsel in criminal proceedings for acts done in good faith in the course of employment, where a grand jury has found probable cause of "fixing bids," however, such "would be clearly beyond the scope of a superintendent's duties."

Furthermore, we concluded that there exists a body of case law which "supports the idea that the payment of public funds for the defense of a public official in a criminal action is not an expenditure for a public purpose but a private one." We particularly referenced the case of Bowling v. Brown, 57 Md.App. 248, 469 A.2d 896 (1984) wherein the Court found that reimbursement of the town manager and town engineer for attorney expenses in defense against charges for official misconduct was not for a public purpose. We quoted from this case at length as follows because the Court had cited numerous authorities in support of this position:

[I]t is generally agreed that a municipality has no power to reimburse a town official for his expenses incurred in defending himself from charges of official misconduct. Board of Chosen Freeholders v. Conda, 164 N.J.Super. 386, 396 A.2d 613 (1978); see 3 McQuillin, Municipal Corporations (3d ed. 1973 rev.), § 12.137. The rationale behind the rule is that such an indebtedness against a city would constitute the application of money to an individual and not to a city purpose. See e.g. Chapman v. New York, 168 N.Y. 80, 61 N.E. 108 (1901). The general rule in Maryland is that public funds of municipalities cannot properly be devoted to private uses, even when expressly authorized by the legislature. City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957); Wilson v. Board of County Commissioners, 273 Md. 30, 327 A.2d 488 (1974) ... *2 New Jersey [case law] presented a fact situation similar to that in the instant case. See Township of Manalapan v. Loeb, 126 N.J.Super. 277, 314 A.2d 81, *aff'd, per curiam* 131 N.J.Super. 469, 330 A.2d 593 (1974). The case involved a complaint by a township for a declaratory judgment as to whether it was authorized to pay for legal expenses incurred by certain of its officers defending against an indictment handed down by a grand jury. A town committeeman had been charged with using a telephone credit card for personal calls and incurring expenses in excess of \$200.00 which was paid from township funds. The town mayor and town business administrator were charged with having knowledge of the improper use of the credit card and failing to take the necessary steps to see that the township was reimbursed for the amount of the calls. The indictment was dismissed against the mayor and administrator, and a jury found the committeeman not guilty. In spite of the favorable termination of the legal proceedings, the court in the declaratory judgment action held that the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment charging them with what amounted to official misconduct. 314 A.2d at 83, citing 56 Am.Jur.2d, Municipal Corporations, Etc., § 208, at 266, and 64 C.J.S., Municipal Corporations, § 183, at 341. In reference to Defendant's 'public purpose' argument in the present case, this Court adopts the words of the Manalapan court: 'Here, under no circumstances can it be said that the acts charged against ... [the town employees] in the indictment were for the benefit of the municipality.' 314 A.2d at 82. 469 A.2d at 902.

Thus, our September 14, 1995 opinion concluded that "a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding."

The Supreme Court of Illinois recently concurred with the body of case law which has concluded that it does not constitute a public purpose to indemnify public officials for expenses incurred in the defense of a criminal prosecution. In Wright v. Danville, 174 Ill.2d 391, 675 N.E.2d 110 (1996), the Court held that a city ordinance was invalid to the extent it attempted to indemnify officials convicted of crimes for their attorneys fees and costs incurred in their unsuccessful criminal defense. The Court's view of the ordinance consisted of the following analysis:

[a]lthough plaintiffs are correct in their assertion that courts in some jurisdictions have determined that defending a public official from criminal charges may be a proper public purpose, it is generally held in these jurisdictions that a valid public purpose exists only when the authority of the municipality is limited to the reimbursement of legal expenses incurred in a successful defense. See Lomelo v. City of Sunrise, 423 So.2d 974, 976-77 (Fla. App. 1983) (costs of defending public official for misconduct charges served public purpose only because official was acquitted of charges); Ellison v. Reid, 397 So.2d 352, 354 (Fla. App. 1981); Snowden v. Anne Arundel County, 295 Md. 429, 439, 456 A.2d 380, 385 (1983) (indemnity ordinance served public purpose primarily because it limited reimbursement to only those public officials who had successfully defended themselves against criminal charges); Bowens v. City of Pontiac, 165 Mich.App. 416,

420, 419 N.W.2d 24, 26 (1988) (Shepherd, J., concurring); *Sonnenberg v. Farmington Township*, 39 Mich. App. 446, 449, 197 N.W.2d 853, 854 (1972); *Korschel v. City of Afton*, 512 N.W.2d 351, 355 (Minn. App. 1994); *Valerius v. City of Newark*, 84 N.J. 591, 596, 423 A.2d 988, 991-92 (1980); *Beckett v. Board of Supervisors*, 234 Va. 614, 619 n. 7, 363 S.E.2d 918; 921 n. 7 (1988). Still, other states have held that the cost of defending a public official from criminal or official misconduct charges is never a proper public purpose. See *Hall v. Thompson*, 283 Ark. 26, 28-29, 669 S.W.2d 905, 906-07 (1984); *Bowling v. Brown*, 57 Md.App. 248, 260, 469 A.2d 896, 902 (1984); *Corning v. Village of Laurel Hollow*, 48 N.Y.2d 348, 353-54, 398 N.E.2d 537, 540-41, 422 N.Y.S.2d 932, 935-36 (1979); *Township of Manalapan v. Loeb*, 126 N.J.Super. 277, 278-79, 314 A.2d 81, 81-82 (1974) (no authority for indemnification of municipal officer for costs of defending criminal charges which amount to official misconduct); *Silver v. Downs*, 493 Pa. 50, 55-57, 425 A.2d 359, 362-64 (1981); see also 56 Am.Jur.2d *Municipal Corporations* § 208 (1971) (municipality has no power to reimburse an official for expenses incurred in defense of official misconduct charges); 63A Am.Jur. *Public Officers and Employees* § 406 (1984) (members of governing body may not expend public funds to shield themselves from consequences of own unlawful and corrupt acts); 3 McQuillin on *Municipal Corporations* § 12.137.10 (3d rev. ed. 1990) (municipality cannot expend money to reimburse its officer for expenses incurred in defending official misconduct charges). Under the principles of all these cases, plaintiffs would not be able to recover the expenses of the unsuccessful criminal defense of the commissioners and corporation counsel from the city.

*3 Further, the purpose of indemnification, so as not to inhibit capable individuals from seeking public office, has no relevance in the context of the criminal conduct involved in this case. No official of public government should be encouraged to engage in criminal acts by the assurance that he will be able to pass defense costs on to the taxpayers of the community he was elected to serve. See *Powers v. Union City Board of Education*, 124 N.J.Super. 590, 596, 308 A.2d 71, 75 (1973). To the contrary, holding public officials personally liable for the expenses incurred in unsuccessfully defending charges of their criminal misconduct in office tends to protect the public and to secure honest and faithful service by such servants. Indeed, allowing expenditure of public funds for such use would encourage a disregard of duty and place a premium upon neglect or refusal of public officials to perform the duties imposed upon them by law. *Bowling v. Brown*, 57 Md.App. 248, 258, 469 A.2d 896, 901 (1984) ("[T]o reimburse [convicted public officials] for their legal expenses would not encourage the 'faithful and courageous discharge of duty on the part of public officials.' [Citation.] On the contrary, it would encourage the reverse"). The types of individuals who are drawn to these corrupt practices should not be given any incentive to seek public office.

675 N.E.2d at 115-116 (emphasis added).

A number of Attorneys General in other jurisdictions have reached the same conclusion as these courts. For example, in *Minn. Op. Att. Gen.* 125-A-25, 1980 WL 119580 (Minn. A.G.), (July 28, 1980), the Minnesota Attorney General concluded that a county was "without authority to reimburse" a deputy for the cost of his legal defense arising out of a criminal charge against him. While acknowledging that there might be instances where public policy considerations "might be advanced in favor of permitting payment of criminal defense costs ..., the authority to do so should derive from proper statutory or charter authorization with respect to such reimbursement." Likewise, in *La. Att. Gen. Op. No.* 89-401, 1989 WL 454326 (La. A.G.) (August 14, 1989), the Louisiana Attorney General found that a coroner performing medical experimentation upon infants "is not within the course and scope of his duty to investigate cause and manner of death is not entitled to attorneys fees for successful legal defense of criminal and civil proceedings against him." And in *N.M. A.G. Op. No.* 85-23, 1985 WL 190691 (N.M. A.G.) (September 16, 1985), it was concluded by the New Mexico Attorney General that "no authority exists which would empower the Risk Management Division to spend money from the Workmen's Com-

pensation Retention Fund, the Public Liability Fund or any of the other statutorily created funds which the Division administers to either employ attorneys to provide a criminal defense for public employees or to purchase insurance for that purpose."

*4 The thrust of your question is what remedies are available where a school board continues to ignore this body of case law and indemnifies a fellow school board member or other school officials for the costs and expenses of a criminal prosecution. A number of remedies are available, of course, the most obvious one—including the ballot box. However, I gather that your question is focused more upon a remedy which would halt this practice and possibly allow for recovery to the public the monies expended by the Board for this purpose.

A leading South Carolina case in this is Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985). There, the town of Greenwood reimbursed spouses of the City Council for attendance of the 1982 National League of Cities Convention in Los Angeles, California. A taxpayer of the Town brought a declaratory judgment action challenging such expenditures.

The initial question before the Supreme Court was whether a taxpayer possessed sufficient legal standing to contest these payments. The Court held that he did. Concluding that "taxpayers ... have an interest in seeing that city officials disburse funds in a lawful manner ... [.] the Court found legal standing to be present. Further the Court found that there existed "no public purpose in this case because the factual circumstances are too remote"

Likewise, in Tucker v. S.C. Dept. of Highways and Pub. Transp., 309 S.C. 395, 424 S.E.2d 468 (1992), the Supreme Court allowed a taxpayer action to challenge a statute requiring approval of county legislative delegation for expenditure of construction funds and allowing the delegation to contract for improvements. The Court subsequently held that the statute violated the constitutional separation of powers provision.

Courts have also permitted taxpayers to bring an action for a declaratory judgment that a town council had acted beyond its powers in approving reimbursement for expenses incurred in the defense of a criminal prosecution. Bowling v. Brown, *supra* provides considerable guidance in this area.

The Bowling decision first concluded that the municipality possessed no authority to authorize reimbursement for criminal defense expenditures. Said the Court:

[i]t is generally agreed that a municipality has no power to reimburse a town official for his expenses incurred in defending himself from charges of official misconduct. Board of Chosen Freeholders v. Conda, 164 N.J.Super. 386, 396 A.2d 613 (1978); see 3 McQuillen, Municipal Corporations, (3d ed. 1973 rev.) § 12.137. The rationale behind the rule is that such an indebtedness against a city would constitute the application of money to an individual and not to a city purpose. See e.g., Chapman v. New York, 168 N.Y. 80, 61 N.E. 108 (1901). The general rule in Maryland is that public funds of municipalities cannot properly be devoted to private uses, even when expressly authorized by the legislature. City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957); Wilson v. Board of County Commissioners, 273 Md. 30, 327 A.2d 488 (1974).

*5 A New Jersey case presented a fact situation similar to that in the instant case. See Township of Manalapan v. Loeb, 126 N.J.Super. 277, 314 A.2d 81, *aff'd*, per curiam 131 N.J.Super. 469, 330 A.2d 593 (1974). The case involved a complaint by a township for a declaratory judgment as to whether it was authorized to pay for legal expenses incurred by certain of its officers defending against an indictment handed down by a grand jury. A town committeeman had been charged with using a telephone credit card for personal calls and incurring expenses in excess of 200.00 which was paid from township funds. The town mayor and town business administrator were charged with having knowledge of the improper use of the credit card and fail-

ing to take the necessary steps to see that the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment charging them with what amounted to official misconduct. 314 A.2d at 82, citing 56 Am.Jur.2d, Municipal Corporations, Etc., § 208, at 266, at 64 C.J.S., Municipal Corporations, § 183, at 341. In reference to Defendants' 'public purpose' argument in the present case, this Court adopts the words of the Manalapan court: 'Here, under no circumstances can it be said that the acts charged against ... [the town employees] in the indictment were for the benefit of the municipality.' 314 A.2d at 82.

Id. at 901.

The Court then noted that "[o]nce the Plaintiff has established that the expenditures were not for a public purpose, the burden shifts to Defendants to justify relieving them of personal liability for the amounts expended." Defendants argued, however, that they were performing a "discretionary function" and were thus immune from suit under Maryland law. The Court rejected this argument, concluding that

[a]s the Plaintiff correctly argues, if the funds expended by the Town Council ... were not for a public purpose, the expenditure was an ultra vires act outside the scope of Defendant's employment and [the immunity statute] ... does not apply.

Id. at 903. Likewise, the Court found that the doctrine of qualified immunity "applies to actions for tort and has no application to acts which are ultra vires." Id. Moreover, the Court refused to hold that the defendants should not "be personally liable for the funds expended because they exercised good faith in authorizing the expenditures." Unsure, however, that the appropriate standard to qualify for immunity was one of "due diligence" in authorizing the expenditures or one of strict liability the Court noted that there was clearly law favoring both standards:

[t]his Court is not sure whether the Maryland Court of Appeals will follow the lead of the California Court and adopt the due care standard. In a similar case, the Court of Appeals declined to consider the question of good faith, because it found that the defendants had acted within the scope of their authority. See, Smith v. Edwards, 292 Md. 60, 437 A.2d 221, 228 n. 5 (1981). This Court does not reach the question of whether the due care standard should apply in Maryland, because the Defendants have failed to present sufficient evidence of due care to bring the question into play. The Court does note that ... Defendants should show evidence of both good faith and due care to present a serious challenge to the continued utility in Maryland of the strict liability standard set forth in Gloyd v. Talbot [221 Md. 179, 156 A.2d 665 (1995)]. ... The Court holds that the Defendants did exceed their authority as Town Commissioners as the Plaintiff has established that the expenditure of town funds by Defendants to reimburse town employees for legal expenses incurred defending themselves from criminal charges of misconduct in office was not an expenditure for a public purpose. Even if the Court assumes that the Court of Appeals would adopt the reasonable care doctrine as previously discussed in this Opinion, the Defendants have failed to establish that they used reasonable care in consulting their attorney about the expenditures subjudice and therefore are personally liable for the funds expended....

*6 469 A.2d at 904-905.

The law in South Carolina is supportive of liability for public officers who perform ultravires acts. Our Supreme Court has held, for example, that

[t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law. Sligh v. Bowers, 62 S.C. 409, 40 S.E. 885; Mauldin v. City Council of Greenville, 33 S.C. 1, 11 S.E. 434, 8 L.R.A.; 291; McCullough v. Brown, 41 S.E. 220, 19 S.E. 458, 23 L.R.A. 410, Pom. Eq. Jur.

277, Sec. 260, 2 Dill. Mun. Corp. Sec. 736.

Kirk v. Clark, 191 S.C. 205, 210, 4 S.E.2d 13 (1939). In Chandler v. Britton, 197 S.C. 303, 310, 15 S.E.2d 344 (1941), the Court stated that "in the absence of any statutory law to the contrary a public official is not liable for the loss of funds deposited with him if he has exercised that degree of care and prudence in the management of funds which a person of ordinary care and prudence would exercise in his own business." The Court, in Long v. Seabrook, 260 S.C. 562, 568, 197 S.E.2d 659 (1973) concluded that "[t]he failure of a public official to comply with the laws governing and regulating his powers and duties may give rise to liability." And in Sumter Co. v. Hurst, 189 S.C. 316, 1 S.E.2d 242 (1939), the Court said that "[w]e think that there can be no dispute of the proposition that when a public officer receives money for the public use, he is a trustee to receive such monies and to pay them to the public official or function for whom or which they were intended." Id. at 319.

Moreover, in Haesloot v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596 (1923), our Supreme Court recognized the following general principle:

... In the sense that all powers of municipal corporations are held in trust for public use, all property held by such corporations is held in a fiduciary capacity. ... Property held by such corporations for strictly governmental purposes or which has been devoted to a special public use may be sold or disposed of only under express legislative authority; but property acquired and held for general municipal purposes is subject to the corporation's discretionary power of use and disposal. ... It is universally conceded, however, that such discretionary power of use and disposal does not include the authority to donate municipal property to a strictly private use, for the obvious reason that a transfer or release of such property by a municipality to a private ownership without receiving in return some consideration of reasonably equivalent value would amount to a palpable breach of the trust upon which it is held.
115 S.E. at 600.

Thus, it would appear to me that the most feasible remedy available with respect to your situation is a taxpayer action concerning the expenditure of public funds for a private purpose. The question of the use of public funds to indemnify a public official for defense of a criminal action has never been addressed by our courts, to my knowledge. Nonetheless, as indicated above, a number of courts in other jurisdictions have concluded that such expenditures do not constitute a public purpose even where the defense of the criminal action is ultimately successful. Here, the issue of the validity of § 59-17-110 would also have to be addressed in any such action. See Wright v. Danville, *supra*. An action for declaratory judgment would be the type of action typically brought by a taxpayer. In addition, the remedy of injunction against future expenditures of such funds for such purpose as well as reimbursement for past expenditures would be possible as well. It is thus my opinion, consistent with the opinion of Attorney General Condon, dated September 14, 1995 that our courts would conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings. It is also my opinion that a taxpayer action of the type described above would be the most effective remedy.

*7 With kind regards, I am

Very truly yours,
Robert D. Cook
Assistant Deputy Attorney General

Reviewed and Approved by:

Zeb C. Williams, III
Deputy Attorney General

1997 WL 323769 (S.C.A.G.)

END OF DOCUMENT

EXHIBIT 15

00532

CHILDS & HALLIGAN

A PROFESSIONAL ASSOCIATION
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October 14, 2014

Allison Aiken Hanna
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†Certified Specialist in Employment
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*Also admitted in District of Columbia

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***Also admitted in Missouri

**Also admitted in Georgia

VIA E-MAIL AND U.S. MAIL

John W. McIntosh, Esq.
Chief Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211

Re: Berkeley County School District

Dear Mr. McIntosh:

We received your letter dated October 14, 2014.

Initially, the District is not expending public funds to pay legal expenses for any non-employee witnesses in the criminal investigation. Rather, attorney Jonathan Milling has been retained by the District as independent legal counsel to advise only District employee witnesses subpoenaed to appear before the State Grand Jury tomorrow, to the extent they wish to utilize his legal services.

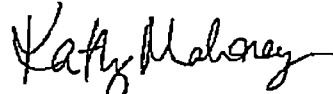
You have asked for the legal basis for the expenditure of public funds to pay the attorneys' fees for District employees under S.C. Code § 59-17-110, who are under investigation and/or indictment. Please see the enclosed opinions of retired Circuit Court Judge, A. Victor Rawl, and University of South Carolina Distinguished Law Professor Emeritus, John P. Freeman, copies of which were released publicly at the School Board's meeting on May 13, 2014. The Board relied on these expert legal opinions in determining the appropriateness of paying the legal fees on behalf of these employees. Further, please note that Professor Freeman's expert opinion specifically addresses both of the opinions you enclosed with your letter. Additionally, we have twice requested from the Attorney General's office information from SLED's investigative report and other investigative information so the Board can consider evidence your office may have that is not available to the Board. To date, the Board has not been provided with any such information from your office.

00533

John W. McIntosh, Esq.
October 14, 2014
Page 2

With kind regards, I am

Sincerely yours,



Kathryn Long Mahoney
kmahoney@childs-halligan.net

/slw

Enclosures

C: Dr. Kent Murray, Board Chairman
All Board Members
Kenneth L. Childs, Esq.
John M. Reagle, Esq.

00534

EXHIBIT 16

00535

Berkeley schools halt payment of Amy Kovach's legal fees on felony charge



Brenda Rindge ✉ Email 🐦 @brindge

Dec 10 2014 8:13 am ⌚ Dec 10 3:38 pm

The Berkeley County School Board will no longer spend taxpayers' dollars to defend indicted Communications Director Amy Kovach on a felony charge.

After a five-hour meeting, half of which was in closed session, the board voted Tuesday to suspend reimbursement to Kovach for fees for lawyer Jerry Theos in connection with a forgery charge.

Kovach was indicted by a Berkeley County grand jury on a misdemeanor ethics charge in February and a felony forgery charge in September in connection with 2012's Yes 4 Schools campaign. The ethics charge carries a fine of up to \$5,000 and a year in jail and the forgery charge is punishable by a fine and up to five years in jail.

According to Tuesday's motion, the board is suspending its decision to pay the fees until after the issue is resolved. Additionally, Chairman Kent Murray "is not to authorize payment of attorney's fees incurred in connection with the forgery indictment for Ms. Kovach unless and until the board takes further action."



Amy Kovach Provided

The action only pertains to the forgery charge and "in no way impacts upon the school district's continued payment of legal fees and costs associated with the original indictment," Theos said Wednesday.

As of Oct. 31, the district has reimbursed her \$130,912, according to a district response to The Post and Courier's Freedom of Information Act request, and some within the district say that figure has swelled closer to \$200,000. It is unclear what portion of that is for work on the forgery charge.

Kovach has been on paid administrative leave from her \$79,995-a-year job since she was indicted on Feb. 11.

For nearly two years, the board has maintained that Kovach and other district employees were acting in good faith and in the scope of their employment during the \$198 million bond referendum campaign to build and renovate schools, and state law requires that the district defend employees under those circumstances.

But residents have repeatedly questioned the move during public comments at board meetings and asked if the district will try to recover the payments if Kovach is found guilty.

In September, the Attorney General's office put the district on notice that it is considering taking legal action to recover the money spent for private defense attorneys for Kovach, Superintendent Rodney Thompson and Deputy Superintendent Archie Franchini. Franchini has been reimbursed \$30,000 for his lawyer, but Thompson has not received any reimbursements so far.

"It is difficult to understand how the board concluded that these officials acted in good faith when the criminal investigation remains ongoing," Chief Deputy Attorney General John McIntosh wrote in the letter.

The charges against Kovach stem from a State Law Enforcement Division investigation that began in January 2013 in response to complaints that she and other district employees illegally campaigned for the referendum during work hours and used district resources.

Although only Kovach has been charged in connection with the investigation, Thompson, who has acknowledged publicly he is under investigation, asked in September to be released from his contract two years early. He plans to step down on July 31.

In all, the district has paid more than \$300,000 to Kovach, Franchini and the law firm of Childs & Halligan in connection with the investigation.

Reach Brenda Rindge at 937-5713 or @brindge on Twitter.

Keywords [Amy Kovach \(/section/search&facet.filter=Keywords:Amy%20%20Kovach\)](#)

[Berkeley County School Board \(/section/search&facet.filter=Keywords:Berkeley%20County%20School%20Board\)](#)

[Rodney Thompson \(/section/search&facet.filter=Keywords:Rodney%20Thompson\)](#)

[Yes 4 Schools \(/section/search&facet.filter=Keywords:Yes%204%20Schools\)](#)

[Amy Kovach \(/section/search&facet.filter=Keywords:Amy%20%20Kovach\)](#)

[Berkeley County School Board \(/section/search&facet.filter=Keywords:Berkeley%20County%20School%20Board\)](#)

[Rodney Thompson \(/section/search&facet.filter=Keywords:Rodney%20Thompson\)](#)

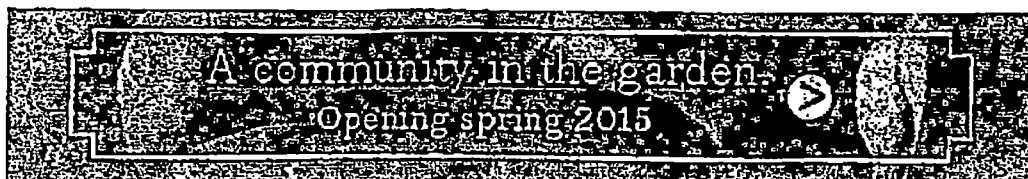
[Yes 4 Schools \(/section/search&facet.filter=Keywords:Yes%204%20Schools\)](#)

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00539

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY) COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA)

STATE,)

v.)

AMY KOVACH)

DEFENDANT.)

TRANSCRIPT OF RECORD
14-GS-08-266
15-GS-08-1073

August 28, 2015
Monks Corner, South Carolina

BEFORE :

THE HONORABLE W. JEFFREY YOUNG, JUDGE

APPEARANCES:

S. CREIGHTON WATERS, ESQ.
Assistant Solicitor

JERRY N. THEOS, ESQ.
Attorney for Defendant

FRANCES BAKIS-RAY, RPR
Circuit Court Reporter
Typed for Melissa W. Singletary



00540

(WHEREUPON, State Exhibits Nos. 1 and 2 were marked for identification and admitted into evidence.)

MR. WATERS: The State calls the case of State versus Amy Kovach. There are five indictments. That's 2014-GS-08-266, 2014-1403, 2015-1072, 1073, and 1074. Ms. Kovach is present with her counsel Jerry Theos. It's my understanding that we're here today and Mr. Kovach intends to enter a guilty plea. And in return the State is not pressing the two forgery indictments, that being, 1403 and 1074, as well as the perjury indictment that's 1075. The defendant will be pleading as indicted to the global common law misconduct in office offense which covers and incorporates all of the conduct that have been charged at issue, as well as the original ethics indictments for use of government funds to influence an election.

THE COURT: So let me get this straight, there's just two indictments that she's pleading guilty to.

MR. WATERS: That's correct, Your Honor.

THE COURT: Mr. Theos, you represent Ms. Amy Sue Kovach under indictment 2014-GS-08-266 and 2015-GS-08-1073; is that correct?

1 kids yelling Yes for Schools in it. Other than that
2 it's the same exact video, same exact footage, same
3 music, same everything.

4 So ultimately, Your Honor, she knew the
5 law. She was in control of this campaign. She knew
6 this was good for her career but she got frustrated
7 because it wasn't going the way that she wanted and
8 so she knowingly broke the law. She used government
9 resources to advocate for the Yes for Schools
10 campaign, and then she engaged in a cover up and in
11 lies a misrepresentation of both during and after in
12 order to cover up what she had done. And that's the
13 factual basis, not only for the misconduct in
14 office, for using her government funds to advocate
15 for the campaign and then covering up with
16 dishonesty, as well as underlying substantive
17 offense of using governmental resources to advocate
18 a campaign.

19 THE COURT: Ms. Kovach, you agree with the
20 facts as stated by the attorney general?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Tell me in your own words what
23 you did that broke the law.

24 THE DEFENDANT: I did my job at the
25 discretion of the leadership of the school district

1 with the leading counsel and the leadership of
2 district as expected of me and filled my, fulfilled
3 all of my obligations to those purposes at their
4 discretion.

5 THE COURT: So you're telling me you did
6 nothing wrong?

7 MR. THEOS: Your Honor, if I may.

8 THE COURT: Yes, sir.

9 (Attorney and defendant confer.)

10 THE COURT: If you want to plead guilty in
11 front of me, then you're gonna have to tell me in
12 your words what you did that was — if you don't
13 think you broke the law, then we're not here for a
14 plea. We will proceed to try this case on the 21st
15 of September. If you're here to plead guilty then
16 you're gonna tell me what you did that broke the
17 law.

18 THE DEFENDANT: In doing my job as
19 directed I violated the law that I am guilty to.

20 THE COURT: How did you violate the law?
21 Did you lie? Did you use resources that you
22 shouldn't have? What did you do?

23 THE DEFENDANT: By using resources to
24 promote school district and its agenda of passing
25 the referendum.

1 THE COURT: Are you, in fact, guilty of
2 misconduct in office?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Are you, in fact, guilty of
5 using public funds to influence an election?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And you understand that I
8 think each of these carries up to a ten year
9 sentence; is that correct?

10 MR. WATERS: No, sir, the misconduct is a
11 common law misdemeanor. It's 0 to ten years, Your
12 Honor. Your Honor, the ethics act offense is up to
13 one year and/or a fine up to five hundred percent of
14 the amount of anything that should have been
15 reported is how it's written in the statute.

16 THE COURT: And y'all's interpretation of
17 that would be that it would be roughly 5300-dollars?

18 MR. WATERS: 5300-dollars is the amount of
19 the video. The 259-dollars is the signs so if you
20 do five hundred percent of that, somewhat over
21 2600-dollars which is would be the total amount.
22 And let me, I can calculate that exact for you Your
23 Honor if you give me one —

24 THE COURT: Let me go ahead and question
25 her. You understand that I'm not making a

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF BERKELEY) Court of General Sessions
3) Case No. 2015-GS-08-01073
4 STATE OF SOUTH CAROLINA)
5 vs.) Transcript of Record
6 AMY KOVACH,)
7 Defendant.)
8) DATE: February 8, 2016

9 B E F O R E:

10 The Honorable W. Jeffrey Young

12 A P P E A R A N C E:

13 S. CREIGHTON WATERS and BRIAN T. PETRANO
14 Attorneys for the State

15 ANDREW J. SAVAGE, III, CHERYL L. SAVAGE,
16 and DONALD McCUNE
17 Attorneys for the Defendant

18 Karen V. Andersen, RMR, CRR
19 Circuit Court Reporter



00545

1 lawsuit had information that was contrary to the statements
2 that you made during your plea; is that correct?

3 MR. SAVAGE: Do you understand the question? That
4 the lawsuit contained the information that was inconsistent
5 with what you had said to this Court? I can't answer that
6 for you.

7 MS. KOVACH: The lawsuit had inconsistencies,
8 correct.

9 THE COURT: What you told me on the day of your plea
10 to the criminal charges was the truth; is that correct?

11 MS. KOVACH: That's correct.

12 THE COURT: You are guilty of those charges; is that
13 correct?

14 MS. KOVACH: Yes, sir.

15 THE COURT: Okay. And you've now withdrawn your
16 lawsuit with prejudice; is that correct?

17 MS. KOVACH: Yes, sir.

18 THE COURT: And you will file no further lawsuits on
19 anything involved in this matter; is that correct?

20 MR. SAVAGE: We hadn't discussed that, but I can
21 assure you our firm will not file any.

22 MS. KOVACH: I would have to speak with my husband
23 and determine our --

24 THE COURT: Well, I guess by this, I cannot take --
25 yes, sir.

- ""eople should watch the video of this meeting. You just can't a sense of the arrogance with seeing it and if they edit it I will expose them.March 11 at 10:12am · ""

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- Cori Corbin Merritt ""They have way to much power with our tax dollars!!!March 11 at 10:49am · ""

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- Jeff Reuer ""Had I won my race against Mr. Lee the vote would have been different I can assure you .March 11 at 11:24am · ""

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- Kevin Condon ""Ditto that Jeff!March 11 at 11:28am · ""

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00547

- Linda M Riney ""The "official" statement from the BCSD says they were advised to take this action by their council. Would this be the same council that advised them on the Yes4Schools project and the 1st amendment law suit?March 11 at 11:48am · {}"

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- Terry Hardesty ""The same ones that cost us over a million dollars in legal fees.March 11 at 11:50am · {}"

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- Nancy Ricciardelli Corbin ""I am sorry I missed last nights meeting. A whole new, now activist, group of citizens could have heard some of the emails between these school board and school district officials showing the unlawful activities that took place during the Yes4Schools campaign and the people (all of whom voted against Hanahan last night) that are paying (with your tax \$\$\$) to keep it quietMarch 11 at 12:40pm · Edited · {}"

href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".f9.1:3:1:\$comment10153116491301250_10153116732891250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"
- ""t was a sight to behold! Mac and Sally were great and Phillip seemed happy to finally have some friends on the board. I think Mrs. Moore votes in favor of everything. BTW, our own Jeff Reuer was also speaking on behalf of Berkeley citizens.March 11 at 9:49pm · {}"

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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like · 2

- Richard Corbin """"Sorry, but I've seen Obie side with the bad guys too many times. I do not consider him on "our" side. He, along with ALL the others, with the exception of Mac and Sally, need to go. Plans should be in the process NOW for HOW we're going to get rid of these folks and WHO do we replace them with !

Bill, the only way we can change this mentality is to vote those like Murray OUT ! We put up 3 CONSERVATIVE candidates this last election. Two of the three were elected, Mac and Sally. The third, Jeff Reuer was far more the better candidate than his opponent, Mrs. Lee. Had Jeff won, the outcome on this vote would have been better. I don't understand the voters in Berkeley County. It is clearly a Republican County but they keep electing liberal weasels to the school board. Hopefully, those in Hanahan who supported Murray see the light and will be aware that, even at the school board level, a person's ideology counts. Thank you for bringing this to front and center. Now organize for the next election and lets get the folks on the school board that will use common sense.

Two things bothered me after reading this article in the print version. First, it is rather impolite to place someone's photo on page A6 and only identify them by their last name with no mention of who they are or how they are related to the article. Nancy Leigh deserves the recognition as a new principal. Second, Berkeley School District can spend a million dollars for attorneys in a little over a year and yet can't find 25-50 thousand dollars to update a professional capacity and growth study from 6 years ago. NC State University's Operations Research and Education Research Lab (ORED) gave the district valuable information regarding existing capacity and expected growth by neighborhood. The School Board does not have to guess where and how much growth is

- """"For the record except for Charleston, Dorchester, and one other county (Beaufort I think) that use Durham, the other 43 counties use state owned busses . The local districts are responsible for drivers and routes only . The State Board of Education is responsible for maintenance . They have told me they need \$\$\$ and that is the state legislators responsibility .February 25 at 7:21pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif; "Like

- Jeff Reuer """"BCSD has 194 busses hauling 21,000 kids every school dayv. Many busses run two or three routes.February 25 at 7:23pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-reactid=".q6.1:3:1:\$comment10153083659236250_10153083919726250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif; "Like
- Cori Corbin Merritt """"That was Colt not Cori questioning the picture....I'm questioning the attorney fees! I believe you can multi-task!! ?February 25 at 8:02pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-reactid=".q6.1:3:1:\$comment10153083659236250_10153083970816250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif; "Like

Did everyone hear that the Berkeley County School Board admitted, at the Board meeting last night, that they are complicit in Kovach's criminal acts by directing her to do them. If that is not a conspiracy, then I do not know what is. I certainly hope that the Attorney General will hold the members who were on the Board at the time as responsible as Kovach !

Because of public outcry the board suspended changing some attendance lines until the

Fox Bank area school is completed. Dr. O'Gorman requested the Health Advisory Board be re-appointed for the 2015-2016 school year. Sally Wofford, District 6, pointed out the clergy seat member had moved out of the district so that seat was left vacant for now .

A sophomore student from SHS and 20 other students told the board that changing to

the AB schedule next year would result in students taking less rigorous courses in order to maintain their

GPA . Terry Hardesty commended the board for hiring a professional group to do a nation wide search

for a new superintendent and for their decision to hold off changing

some attend lines. He also urged them to stop paying legal fees for Mrs. Amy Kovach which now has exceeded \$417,000.00 and growing. The superintendent and deputy superintendent still have State Grand Jury indicements pending .

The budget audit that ended June 30, 2014 was UNMODIFIED. The best you can get . A note of concern: The district has an 18 BILLION retirement and health benefit obligation that has not been addressed .

You can review the entire budget by visiting their web site . The board pass a resolution, after months of pleading from me, to be sent to the State Legislators asking that our school busses receive the necessary funding needed to be upgraded .

End of report

- """"This issue is pretty simple. All involved knew the legal parameters. They deliberately stepped over the line thinking no one would call them on it. Now we have a game of CYA. If one goes down, all go down.January 30 at 2:00pm · ""
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role="button" title="Like this comment" data-reactid=".11r.1:3:1:\$comment10153022556671250_10153022581846250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 3
- Terry Hardesty """"Just for the record, Ms. Kovach's attorney is not denying her actions -- he states over and over that the Board APPROVED of her actions. I predict this will go on a while longer now and more heads will roll.January 30 at 2:54pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-reactid=".11r.1:3:1:\$comment10153022556671250_10153022666176250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1
- Caroline Gardner Hall """"Thanks Terry for sharing.January 30 at 3:29pm · ""
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role="button" title="Like this comment" data-reactid=".11r.1:3:1:\$comment10153022556671250_10153022718206250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1

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- Terry Hardesty """"Thanks Caroline.January 30 at 3:45pm · ""
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- """"Is o remember that we have paid her for a year NOT to work. I so want that job.January 30 at 6:12pm · ""
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- Terry Hardesty """"But Greg, they were doing all of the illegal stuff to benefit the kids.January 30 at 6:20pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##"
role="button" title="Like this comment" data-reactid=".11r.1:3:1:\$comment10153022556671250_10153023229931250:0.0.\$rig
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- Linda M Riney """"It's a good thing we don't need any government oversight in this county. We can trust them all.

""""My question is will the Berkeley County Sheriff's Dept pay for his legal defense? If not then why did the school board pay for criminal lawyers??December 28, 2014 at 9:08pm · ""

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role="button" title="Like this comment" data-
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When the Berkeley County School Board hired Dr. Anthony Parker some people groused about his salary and benefit package. He literally saved the taxpayers millions of dollars and put BCSD on an upward trend in achievement. The subsequent Board pushed him out in favor of Rodney Thompson and the District has suffered with poor financial and administrative decisions, not withstanding the ongoing criminal investigation by SLED and the Attorney General. Cheaper is not always better, especially in getting and keeping someone with Dr. Parker's expertise. I pray both board are successful in their searches.

he previous board is directly responsible for the fiasco with the Superintendent. I hope the addition of Sally Wofford and Mac McQuillin will change the boards direction.

There are four new elementary schools in the current referendum build out. I see no information concerning the impact these new schools will have on short term or long term capacity of the entire elementary school population. Surely the administration has considered this prior to adjusting attendance lines in stable areas that have seen minimal growth. I thought the new school capacity was supposed to be the remedy, not the displacement of existing school boundaries.

- """"Thank you for sharing this information Terry Hardesty!December 15, 2014 at 1:55pm · ""
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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like
- Richard Corbin """"I was told that this was a move to get back at one of our newly elected School Board members. Is there any truth to that ?
- """"HUH???gotta be kidding/ or does majority of school board + stupid?November 14, 2014 at 11:43am · ""
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role="button" title="Like this comment" data-
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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like

- Richard Corbin "" don't know about stupid, but definitely no common sense AND very liberal ! Our work has just started. Every time these liberals vote contrary to the conservative ideology, we need to make sure it is known by the conservative voters of Berkeley County so that in 2 years we can get rid of 3 or 4 of them. Let's eliminate the possibility of UNINFORMED VOTERS controlling the election.November 14, 2014 at 12:59pm · "}"
[href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"](https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#)
 role="button" title="Like this comment" data-reactid=".1jf.1:3:1:\$comment10152815532316250_10152815647986250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: underline; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1
- Cori Corbin Merritt "" And don't forget....unethical!November 14, 2014 at 1:12pm · "}"
[href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"](https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#)
 role="button" title="Like this comment" data-reactid=".1jf.1:3:1:\$comment10152815532316250_10152815668861250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1
- The Bryan Crabtree Show These people are authoritarian and think they are above the law. We'll see.Reply · Like · 3 · Follow Post · December 10, 2014 at 11:00am
- Terry Hardesty · Top Commenter · Former Chairman at Berkeley County Republican Party I am still wondering when violating the state's ethics laws became part of the "scope of employment" for school administrators. In good faith or not doesn't matter, its wrong!Reply · Like · 1 · Follow Post · December 10, 2014 at 12:30pm
- Nancy Ricciardelli Corbin · Top Commenter · Works at Retired This past election has put some common sense on this School Board. Now when they are discussing issues they have voices of reason questioning the white wash bucket that has been kept in the board room.Reply · Like · Follow Post · December 10, 2014 at 9:29am
- "" Ain't it great when a plan comes together !December 10, 2014 at 9:26am · "}"
[href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"](https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#)

role="button" title="Like this comment" data-reactid=".1jc.1:3:1:\$comment10152870038901250_10152870056961250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1

- Nancy Ricciardelli Corbin ""Finally some common sense has come to our School Board. They now have members asking pointed questions that the "old" board members can not answer.December 10, 2014 at 9:27am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-reactid=".1jc.1:3:1:\$comment10152870038901250_10152870057701250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 5

- Connie C Evans ""About time!December 10, 2014 at 9:39am · ""
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role="button" title="Like this comment" data-reactid=".1jc.1:3:1:\$comment10152870038901250_10152870076171250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1

- Candice Barnhart ""At last!!December 10, 2014 at 10:28am · ""
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role="button" title="Like this comment" data-reactid=".1jc.1:3:1:\$comment10152870038901250_10152870186756250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1

- Cori Corbin Merritt ""Hmmm....I guess elections do have

consequences.December 10, 2014 at 10:35am · "}"
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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like · 4

- Cindy Satterfield Williams """"About time! She paying it back??December 10, 2014 at 10:54am · "}"
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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like ·

- """"About time! She paying it back??December 10, 2014 at 10:54am · "}"
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serif;"Like · 2

- Terry Hardesty """"They are still paying the lawyer for the ethics charges which
is absurd. The felony charge stems from an attempt to hide the actions that
brought the ethics charge.December 10, 2014 at 12:14pm · Edited · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
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serif;"Like

- Terry Hardesty """"I am still wondering when violating the state's ethics laws

became part of the "scope of employment" for school administrators. In good faith or not doesn't matter, its wrong!December 10, 2014 at 12:32pm · "}"
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- "I am still wondering why she is still on the payroll.December 10, 2014 at 12:38pm · "}"
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role="button" title="Like this comment" data-reactid=".1jc.1:3:1:\$comment10152870038901250_10152870382166250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 2

- Terry Hardesty "Buying silence.December 10, 2014 at 12:59pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-reactid=".1jc.1:3:1:\$comment10152870038901250_10152870412766250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

- Cindy Satterfield Williams "Enough.December 10, 2014 at 1:10pm · "}"
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role="button" title="Like this comment" data-reactid=".1jc.1:3:1:\$comment10152870038901250_10152870430471250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

- Richard Corbin "Yeah, she should not be getting ANY financial help for her defense, but I take a lot of pleasure in knowing that her butt tightened up when

she got the news. Not only that, if the Attorney General goes after requiring her to repay for her defense expense..... knowing that she must be thinking of that every day makes me kinda feel we're getting justice.December 10, 2014 at 4:16pm · "}"

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- Terry Hardesty """"I think the board members who relied on advice from their law firm should personally pay it back. It was their bad decision based on what I consider bad legal advice.December 10, 2014 at 4:27pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".1jc.1:3:1:\$comment10152870038901250_10152870872501250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like
- Gregory Adams """"There is more to come...[queue dramatic music]
- """"Soon I hope.December 10, 2014 at 8:05pm · "}"
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- Jeff Reuer """"Don't forget what Mrs. Kovach attorney said to the judge the last time she was in court . " Mrs. Kovach acted with the full knowledge and approval of the board ."December 10, 2014 at 9:28pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-

reactid=".1jc.1:3:1:\$comment10152870038901250_10152871356396250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 4

- Terry Hardesty """"I had a conversation with someone in one of the schools who is really happy Thompson has tendered his resignation.December 11, 2014 at 4:58pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".1jc.1:3:1:\$comment10152870038901250_10152873174816250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1
- Kenneth William Hill """"No Good Rotten Government Skank !
- """"I hate to pop your bubble, but many State writers cross publish on the fishwrap.November 23, 2014 at 8:43pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".1o6.1:3:1:\$comment10152832446576250_10152834803071250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1
- Linda M Riney """"What a rag.November 23, 2014 at 10:42pm · ""
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- Terry Hardesty """"I cant complain too much. The editorial pages have left and right views but most of all they have Brenda Rindge reporting and she is the most straight up reporter I have ever encountered.November 23, 2014 at 10:54pm · ""} "
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like
- Linda M Riney """"True, Terry, Brenda is the rose among the thorns.November 24, 2014 at 7:00am · ""}
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serif;"Like · 1

Thompson released from contract, offered teaching position

Superintendent Rodney Thompson plans to return to teaching.

The school district has agreed to release its chief employee from his position effective July 31, 2015.

In September, Berkeley County School Superintendent Rodney Thompson requested release from his contract.

During its Nov. 11 regular meeting, the school board agreed to honor his request and offer him a position as a social studies teacher, which he requested in a letter to the board dated Nov. 11.

"There is no higher calling than teaching students, and I am honored to re-join the dedicated corps of teachers in the district," Thompson wrote.

According to Board Chair Kent Murray, the location of the position has not been determined.

The decision was made in a 6-0 vote with three school board members abstaining from the vote.

After a long executive session, board member Jim Hayes moved to accept the release effective July 31, 2015, and offer Thompson a contract as social studies teacher in the district for Aug. 1, 2015.

Once the motion was open for discussion, one of the board's newest members made an ultimately unsuccessful motion to amend. Mac McQuillin was sworn in earlier in the night.

"It's no secret the superintendent is under investigation," McQuillin began, referencing a nearly yearlong investigation of Thompson and two other school district employees by the state's attorney. The investigation stems from the successful 2012 Yes4Schools bond referendum campaign. Two indictments on the district's communication director have come out of the investigation; Thompson has not been indicted.

"I'd like to amend that if he is indicted then it is the agreement of the board and the superintendent that his resignation would be effective immediately upon the indictment and that the social studies teacher offer ... will be voided," McQuillin said.

McQuillin, board member Phillip Obie and new member Sally Wofford voted in favor of the motion, but the six other board members voted against it and it failed.

"It's unnecessary," Murray said.

Murray and newly reelected Frank Wright said the agreement would not negate any future decision the board would make in the best interest of the district.

The district has kept Communication Director Amy Kovach on paid leave and provided for her legal fees after a judge determined she acted in "good faith" for the first ethics indictment. A subsequent criminal indictment of forgery has not resulted in a review of that decision.

McQuillin, Obie and Wofford then abstained from the vote on releasing Thompson and offering him a teaching contract.

- "t's sad that the changes in the new school board didn't go further. Why is it that they feel they owe our superintendent anything if there's a chance to be found guilty on any charges. Macs request was the right move. The others (6 old remaining members) not agreeing show the problems still left on the BCSBNovember 12, 2014 at 8:10am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/""
role="button" title="Like this comment" data-reactid=".1so.1:3:1:\$comment10152811076951250_10152811087306250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 2

- Josh Whitley ""I think it tells the Attorney General all he needs to know. The amendment should have passed unanimously- it is a no brainer. You cannot defend the vote. If he's not indicted, then the main motion's intent is carried out. If he is, then the district will not be obligated. I have a feeling this will not be the end of this motion, even if the 6 hope it is.November 12, 2014 at 8:16am · ""
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- Candice Barnhart """"Is it bad to say that I really hope this comes back to bite them?"
- """"Is it bad to say that I really hope this comes back to bite them?November 12, 2014 at 8:21am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".1so.1:3:1:\$comment10152811076951250_10152811104186250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 2
- Terry Hardesty """"A judge did not determine she acted in good faith. A paid retired judge produced and opinion bolstered by another crony of the District's long time law firm. That document is meaningless in a court of law. The matter will be determined in court at some time and I hope those board members who have knowing condoned illegal behavior are charged with malfeasance and forced to resign.November 12, 2014 at 8:27am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".1so.1:3:1:\$comment10152811076951250_10152811111976250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 3
- Terry Hardesty """"The Attorney General has stated violating the law can not be an act of good faith. Think about it: Do we want the folks in charge of educating our children willfully and knowingly violating state law and then using classroom dollars to defend said action?November 12, 2014 at 9:36am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-

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- Richard Corbin """"Okay, those idiot tag-a-longs have magnified the target on their backs. Let's be sure that we have some strong folks opposing them in 2 years. We need to start now making certain that the voters in Berkeley County hear of this and, I'm sure, future stupid positions taken on the issues. Lets investigate methods of successfully getting the word out so that in 2 years the voters know what their District Reps are doing.November 12, 2014 at 9:49am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##" role="button" title="Like this comment" data-reactid=".1so.1:3:1:\$comment10152811076951250_10152811409821250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1

Here is the comment I made on the Post and Courier article about Rodney Thompson's resignation:

We have the leader and two high level employees of Berkeley County School District under investigation for ethics violations. One has been charged with a felony forgery. The School Board is spending classroom dollars defending them. This is scandalous in my opinion.

- """"Ask your school board members WHY they continue paying for Mrs. Kovach's legal fees . The State Attorney General Office told they to stop paying or they could face sanctions . In spite of everything they so far have made no effort to stop wasting taxpayer dollars . It wasn't even on the agenda last week . Business as usual .November 3, 2014 at 6:36pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##" role="button" title="Like this comment" data-reactid=".1vo.1:3:1:\$comment10152793749481250_10152793999786250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1

- Linda M Riney """"Do you think it will dawn on some people pretty soon that laws were broken?November 3, 2014 at 7:28pm · ""

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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like · 1

- Terry Hardesty """"This made the Channel 2 news at 6.November 3, 2014 at 7:50pm · "}"
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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like

- Nancy Ricciardelli Corbin """"Well I guess we may not have been wrong after
all. I wonder if the AG will pursue the legal fee issue?November 3, 2014 at 7:52pm · "}"
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role="button" title="Like this comment" data-
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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like

- Nancy Ricciardelli Corbin """"Does she develop the School District web page? It
looks like her handy work today, putting an incumbents picture on it just in time
for an election. I wonder how often board members are pictured.

I have it on very good authority Ms. Kovach's hearing for her first charge to be dismissed
will be in Berkeley County Courthouse A at 10:00 AM next Tuesday.

""""""&&&&" data-reactid=".1zy" style="color: rgb(109, 132, 180); cursor: pointer;
text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like · Share

- 3 people like this.

- View 5 more comments
- Gregory Adams """"And?October 28, 2014 at 9:01pm · ""
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 role="button" title="Like this comment" data-
 reactid=".200.1:3:1:\$comment10152771624521250_10152780609816250:0.0.\$ri
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 pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
 serif;"Like · 1
- Terry Hardesty """"Long argument by both sides and Judge Young said he would
 take the argument under advisement and make a ruling hopefully sooner that later.
 I thought from his early comments and questions he may have been favoring
 quashing the indictment but the AG's attorneys argued well and may have made
 that a difficult conclusion for the judge. I think Senator Grooms was very clear in
 his statement to channel 2 after the hearing. He said if the judge rules in the
 defendants favor then any government entity like a school district can use your
 tax dollars at will to advocate for any thing they want. They could spend millions
 and nothing could be done about it. I want to thank Rep Southard for
 attending.October 28, 2014 at 11:16pm · Edited · ""
 href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
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 serif;"Like · 2
- """"Commented. Please add yours at the link provided. Sick of Hicks.October 19,
 2014 at 3:00pm · ""
 href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
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 pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
 serif;"Like
- Nancy Ricciardelli Corbin """"It was NOT Ms. Kovach's job to head up the

Yes4Schools referendum campaign (as she states in her emails). It was not Ms. Kovach's job to give the press untrue information when asked if any public funds were used in the production of the Yes4Schools video. It was not Ms. Kovach's job to spend 16 hours a day on the Yes4Schools campaign to the detriment of her district responsibilities (per her emails). Just read some of them and you will realize this is a matter of legal/illegal and right/wrong, not politics. I could not tell you what her politics are, just that the whole Yes4Schools referendum was a sham based on giving the public untrue and half-true information....the people were defrauded.October 19, 2014 at 8:11pm · "}"

href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".237.1:3:1:\$comment10152760304306250_10152760891956250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

- Nancy Ricciardelli Corbin """"I posted this tonight in rebuttal to comments posted on the P&C comment section of this article: Jane it does not take a brain surgeon to read Ms Kovach's emails and realize laws were broken. She wrote a Do's and Don't list for district employees and then personally did all of the don't's. Since you were the Chairman of the Yes4Schools campaign I also sent you a copy of the initial presentation with some of the FOIA info in it. I guess you did not read it. The public was misled prior to the Referendum and then again when the School Board was confronted with evidence. You can try and shift the blame to those of us that have brought this information out, but we are not responsible for the actions of those of you that managed the Yes4Schools campaign. Your involvement with the campaign takes the objectivity out of your comments.October 21, 2014 at 12:35am · "}"

href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".237.1:3:1:\$comment10152760304306250_10152763286881250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1

- """"And we are supposed to be "astonished" that more people haven't "rallied around" an individual receiving a felony indictment? LaLa land?October 12, 2014 at 2:14pm · "}"
- href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152743424266250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-

serif;"Like · 2

- Nancy Ricciardelli Corbin ""The fact that she is a "nice person" and they were "doing it for the kids" makes all of the unethical and illegal actions okay in their minds....AND THEY ARE IN CHARGE OF OUR CHILDREN 8 HOURS A DAY....October 12, 2014 at 4:11pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152743792766250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like
- Linda M Riney ""And don't forget, the forgery was "authorized".October 12, 2014 at 4:29pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152743853611250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like
- ""JohnandDebbie, is that kind of like being a little bit pregnant?October 13, 2014 at 7:18am · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152745516451250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like
- Gregory Adams ""Bordering on libel means it isn't. Why threaten her?October 13, 2014 at 7:37am · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152745550171250:0.0.\$ri

ght.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

- Richard Corbin """"JohnandDebbie, explain just how Cori's comment "borders on libel". She is correct about Dahmer he did have friends. Some said that he was wierd, but seemed to be a nice guy ! So, JohnandDebbie, just how can that be libelous of anyone ?October 13, 2014 at 7:40am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152745556296250:0.0.\$ri
ght.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like
- """"JohnandDebbie Spitler really?? Good luck with that. My defense...it was for the kids!October 13, 2014 at 8:22am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152745652086250:0.0.\$ri
ght.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like
- Cori Corbin Merritt """"JohnandDebbie Spitler BTW I'm nice too, so I'm completely innocent!!October 13, 2014 at 8:23am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152745653986250:0.0.\$ri
ght.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1
- Cori Corbin Merritt """"For the record, even a psychopath like Dahmer can take responsibility for his actions, as quoted here when being interviewed by a reporter about who is to blame for his behavior. "The person to blame is the person sitting

across from you," he told an Inside Edition interviewer in January 1993. "Not parents, not society, not pornography. Those are just excuses."

- ""JohnandDebbie..... it makes no difference to me just what "FBF" is. You can try to lump us into whatever, but it seems as though you are about the only one on this post with an opposing view. So, JohnandDebbie, are you right and everyone else is wrong ? And, by the way, just what do you know, fact based, about what we're speaking ? We can furnish FACTS that substantiate our views. Where are yours ?October 13, 2014 at 9:28pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##" role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152747679651250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

- Nancy Ricciardelli Corbin ""Debbie and John if you REALLY want the truth read this....<https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/10152311178886250/>

""You have attacked and demonized a hard-working mother of two who, though she may have made some mistakes, does not deserve in any sense to be compared to a mass murderer like Jeffrey Dahmer. Most of the comments you people make are out of line. You talk of ethics but have no common courtesy. You expect ethical behavior of those in public service, but fail to exhibit respect for the process of law. You are, in this forum, exhibiting the same behavior as those in Missouri who took the law into their own hands. What a bunch of hypocrites! I wish you the joy of one day being indicted, having your name and family drug through the mud with the outcome yet to be determined. Oh, and have a nice day!October 16, 2014 at 7:35am · "}"

href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##" role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152753115941250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

- ""ohnandDebbie, you, like all Liberals, think the end justifies the means. Because you were in favor of the goal, you are willing to ignore any behavior needed to achieve that goal. That's the long and short of it. I don't doubt this lady is, otherwise, a likable person. I know she has a family. I am certain all the people sitting in jail today have some redeeming quality. BUT, that is NOT this point. The ugly fact is, you cannot engage in certain behavior and expect the legal system to look the other way. And, no one here has "attacked and demonized"

anyone. Based on the evidence, the legal system has determined that crimes were committed so indictments have been issued. Everyone involved will get their day in court. October 16, 2014 at 8:22am · "}

href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".247.1.3:1:\$comment10152743011286250_10152753173406250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1

- Cori Corbin Merritt """JohnandDebbie Spitler, let me get this straight.....my comment regarding Jeffery Dahmer was to put it in perspective that "nice people" do bad things. However, you compare those of us who disagree with you, with the thugs in Missouri. You should practice what you preach if words are oh so hurtful. The bottom line is whether or not she is nice, if her heart was in the right place, if she has 2 kids or 15 kids, she broke the law. She will suffer the consequences of breaking the law. SHE is totally responsible for not only HER actions but dragging her family through the mud. I'm sure her children would be much better off if the example she set was one of honesty and integrity. Your way of thinking means that thousands of good people who are incarcerated but just broke the law should be released. Or do you only feel that way if YOU know them? Either way that is ignorant and irresponsible. Yes, those are harsh words...but I am a single mother of one, so I cannot be held responsible for them. October 16, 2014 at 8:25am · "}" href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".247.1.3:1:\$comment10152743011286250_10152753176971250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

JohnandDebbie, You're correct, I do not know you personally, but your comments have given me a good bit to go on. One thing, for sure, is that you're an ED-U-K-TOR ! The folks here are not interested in castrating any person who is a law abiding citizen. However when the School Board decides to ask the voters for a tax increase, then the voters have a right to know "what for" ! And, when they illegally promote it, then someone has to be held accountable. The nice lady to whom you refer, has been charged with breaking the law. SLED did an extensive investigation and determined there was enough to recommend the Grand Jury look at it. The Grand Jury indicted her. You are trying to place the responsibility for this on someone other than the perpetrator. Is that really the way you want you children to view things no personal responsibility ?

- """Castrating? Really? I hope that was an auto correct!October 16, 2014 at

5:44pm · "}"

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- Nancy Ricciardelli Corbin """"No J/D he meant just that...he used that for emphasis....Have you read the FOIA info in my post above yet. I bet not, in the words of a famous movie role "you can't handle the truth". Read her own words and then judge us.October 16, 2014 at 9:06pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152754442306250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like
- Nancy Ricciardelli Corbin """"J/D I re-read some of the FOIA emails last night. I wonder how "good faith" comes into her writing a response for the Superintendent to Channel 2's question about the funding of the video. HER email to him with his proposed response (which was what was given to Channel 2) says NO District money was used to make the video....which she, at least, knew was not true. The FOIA information is on my earlier post, as I said before, read them for yourself.October 17, 2014 at 1:08pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".247.1:3:1:\$comment10152743011286250_10152755652536250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like
- """"his business of paying a retired judge \$ 7,000 for an opinion is absurd on its face. His paid opinion flies in the face of our entire legal system of "blind justice". The Attorney General has put the School Board on notice it may find itself in from...See MoreOctober 17, 2014 at 8:44am · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".24p.1:3:1:\$comment10152755105611250_10152755260311250:0.0.\$ri

ght.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 2

- Linda M Riney ""I'm afraid a lot of people are going to be embarrassed (at the least) by this "professional (PAID) opinion". Since it is customary to request an opinion from the AG on such matters, the contrary actions of the SB are going to be hard to explain. When an entity engages in an activity and , then, tries to create arguments to support these actions, it almost never ends well. These folks just don't know when to stop digging.October 17, 2014 at 9:03am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-reactid=".24p.1:3:1:\$comment10152755105611250_10152755286381250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like
- Nancy Ricciardelli Corbin ""I re-read some of the FOIA emails last night. I wonder how "good faith" comes into her writing a response for the Superintendent to Channel 2's question about the funding of the video. HER email to him with his proposed response (which was what was given to Channel 2) says NO District money was used to make the video....which she, at least, knew was not true. The FOIA information is on this site under Files if you wish to check it out yourself.October 17, 2014 at 9:09am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-reactid=".24p.1:3:1:\$comment10152755105611250_10152755294061250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like
- ""Forget paying lawyers to defend those who couldn't make good choices. Let's put the money in the pockets of educators who will teach our children.October 3, 2014 at 1:18pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-reactid=".2ay.1:3:1:\$comment10152715122366250_10152715590691250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

- Terry Hardesty """"I noticed livefive updated the story to include the felony forgery charge.October 3, 2014 at 1:57pm · ""}"
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 role="button" title="Like this comment" data-reactid=".2ay.1:3:1:\$comment10152715122366250_10152715688291250:0.0.\$ri
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- Terry Hardesty """"I think its a little odd that Kovach has two indictments and Franchini has none but her fees are only 50% more than Franchini's.October 3, 2014 at 7:16pm · ""}"
[href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##"](https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##)
 role="button" title="Like this comment" data-reactid=".2ay.1:3:1:\$comment10152715122366250_10152716434881250:0.0.\$ri
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- """"Melville said he personally watched rats jump overboard BEFORE a ship actually sunk. I guess the rats mentioned by Melville must have been smarter than people thought as they perceived the inevitable.September 30, 2014 at 3:18pm · ""}"
[href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##"](https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##)
 role="button" title="Like this comment" data-reactid=".2av.1:3:1:\$comment10152708587326250_10152708707201250:0.0.\$ri
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- Gregory Adams """"Ho ho, what's this?September 30, 2014 at 3:50pm · ""}"
[href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##"](https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##)
 role="button" title="Like this comment" data-reactid=".2av.1:3:1:\$comment10152708587326250_10152708786756250:0.0.\$ri
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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 2

- Terry Hardesty """"Its a sad commentary when you have two meetings left in your term and you resign. It makes me wonder why. I was told the entire board may be under the SLED spotlight
September 30, 2014 at 3:59pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".2av.1:3:1:\$comment10152708587326250_10152708810586250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1
- Terry Hardesty """"Sadly if the the school board had followed their own procedures all three employees under investigation would have been placed on administrative leave until the investigation was complete and this fiasco would have been short lived and profoundly less expensive for the taxpayers.September 30, 2014 at 4:23pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".2av.1:3:1:\$comment10152708587326250_10152708863936250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 5
- Richard Corbin """"WELL, would the fact that they are running like a bunch of scared rats make them immune from prosecution ? I think not. IF they broke the law, they are just as guilty whether they are on the Board or not !September 30, 2014 at 5:38pm · "}"
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".2av.1:3:1:\$comment10152708587326250_10152709023536250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1

pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif; "Like · 1

- """"would the fact that they are running like a bunch of scared rats make them immune from prosecution ? I think not. IF they broke the law, they are just as guilty whether they are on the Board or not !September 30, 2014 at 5:38pm · "" href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".2av.1:3:1:\$comment10152708587326250_10152709023536250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif; "Like · 1

- Richard Corbin """"I guess old Dougie ran that bluff as far as he could. Anyone taking bets on whose next ?September 30, 2014 at 5:41pm · "" href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".2av.1:3:1:\$comment10152708587326250_10152709027781250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif; "Like

- Nancy Ricciardelli Corbin """"When Doug Cooper and the rest of the Board were first confronted with the proof of wrong doing all that was asked was for them to admit mistakes had been made and ensure they do not happen again. Doug Cooper was just to arrogant to admit it, thus all the rest of this stuff came out. So if those being investigated want to blame someone other than themselves for their actions they can blame him.....it could all have gone away with an admission and apology.September 30, 2014 at 10:25pm · "" href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".2av.1:3:1:\$comment10152708587326250_10152709435451250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif; "Like · 2
- """"My question to Mr. Rawl would be, "Exactly how DO you commit forgery "in good faith"?September 18, 2014 at 1:27pm · "" href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-

reactid=".2hm.1:3:1:\$comment10152682276171250_10152682283561250:0.0.\$ri
ght.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor:
pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like · 3

- Terry Hardesty """"The alleged forgery was committed to hide one of the issues being investigated as a misdemeanor. If the acts were "in good faith" why commit a higher crime in an attempt to hide the first act?September 18, 2014 at 1:32pm · ""

href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-
reactid=".2hm.1:3:1:\$comment10152682276171250_10152682291471250:0.0.\$ri
ght.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor:
pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like · 2

- Jane Freeman """"And she's still being paid her salary. ..September 18, 2014 at 2:34pm · ""

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role="button" title="Like this comment" data-
reactid=".2hm.1:3:1:\$comment10152682276171250_10152682386981250:0.0.\$ri
ght.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor:
pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like · 1

- Pamela Lamb """"And we are paying someone else to do her job while we are paying her for not doing her job. Where do I apply for that?September 18, 2014 at 3:12pm · ""

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role="button" title="Like this comment" data-
reactid=".2hm.1:3:1:\$comment10152682276171250_10152682447771250:0.0.\$ri
ght.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor:
pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like

- Gregory Adams """"Because it's for the kids.September 18, 2014 at 3:12pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-
reactid=".2hm.1:3:1:\$comment10152682276171250_10152682449061250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor:
pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like

I am nearly as proud to hear of Harrell's indictment as I was Amy Kovach's ! They both deserve to be prosecuted to the fullest extent of the law. It is really gratifying to see that those arrogant folks don't always get away with their crap. The only thing that would top this is for the other 2 folks on the Berkeley County School Board who are being investigated to get indicted. I'll bet they are sweating bullets about now.

""""""&&&&"" data-reactid=".2kt" style="color: rgb(109, 132, 180); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · Share

Richard Corbin """"Greg, that's not very nice September 18, 2014 at 7:28pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-
reactid=".2hm.1:3:1:\$comment10152682276171250_10152682960591250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

AG's office indicts Kovach on felony charges, Pascoe indicts Harrell on the AG's work. I bet there are a couple more who are targets of the AG's office investigations who are getting pretty resolved they are next.

""""""&&&&"" data-reactid=".2lk" style="color: rgb(109, 132, 180); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · Share

- """"""Good faith" forgery? Why would anyone have a problem with that? I wonder if the SB Chairman still considers this issue to be of little consequence?September 9, 2014 at 2:14pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#"
role="button" title="Like this comment" data-
reactid=".2ld.1:3:1:\$comment10152663460386250_10152663586566250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-

serif;"Like · 2

- Nancy Ricciardelli Corbin """"No wonder they tried to keep us from speaking about this at School Board meetings.....I wonder who knew what and when September 9, 2014 at 2:42pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##"
role="button" title="Like this comment" data-reactid=".2ld.1:3:1:\$comment10152663460386250_10152663631131250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1

- Richard Corbin """"Hey Amy, was it worth it ? Are you going to spill the beans on the rest of those evil doers on the School Board for a deal ? I know those self serving jerks will let you take all the blame IF you will. If it were me. I'd pull them under the bus with me ! September 9, 2014 at 3:00pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##"
role="button" title="Like this comment" data-reactid=".2ld.1:3:1:\$comment10152663460386250_10152663684336250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 1

""""We all know the excuses the SB has used up to now to try to justify maintaining her salary and paying her legal bills but I wonder what they will say now that there is a felony charge involved? Forgery doesn't sound like something one could commit accidentally. September 9, 2014 at 5:25pm · ""

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role="button" title="Like this comment" data-reactid=".2ld.1:3:1:\$comment10152663460386250_10152663960071250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 2

""""We all know the excuses the SB has used up to now to try to justify maintaining her salary and paying her legal bills but I wonder what they will say now that there is a felony charge involved? Forgery doesn't sound like something one could commit accidentally. September 9, 2014 at 5:25pm · ""

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role="button" title="Like this comment" data-reactid=".2ld.1:3:1:\$comment10152663460386250_10152663960071250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-

decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · 2

- """"I commented during public comment at last nights meeting about excessive attorney fees including the \$230,000 spent so far on the Attorney General's investigation of Berkeley County School District's famous 3. Stated since there was now a FELONY indictment, is was time to stop misusing tax dollars for criminal defense. Jeff Reuer also spoke out against the attorney fees. As usual the board does not respond and I did not see any of the multitude of lawyers they pay in the boardroom last night. That does not mean one of them did not slip in through the back door to the executive session.September 10, 2014 at 9:15am · "}"

href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".2ld.1:3:1:\$comment10152663460386250_10152665310486250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

- Terry Hardesty """"Posted this on the P&C article: I did not know criminal defense attorneys were supposed to see evidence before it was presented to a grand jury. How would Mr. Theos have knowledge there is no evidence? The Grand Jury thinks otherwise and I hope this begins to move this issue to conclusion soon. The 3 people under investigation should have resigned at the outset and the School Board should have removed them if they did not. The Board is culpable too in my opinion.

- """"I wonder if the School Board will now stop paying for the legal defense of Kovach, not to mention removing her from her paid leave status, since the State Grand Jury indicted her for a felony ? She's going down, and I hope that she has the good sense to take those arrogant jerks who urged her to do this, with her!September 9, 2014 at 8:11pm · "}"

href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/#" role="button" title="Like this comment" data-reactid=".2lg.1:3:1:\$comment10152663461541250_10152664237161250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

- Gregory Adams """"Will the good soldier go down alone, or save herself and implicate the others involved? Stay tuned.September 9, 2014 at 10:26pm · "}"

href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##"
role="button" title="Like this comment" data-
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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like

- Cori Corbin Merritt """"Continuing to pay her salary and legal fees is nothing short of hush money!September 10, 2014 at 6:48am · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##"
role="button" title="Like this comment" data-
reactid=".2lg.1:3:1:\$comment10152663461541250_10152665124396250:0.0.\$rig
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pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like

AND THE BEAT GOES ON can you hear it Amy ?

- """"Good catch.August 13, 2014 at 1:17pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##"
role="button" title="Like this comment" data-
reactid=".2vl.1:3:1:\$comment10152596806421250_10152596843241250:0.0.\$rig
ht.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor:
pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-
serif;"Like
- Terry Hardesty """"Well she missed the fact the School Board refused to put the Hahahan Mayor on their agenda. She missed they fact they desperately tried to keep the Hanahan Council and Mayor from speaking as a group and in succession and largely succeeded. She missed my comment the Board blatantly violated their own policy for having speakers speak in the order they sign in. I waited to turn in my "request to speak card" last and was called first. She missed the fact that numerous speakers chastised the board for wasting the taxpayers money on criminal attorney fees. She missed me calling out one Board Member by name as he sat their smirking at me during my comments. She missed the NY man's early comments that exposed the Board for their sham belief in their own core value statement posted on the walls of the Boardroom. His question about them being empty word without meaning was a strong conviction of their hypocrisy.August 13, 2014 at 9:34pm · ""
href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##"

role="button" title="Like this comment" data-reactid=".2vl.1.3:1:\$comment10152596806421250_10152597785446250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

What's this I hear? Did our favorite SB member get his little hind quarters spanked at the SB meeting last night?

""""&&&&"" data-reactid=".2w7" style="color: rgb(109, 132, 180); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like · Share

- Richard Corbin likes this.

- Richard Corbin """"I didn't hear it, but if it is who I think it is, I'd like to hear it ! I could ask if it was one of those egg sucking liberal members of the School Board, but that would only be narrowing the field by, maybe, one !August 13, 2014 at 9:17am · ""

href="https://www.facebook.com/groups/BerkeleyCountyRepublicanParty/##"

role="button" title="Like this comment" data-reactid=".2w9.1.3:1:\$comment10152596394386250_10152596445871250:0.0.\$right.0.\$left.0.3.\$likeToggle:0:\$action:0" style="color: rgb(59, 89, 152); cursor: pointer; text-decoration: none; font-family: helvetica, arial, 'lucida grande', sans-serif;"Like

We need to keep this information in the publics eye. With the elections coming up and the huge amount Berkeley County School District is paying on criminal legal fees people need to be reminded what happened and how they were scammed.

Nancy Ricciardelli Corbin uploaded a file.

If you have any question about whether the BCSD did anything unethical look at this presentation compiled from FOIA received documents.....

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Nancy Ricciardelli Corbin uploaded a file.

(If you have any question about whether the BCSD did anything unethical look at this presentation compiled from FOIA received documents.....

""""Anyone who takes but the time to read this and then disagrees the Attorney General should be prosecuting the perpetrators please message me. I will be happy to meet and enlighten you with much more.

) IN THE COURT OF COMMON PLEAS

) C.A. No.: 2015-CP-08-2380

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FILED
2016 NOV -2 PM 12:57
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

2. I am a member of Haynsworth Sinkler Boyd, P.A. and have been a practicing attorney in South Carolina for more than 36 years. My law practice is focused on general civil litigation. After completing law school at the University of South Carolina I clerked for a federal judge for one year and served as an Assistant U.S. Attorney for three and one-half years, handling both criminal and civil matters prior to going into private practice. I am a member of the American Board of Trial Advocates and a Permanent Member of the Fourth Circuit Judicial Conference. I am listed in the Best Lawyers in America in the categories of commercial litigation and professional defense.

WMHM

2. At the request of Dr. Whitley and her son Joshua S. Whitley, I have maintained a lead role in Dr. Whitley's defense, which involved at the outset a personal meeting with Plaintiff's counsel Nancy Bloodgood on October 27, 2015. At my meeting with Ms. Bloodgood I requested that she voluntarily dismiss Dr. Whitley from the action prior to serving her with the summons and complaint and prior to this firm's incurrence of significant expense in the defense of Dr. Whitley.

3. I submit the attached invoice for legal services (Exhibit A) and attest that all work recorded by the timekeepers in this law firm was necessary to the diligent defense of this client and was performed as indicated. Any redactions of the invoices are for privileged entries. The billing rates for all timekeepers are recorded at their usual and customary hourly rates as routinely charged to this firm's clients.

4. Because Amy Kovach's Complaint against Dr. Karen Whitley, as drafted by Ms. Bloodgood, employed a strategy of accusations against my client in her personal capacity—rather than as an employee of the Berkeley County School District—Dr. Whitley was denied representation by the BCSD, forced to defend the case at her personal expense, and is responsible for all costs of defense set forth in Exhibit A, for which she has no insurance coverage.

6. I requested several times that BCSD defend Dr. Whitley and/or reimburse her as its employee for her defense; but my requests were refused by the BCSD board. BCSD's insurer, the Insurance Reserve Fund, finally agreed to provide a defense to Dr. Whitley, some 58 days after service of the Complaint on Dr. Whitley, and after I had secured from Ms. Bloodgood that she intended to dismiss Dr. Whitley from the case. The IRF did not, however, offer to reimburse Dr. Whitley for defense costs incurred on her behalf before the BCSD's delayed

notice to the IRF of this lawsuit, nor would the IRF offer any representation under its coverage for pursuit of Rule 11 sanctions or of relief under the Frivolous Civil Proceedings Act. Accordingly, none of the costs and fees in Exhibit A is reimbursable by the IRF according to its interpretation of its coverage obligations.

7. To the extent I am unable to recover Dr. Whitley's costs of defense in this matter, I have made clear to the attorneys for the BCSD that Dr. Whitley will have little choice but to sue the Board to make good on its statutory obligation to reimburse her for the costs of defense. In that event—which we hope to avoid—Dr. Whitley would bring a taxpayer suit against those individual members of the Board, in their personal capacities, who voted to pay for Amy Kovach's and Rodney Thompson's criminal defense costs on the grounds that those votes were contrary to the extensive authority assembled by the Attorney General that such votes were *ultra vires* set forth in its opinion at S.C. AG Lexis 63 5/13/97. In addition, Dr. Whitley would also claim against the current Board that it owes her reimbursement for her costs of defending the frivolous Kovach civil suit.

8. I respectfully submit to the Court that the submitted attorneys' fees and litigation expenses have been warranted in this unusual matter based on the criteria recognized by the courts of South Carolina for such determinations. Most of these considerations are apparent from the extensive briefing and the Court's order awarding sanctions. They include the difficulty of the legal services rendered, the labor and time devoted to the case, the contingency of the compensation representing a client who can ill-afford such expenses on a teacher's salary, counsel's professional standing, and the beneficial results obtained in the representation—including the recognized benefit to the bench and bar of this state of a clear ruling by a preeminent jurist that has been the subject of press coverage and already served to remind the

state's courts and attorneys of the seriousness of the attorney's obligation to comply fully with Rule 11, SCRPC, before filing any pleadings.

Further Affiant Saith Naught.

Wm. Howell Morrison

Wm. Howell Morrison

Sworn to before me this 1st
day of November, 2016.

Kathy M. Gulick
Notary Public for South Carolina
My Commission Expires: 5/25/22

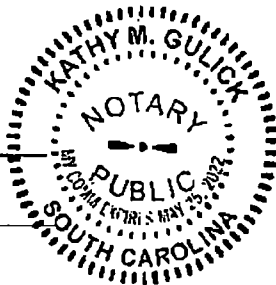


EXHIBIT A

00587

HAYNSWORTH SINKLER BOYD, P.A.

ATTORNEYS AT LAW
134 Meeting Street
P.O. Box 340
Charleston, S.C. 29402-0340
843-722-3366

Tax ID No. 57-1111443

November 1, 2016

Invoice # 1739318

Dr. Karen Whitley
234 Seven Farms Drive
Charleston, SC 29492

Re: 35395-0002 / Kovach, Amy v. The Berkeley County School District; Joshua S. Whitley; Terry Hardesty; Scott Marino; Karen Whitley in her individual capacity and The Berkeley County Republican Party, LLC

STATEMENT OF ACCOUNT

Current Activity

Fees from 10/15/15 through 10/31/16	88,669.00
Expenses from 10/19/15 through 10/31/16	842.57
Current Invoice Total	<u>\$89,511.57</u>

Total Balance Due (Balance Forward + Current)	\$ 89,511.57

Kovach, Amy v. The Berkeley County School District; Joshua S. Whitley; Terry Hardesty; Scott Marino; Karen Whitley in her individual capacity and The Berkeley County Republican Party, LLC

Invoice No. 1739318

TIMEKEEPER SUMMARY

Timekeeper	Hours	Rate	Amount
William H Morrison - Shareholder	190.60	385.00	73,381.00
Perry T. MacLennan - Associate	60.90	215.00	13,093.50
Bess C Allen - Law Clerk	3.00	170.00	510.00
Julia G Lyons - Paralegal	1.70	165.00	280.50
Jeslyn S. Harvey - Paralegal	11.70	120.00	1,404.00
Total All Staff	267.90		\$88,669.00

FEE DETAIL

Date	Atty	Description	Hours	Amount
10/15/15	WHM	Receipt and review of Complaint and confer with associate regarding facts	1.50	577.50
10/19/15	WHM	Letter to School Board seeking attorneys' fees for client; Respond to press inquiry	1.00	385.00
10/19/15	PTM	Review of Complaint and initial discussions re: strategy and response.	0.70	150.50
10/19/15	PTM	Internal conference re: letter to Board tendering defense.	0.40	86.00
10/19/15	PTM	Draft letter to Berkeley School Board re: defense of Dr. Whitley in Complaint brought by Ms. Kovach.	1.10	236.50
10/20/15	WHM	Full file review and meet with K. Whitley, J. Whitley and S. Brown; E-mails with N. Bloodgood scheduling appointment; Begin work on draft Answer and motion for Complex Case designation	4.00	1,540.00
10/20/15	PTM	Meeting with J. Whitley, K. Whitley, H. Morrison, and Stephen Brown.	2.00	430.00
10/22/15	PTM	Emails/calls re: scheduling of AG meeting.	0.30	64.50
10/25/15	WHM	Draft Motion for Complex Case Designation; Continue review of criminal case file in preparation for meeting with N. Bloodgood	2.50	962.50
10/25/15	PTM	Draft Motion to Designate Complex Case; emails with H. Morrison re: same; Revise Motion.	1.40	301.00
10/26/15	WHM	Prepare for AG meeting and response to Complaint; Receipt and review of Power Point; Receipt and review of indictment of Kovach; Various e-mails with co-counsel for defendants regarding strategy for AG meeting; Receipt and review of draft Answer/Counterclaims/Third Party Claims by Ms. Whitley	5.00	1,925.00
10/27/15	WHM	To Daniel Island for meeting with Plaintiff's counsel; Report to co-counsel; Telephone conference with J. Whitley regarding timing for defense filings and plan for conference with AG Wilson; Supplemental letter to Dr. Turner regarding payment of fees for K. Whitley	4.00	1,540.00
10/27/15	PTM	Meeting with Nancy Bloodgood requesting dismissal of Karen Whitley from case.	1.30	279.50

35395.0002

November 1, 2016

Kovach, Amy v. The Berkeley County School District; Joshua S. Whitley; Terry Hardesty; Scott Marino; Karen Whitley in her individual capacity and The Berkeley County Republican Party, LLC

Invoice No. 1739318

Date	Initials	Description	Hours	Amount
10/28/15	WHM	Revise/edit Joint Defense Agreement; E-mails with N. Bloodgood regarding proposal for complex case designation and choice of judge; Calls with Whitley regarding pending issues and meeting with AG Wilson	1.60	616.00
10/29/15	WHM	To meeting with AG and return from Columbia; follow-up with J. Whitley.	5.80	2,233.00
11/02/15	WHM	Complete revision/edit to Whitley Answer, Counterclaims and Third-Party claims for protection of K. Whitley positions; Review draft dismissal motion of J. Whitley for adoption in motion for K. Whitley; Telephone conference with Mr. Whitley regarding developments with Attorney General and strategies for defense filings; Work on K. Whitley motion to dismiss; Edit draft motion for sanctions from Mr. Whitley	4.50	1,732.50
11/02/15	PTM	Begin Drafting Answer	1.00	215.00
11/02/15	PTM	Draft motion to dismiss complaint.	1.20	258.00
11/03/15	WHM	Begin editing motion and memo to dismiss per Rule 12(b)(6); Telephone conference with J. Whitley regarding new dispute between N. Bloodgood and AG's office	1.00	385.00
11/03/15	PTM	Edit Motion to Dismiss Complaint and draft supporting memorandum.	1.50	322.50
11/04/15	WHM	E-correspondence from N. Bloodgood refusing dismissal of cases and respond to same; Telephone conference with Dr. Whitley regarding same; Receipt and review of new documents from AG's office; Receipt and review of correspondence from Dr. Turner regarding school board reimbursement of Dr. Whitley's defense costs; Continue drafting Motion/Memo to Dismiss	2.00	770.00
11/05/15	WHM	Draft motion to dismiss/motion for summary judgment	6.00	2,310.00
11/06/15	WHM	Work on dismissal/summary judgment motion	3.50	1,347.50
11/07/15	WHM	Draft Motion/Memo for Rule 11 Sanctions; Edit motion/memo to dismiss; Letter filing/serving motions; Motions slip, check, etc.	2.20	847.00
11/08/15	PTM	Research related to motion to dismiss - civil conspiracy, sanctions, rule 12(b)(6) standard, etc.	1.70	365.50
11/08/15	PTM	Edit Motion to Dismiss and Motion for Sanctions	0.80	172.00
11/09/15	WHM	Final edits to motions for filing and service; Letter to Superintendent of Berkeley County Schools following up on fee request; Letter to defense counsel circulating JDA for signing; Telephone conference with P. Berlinsky regarding parallel action for Rule 11 sanctions against Plaintiff's counsel; Draft letter to BCSD regarding legal fees	4.30	1,655.50
11/09/15	JGL	Research Lexis to locate and print case law	0.30	49.50
11/10/15	WHM	Calls from Mr. Whitley regarding Griffith conversation; Arrange meeting with Messrs. Theos and Griffith; Begin drafting Litigation Hold for delivery to same	0.90	346.50
11/11/15	WHM	Work on motion/memo for complex designation; Draft letter to BCSD's Brenda Blackburn; Draft letter to Judge Dennis requesting Rule 16 status conference; Telephone conference with J. Whitley regarding preparing for conference with G. Theos and J. Griffith; File review in preparation for meeting; Various e-mail with E. Gray, attorney for BCSD, regarding facts and documents to complete her file	4.20	1,617.00
11/12/15	WHM	Meet with Messrs. Theos and Griffith regarding pending motion; Telephone conference with R. Stoney regarding representation of C. Kovach; E-correspondence to Dr. Whitley regarding same	2.30	885.50

Kovach, Amy v. The Berkeley County School District; Joshua S. Whitley; Terry Hardesty; Scott Marino; Karen Whitley in her individual capacity and The Berkeley County Republican Party, LLC

Invoice No. 1739318

11/13/15	WHM	E-mail exchanges with Judge Dennis and N. Bloodgood regarding assignment of Judge J. Young to case and potential conflicts;	1.50	577.50
11/16/15	WHM	Receipt and review of Rule to Show Cause from Attorney General Call from R. Stoney; E-mails with J. Whitley regarding negotiations with N. Bloodgood for mutual dismissals; Telephone conference with D. Cleveland regarding status and forward select documents	0.90	346.50
11/18/15	JGL	Research Lexis for case cites per request of H. Morrison	0.20	33.00
11/19/15	WHM	Receipt and review of correspondence from attorney for BCSD rejecting statutory reimbursement; E-mails with K. Whitley regarding same	0.50	192.50
11/20/15	WHM	Telephone call from J. Whitley regarding scheduling Show Cause hearing and new attorney for A. Kovach; Draft letter to Betsy Gray with response regarding legal fees	0.70	269.50
11/23/15	WHM	Draft response letter to E. Gray explaining fee demand for K. Whitley and deliver; Receipt and review of offer of dismissal from Kovach's attorney; Telephone conference with N. Bloodgood regarding same and attorneys' fee issue; Telephone call from J. Whitley; Status update to K. Whitley; Telephone conference with C. Waters and J. Whitley regarding status of Rule to Show Cause; E-mail update to E. Gray with urgent demand	4.80	1,848.00
11/24/15	WHM	Receipt and review of correspondence from E. Gray responding to fee reimbursement; Telephone conference with D. Cleveland regarding dismissal developments; E-mails/calls with J. Whitley regarding strategy for fee recovery from BCSD and/or Kovach/Bloodgood; Extended conversation with R. Stoney regarding securing dismissals from all Defendants; Telephone conference with J. Whitley regarding same; Receipt and review of draft e-mail demand from J. Breit to N. Bloodgood; Multiple calls/e-mails with Mr. Whitley regarding Bloodgood negotiations	3.80	1,463.00
11/25/15	WHM	Additional legal research on civil conspiracy proof required to overcome motion to dismiss; Respond to inquiry from B. Rindge	0.60	231.00
11/27/15	WHM	Receipt and review of correspondence from J. Breit to N. Bloodgood regarding sanctions motion for attorneys fees; E-mails with J. Whitley regarding same and with N. Bloodgood requesting meeting; E-mail to E. Ganes requesting list of clients of IRF	0.50	192.50
11/30/15	WHM	Office conference with N. Bloodgood regarding pending motions; Follow up with J. Whitley; E-mails with court and counsel with effort to schedule hearing; E-mails with E. Ganes seeking details of IRF representation; Begin drafting Answer of K. Whitley	2.40	924.00
12/01/15	WHM	Extended telephone conference with J. Griffith regarding resolution of civil suit; Telephone conferences with J. Whitley regarding strategy matters; Receipt and review of Kovach Stipulation of Dismissal; E-mail to Judge R. Young regarding hearing date and necessary parties; Research Rule 41 requirements; Draft letter to Betsy Gray	3.00	1,155.00
12/02/15	WHM	Work on Motion/Memo to Strike Dismissal; E-mails with J. Whitley and E. Ganes regarding IRF representation issues; Telephone conference with J. Whitley regarding same; Telephone conference with IRF attorney E. Ganes regarding status of attorneys' fees issues, dismissals and sanctions motion; Complete drafting Motion to Strike Dismissal, file and serve same; Draft letter to BCSD board and Superintendent requesting personal appearance to explain fees	3.50	1,347.50
12/02/15	PTM	Draft Motion to Strike Plaintiff's Stipulation of Dismissal.	1.50	322.50

35395.0002

November 1, 2016

Kovach, Amy v. The Berkeley County School District; Joshua S. Whitley; Terry Hardesty; Scott Marino; Karen Whitley in her individual capacity and The Berkeley County Republican Party, LLC

Invoice No. 1739318

Date	Initials	Description	Hours	Amount
12/02/15	JGL	Review motion to strike; prepare exhibits for attachment to motion; prepare motion cover sheet to file motion; draft correspondence to Berkeley County Clerk to file motion; arrange for filing fee for motion	1.20	198.00
12/03/15	WHM	Re-draft letter to E. Gray requesting appearance at Board meeting; Telephone conference with J. Whitley regarding status of pending issues; Telephone conference with S. Brown regarding same	1.80	693.00
12/07/15	WHM	Ongoing communications with IRF, BCSD, E. Gray and K. Whitley regarding preparing for school district board meeting; Notice from court of Rule 16 status conference	1.00	385.00
12/08/15	WHM	Prepare for and attend meeting of BCSD regarding fee recovery for K. Whitley; To Moncks Corner and return; E-mails with E. Ganes regarding IRF situation	6.00	2,310.00
12/09/15	WHM	Ongoing communications with E. Gray, J. Whitley and N. Bloodgood regarding follow up on legal fees and new suit against BCSD; Extended call with J. Griffith regarding same; E-mail to E. Gray summarizing threat of new Whitley suit; Telephone conference with Ms. Gray and Mr. Tyson; Report to client regarding probable employment suit	2.00	770.00
12/29/15	WHM	Meeting with J. Whitley and E. Ganes to plan for hearing on pending motions; Follow up with J. Whitley	2.00	770.00
12/30/15	WHM	Prepare for and attend Status Conference with Judge R. Young on dismissal and sanctions issues	1.50	577.50
01/05/16	WHM	E-mails with client and J. Whitley regarding planning for Kovach contempt hearing	0.20	77.00
02/08/16	WHM	Aftermath of contempt hearing; Various calls regarding outcome and impact on upcoming sanctions hearing	1.00	385.00
02/09/16	WHM	Preparations for sanctions hearing; Telephone conference with J. Whitley	1.40	539.00
02/09/16	PTM	Research re: sanctions in South Carolina and elements of proof	1.00	215.00
02/10/16	WHM	Preparations for sanctions hearing	0.60	231.00
02/10/16	PTM	Emails re: motion for sanctions and strategy.	0.40	86.00
02/11/16	WHM	Review/analysis of Bloodgood filings; Confer with co-counsel regarding strategy for hearing; Respond to court inquiry regarding hearing and continuance, prepare for hearing and new witnesses and relief against Kovach	2.00	770.00
02/11/16	PTM	Conference with H. Morrison re: sanctions hearing; emails/calls re: same; review correspondence with the court.	0.60	129.00
02/12/16	WHM	Secure continuance and various ongoing e-mails with attorneys regarding allocation of duties to prepare for hearing; Various e-mails with E. Ganes regarding same; Request new hearing date from court; Memo to E. Gray regarding IRF withdrawal of representation	2.00	770.00
02/12/16	PTM	Calls/emails with H. Morrison and other counsel re: motion for sanctions hearing.	0.60	129.00
02/16/16	WHM	Receipt and review of J. Whitley's Amended Motion for Sanctions and plan response for K. Whitley; Follow up with IRF attorney regarding position of insurer	1.50	577.50
02/17/16	WHM	Planning call with J. Whitley regarding developments and strategy for prevailing at hearing	0.60	231.00
02/18/16	WHM	Revise/edit K. Whitley's Amended Motion for Sanctions adding Kovach as respondent; Respond to E. Ganes' transmittal from IRF	1.20	462.00
02/18/16	PTM	Draft amended motion for sanctions.	0.90	193.50
02/18/16	PTM	Calls/emails with H. Morrison re: amended motion for sanctions.	0.40	86.00

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02/22/16	WHM	Finalize Amended Motion for Sanctions, file and serve with letter to court and counsel	1.10	423.50
03/03/16	WHM	Ongoing communications with IRF attorney and Board attorneys regarding dismissal options	0.30	115.50
03/07/16	WHM	Work on scheduling hearing on sanctions motions; Telephone conference with J. Whitley; E-mails with court	0.30	115.50
05/19/16	WHM	Update developments and plan with K. Whitley	0.30	115.50
08/10/16	WHM	Begin preparation for motions hearing; Draft/serve subpoenas; Letters to Messrs. Griffith and Theos; E-mails with Mr. Whitley regarding preparations	3.00	1,155.00
08/16/16	WHM	Prepare for and office conference w/ Josh Whitley re hearing preparations; letter to R. Tyson re hearing; email to E. Gaines; hearing preparation and exhibits for court notebook; work on Supplemental Brief in Support of Motion for Sanctions; call w/attorney re: other Bloodgood Rule II filings	3.70	1,424.50
08/16/16	PTM	Review pleadings and documents in case in preparation for 8/29 hearing and to determine whether affidavit on service/timeline is necessary; draft supplemental brief to court.	1.00	215.00
08/16/16	PTM	Legal research into requirements of SCRCP 41 and case law supporting supplemental brief on jurisdictional issue for court; revise supplemental brief accordingly.	0.80	172.00
08/16/16	PTM	Meeting with J. Whitley and H. Morrison re: preparing for motion hearing on sanctions.	0.50	107.50
08/16/16	JSH	Review pleadings filed to prepare for meeting with H. Morrison and J. Whitley.	0.50	60.00
08/16/16	JSH	Attend meeting with H. Morrison and J. Whitley on strategy for hearing on Defendants' Motions for Sanctions.	1.00	120.00
08/17/16	WHM	Continue preparation for sanctions hearing.	0.30	115.50
08/17/16	PTM	Review and finalize supplemental brief to court.	0.40	86.00
08/17/16	JSH	Prepare notebook of documents for attorney review to send to Judge Mullen prior to hearing on Motion for Sanctions.	2.50	300.00
08/18/16	WHM	Work on notebook of exhibits for court and preparation for sanctions hearing	3.00	1,155.00
08/18/16	JSH	Per Mr. Morrison, update/revise notebook of key documents for Judge Mullen's review prior to motions hearing and prepare notebooks for counsel.	4.00	480.00
08/18/16	JSH	Prepare letter to Judge Mullen regarding notebook of key documents for her review prior to motions hearing.	0.20	24.00
08/21/16	WHM	Review of Bloodgood's new filing in opposition to sanctions motion; Analyze arguments and draft response for court	2.50	962.50
08/22/16	WHM	Ongoing preparation for status conference and hearing on Motion for Sanctions; Telephone conference with J. Whitley regarding same; Telephone conference with Dawes Cooke regarding hearing	4.00	1,540.00
08/22/16	PTM	Review all email correspondence with court in preparation for upcoming hearing; discussions with H. Morrison re: research needed for upcoming hearing.	0.40	86.00
08/23/16	WHM	Telephone conferences with J. Whitley regarding Cooke conversation; Draft arguments for sanctions motion hearing; Correspondence with J. Theos and J. Griffith regarding proposed affidavits in lieu of appearance at hearing	4.00	1,540.00
08/23/16	PTM	Review H. Morrison oral argument outline and edit/revise same; research re: Rule 11 case law.	1.00	215.00

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08/24/16	WHM	Complete preparations for status conference and motions hearing; Correspondence to R. Tyson documenting K. Whitley's efforts to secure representation; Receipt/analysis of Memorandum in Opposition filed by N. Bloodgood; Prepare/attend phone conference with Judge Mullen; Revisions to prepared remarks for motions hearing; Draft supplemental memorandum on standing; Forward pending K. Whitley motions to court and counsel.	5.50	2,117.50
08/24/16	PTM	Prepare for status conference with Judge Mullen - research and brief procedural issues on Rule 41; review file, etc. research federal rules and case law on Rule 41; research legal prejudice.	1.40	301.00
08/24/16	PTM	Review N. Bloodgood supplemental brief in prep for telephone conference with Judge Mullen; research case law cited therein and prepare for rebuttal at conference.	0.60	129.00
08/24/16	PTM	Status conference call with Judge Mullen.	0.50	107.50
08/24/16	PTM	Draft supplemental brief to court on procedural issues after status conference with Judge Mullen.	0.80	172.00
08/24/16	JSH	Prepare updated link and email communication to Judge Mullen and all current counsel regarding letter and notebook contents for review prior to scheduled hearing.	0.30	36.00
08/24/16	JSH	Assist preparation of Dr. Whitley's Supplemental Brief in Support of Motion for Sanctions for filing with the court and service on Judge Mullen and counsel.	0.50	60.00
08/25/16	WHM	Begin drafting affidavit regarding legal fees for K. Whitley and exhibits; Confer with J. Whitley regarding strategy matters; Draft settlement demand letter to K. Monoc for discussion with J. Breit; Work with Griffith/Theos regarding affidavits; Legal research regarding declaratory judgment suit vs. BCSD board for fee reimbursement; Ongoing communications with Rob Tyson regarding K. Whitley's options after Rule 11 hearing vs. BCSD; Revise motions arguments based on recent filings and affidavits.	6.50	2,502.50
08/25/16	JSH	Review SCRCP Rule 6 regarding service of Affidavits.	0.10	12.00
08/25/16	JSH	Communications with Judge Mullen and all counsel serving copies of the Affidavits of Jerry Theos and Joseph Griffith, Jr.	0.10	12.00
08/26/16	WHM	Correspondence from Judge Mullen regarding hearing cancellation; Confer with J. Whitley regarding plan for hearing with Chief Justice Toal; E-mail to Justice Toal requesting dates for reschedule; Correspondence with D. Cooke regarding handling Kovach issues with Bloodgood; Settlement overture e-mail to attorneys for Kovach and Bloodgood.	2.00	770.00
08/29/16	WHM	Convert oral argument to Second Supplemental Memo in Support; Meet with D. Cooke; Telephone conference with A. Goodstein regarding potential affidavit regarding Bloodgood suits against Aviation Authority	2.00	770.00
08/30/16	WHM	Confirmation from Justice Toal of sufficient time at hearing; Telephone conference with J. Whitley regarding more affidavits; Continue drafting Second Supplemental Memorandum for Sanctions; Request affidavits from Mr. Goodstein and P. Berlinsky, Esq.	3.50	1,347.50
08/31/16	WHM	Investigate possible affidavit from P. Berlinsky and e-mails with same; Telephone conference with L. Evans exploring ideas for resolution; E-mails with J. Whitley regarding file materials available to Justice Toal and L. Grooms affidavit; Finalize Supplemental Memorandum for court; Edit Grooms draft affidavit	2.50	962.50
09/01/16	JSH	Online case research per attorney request.	0.30	36.00
09/02/16	WHM	Draft Reply brief for court.	1.50	577.50

Kovach, Amy v. The Berkeley County School District; Joshua S. Whitley; Terry Hardesty; Scott Marino; Karen Whitley in her individual capacity and The Berkeley County Republican Party, LLC

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09/02/16	JSH	Insert additional citations in Defendant Karen Whitley's Second Supplemental Memorandum in Support of Rule 11 Sanctions.	0.50	60.00
09/06/16	WHM	Draft Reply brief	2.50	962.50
09/06/16	JSH	Review Karen Whitley's Second Supplemental Memorandum in Support of Rule 11 Sanctions; cite check references and insert/correct citations as needed for Mr. Morrison.	1.20	144.00
09/07/16	WHM	Final edits to Reply and memo to P. MacLennan regarding completion of legal research for hearing.	1.00	385.00
09/07/16	PTM	Review and revise K. Whitley supplemental brief for C.J. Toal; case research re: civil conspiracy and collateral estoppel for Mr. Morrison.	1.40	301.00
09/08/16	WHM	Correspondence with L. Evans regarding negotiations; Respond to court and counsel regarding K. Monoc's request for court assistance on privileged issues; Revisions to Reply.	2.50	962.50
09/08/16	PTM	Review and revise K. Whitley supplemental memo for J. Toal.	0.50	107.50
09/08/16	PTM	Prepare for hearing - review correspondence, review complaint on issue of perjury and civil conspiracy.	0.60	129.00
09/11/16	PTM	Prepare for sanctions hearing - review guilty plea transcript and complaint, compare, and outline contradictions for use at hearing.	2.00	430.00
09/12/16	WHM	Prepare for sanctions hearing; Respond to new filing by N. Bloodgood; Review draft of J. Whitley's supplemental memo	3.50	1,347.50
09/12/16	PTM	Prepare for sanctions hearing - draft comparison of complaint and transcript chart for use at hearing.	1.00	215.00
09/12/16	PTM	Additional preparation for sanctions hearing per H. Morrison	0.50	107.50
09/12/16	JSH	Review Post & Courier newspaper article regarding "whistleblower" lawsuit filed by Nancy Bloodgood on 1/26/16; research same on Charleston County Clerk of Court website and print relevant pleadings for Mr. Morrison.	0.50	60.00
09/13/16	WHM	Final edits, exhibits and file/serve K. Whitley Reply brief; Prepare on conference call with Messrs. Breit and Whitley for hearing.	1.60	616.00
09/14/16	WHM	Forward memo to co-counsel	0.20	77.00
09/15/16	WHM	Hearing preparation; Receipt and review of multiple filings from Bloodgood and Kovach from "unsealed" exhibits	5.00	1,925.00
09/15/16	PTM	Prepare for hearing before CJ Toal; review L. Sanders and N. Bloodgood sealed affidavits; case law research on conspiracy cases cited by N. Bloodgood; review and revise comparison chart; review AG Letter to School Board; correspondence with H. Morrison re: hearing prep, strategy; review D. Cook brief and other filings	2.30	494.50
09/16/16	WHM	Prepare for and argue sanctions motions, discussions with K. Whitley re: outcome.	6.00	2,310.00
09/16/16	PTM	Preparation and attend sanctions hearing; travel to/from.	6.00	1,290.00
09/19/16	WHM	Draft final demand letter to R. Tyson, attorney for BCSD	1.20	462.00
09/19/16	PTM	Research case law for Court's proposed order.	0.50	107.50
09/20/16	WHM	Work on proposed Order for court on sanctions motion; Research Rest of 2d Torts and memo to J. Whitley and J. Breit re: same.	1.00	385.00
09/20/16	PTM	Draft proposed order on K. Whitley Motion for Sanctions.	2.10	451.50
09/20/16	PTM	Draft proposed order on K. Whitley Motion for sanctions - factual background.	0.90	193.50
09/20/16	PTM	Research case law pursuant to Court's request on issue of claim preclusion and attorney sanctions.	1.40	301.00
09/20/16	BCA	Research law re: civil conspiracy charges after a guilty plea in the underlying criminal case per Mr. Morrison.	2.00	340.00
09/22/16	PTM	Draft proposed sanctions order - continue working on factual background.	3.00	645.00

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Date	PTM	Description	Hours	Amount
09/22/16	PTM	Case law reseach for proposed sanctions order.	0.60	129.00
09/23/16	PTM	Draft proposed order - continue working on factual background section and legal arguments.	1.50	322.50
09/25/16	WHM	Work on proposed Order for Sanctions	1.60	616.00
09/26/16	WHM	Complete editing proposed Order and return to P. MacLennan with instruction.	2.00	770.00
09/26/16	PTM	Review Morrison edits to proposed sanctions order; revise and edit accordingly; review hearing transcript and edit order accordingly; research re: Rule 11 consultation/futility.	1.30	279.50
09/26/16	PTM	Continue revising sanctions order; review H. Morrison edits re: same.	0.80	172.00
09/26/16	BCA	Researched case law on Rule 11 sanctions in the context of frivolous civil pleadings following criminal guilty plea	1.00	170.00
09/27/16	WHM	Additional edits to final version of proposed Order; Review legal research from J. Breit per request of court; Arrange/host conference call regarding final proposed Orders of J. Whitley and K. Whitley	2.00	770.00
09/27/16	PTM	Revise proposed sanctions order based on new research; Heck and Tozier cases	0.40	86.00
09/27/16	PTM	Conference call with J. Whitley and B. Leeth re: draft orders.	0.40	86.00
09/28/16	WHM	Review draft J. Whitley sanctions order for edits to K. Whitley proposed Order; Memo to P. MacLennan regarding same; Revisions per co-counsel suggestions	1.70	654.50
09/28/16	PTM	Final work on proposed sanctions order - review H. Morrison edits and revise order accordingly; include portions of rule to show cause hearing.	0.70	150.50
10/04/16	PTM	Review and analyze Kovach and Bloodgood proposed orders.	0.30	64.50
10/04/16	PTM	Draft reponse to Kovach/Bloodgood proposed orders.	0.60	129.00
10/10/16	WHM	Draft Reply to Objections to proposed Orders of Kovach and Bloodgood; tele. conf. w/ J. Whitley re status.	1.50	577.50
10/10/16	PTM	Draft reply to Kovach and Bloodgood proposed orders.	2.50	537.50
10/10/16	PTM	Calls/emails with H. Morrison re: response; edits based on conversation.	0.70	150.50
10/11/16	WHM	Work on objections/replies to Kovach and Bloodgood's proposed orders to court.	2.00	770.00
10/11/16	PTM	Edit reply brief per Morrison edits; calls/emails re: same; additional research on Kovach/Bloodgood orders.	1.80	387.00
10/17/16	WHM	Final edits to Reply for Court; File/serve same	0.50	192.50
10/17/16	PTM	Review Reply to proposed orders of Kovach and Bloodgood; correct citations, final revisions.	0.50	107.50
10/18/16	WHM	Receipt and review of Order objections from Bloodgood and Kovach	0.60	231.00
10/18/16	PTM	Review Bloogood Reply to Proposed Orders.	0.40	86.00
10/26/16	WHM	Review C. Justice Toal's order granting sanctions; Telephone conference with Karen Whitley; call from J. Whitley re: same.	1.20	462.00
10/31/16	WHM	Prepare fee request and affidavit per Order of Court.	3.70	1,424.50
Total Hours and Fees			267.90	\$ 88,669.00

EXPENSE RECAP

Date	Description	Amount

35395.0002

November 1, 2016

Kovach, Amy v. The Berkeley County School District; Joshua S. Whitley; Terry Hardesty; Scott Marino; Karen Whitley in her individual capacity and The Berkeley County Republican Party, LLC

Invoice No. 1739318

11/05/15	Court Reporter - Hearing - Copy of Transcript VENDOR: Ray, RPR, Francis, B.; INVOICE#: 11052015; DATE: 11/5/2015	\$ 43.50
11/09/15	Kathy Gulick Filing Fee - Filing fee VENDOR: Berkeley County Clerk of Court; INVOICE#: 11092015; DATE: 11/9/2015	25.00
11/09/15	Kathy Gulick Filing Fee - Filing Fee VENDOR: Berkeley County Clerk of Court; INVOICE#: 110920105A; DATE: 11/9/2015	25.00
12/01/15	Kathy Gulick Courier Service - Courier Mileage to Berkeley County Courthouse	45.25
12/02/15	Filing Fee - Filing fee; VENDOR: Berkeley County Clerk of Court; INVOICE#: 12022015; DATE: 12/2/2015 - REQ: Julee Lyons	25.00
02/23/16	Filing Fee - Filing Fee VENDOR: Berkeley County Clerk of Court; INVOICE#: 02232016; DATE: 2/23/2016	25.00
02/23/16	Kathy Gulick Courier Service - Courier Mileage to Berkeley County Courthouse	40.64
08/26/16	Courier Service - 8/17/16 Berkeley County Clerk of Court	51.04
08/31/16	Courier Service - 8/25/16 Berkeley Co Clerk	41.18
08/31/16	Courier Service - 8/25/16 Smith Moore Leatherwood	6.08
09/28/16	Courier Service - 9/13/16 Smith Moore Leatherwood	6.08
09/29/16	Court Reporter - Hearing - Hearing Transcript VENDOR: Haffenden, RPR, CRR, Amanda, K.; INVOICE#: 09292016; DATE: 9/29/2016	346.50
10/04/16	Kathy Gulick Conference with: - 9/27/16 Conference call services;	6.65
	Photocopies - 699 pages @ 0.10	69.90
	Postage	85.75
	Total Expenses	\$ 842.57

HAYNSWORTH SINKLER BOYD, P.A.

ATTORNEYS AT LAW
134 Meeting Street
P.O. Box 340
Charleston, S.C. 29402-0340
843-722-3366

Tax ID No. 57-1111443

November 1, 2016

Invoice # 1739318

Dr. Karen Whitley
234 Seven Farms Drive
Charleston, SC 29492

Re: 35395-0002 / Kovach, Amy v. The Berkeley County School District; Joshua S. Whitley; Terry Hardesty; Scott Marino; Karen Whitley in her individual capacity and The Berkeley County Republican Party, LLC

STATEMENT OF ACCOUNT

Current Activity

Fees from 10/15/15 through 10/31/16	88,669.00
Expenses from 10/19/15 through 10/31/16	842.57
Current Invoice Total	<u>\$89,511.57</u>

Total Balance Due (Balance Forward + Current)	\$ 89,511.57

REMITTANCE COPY -- PLEASE RETURN WITH PAYMENT

00598

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY

AMY KOVACH,

Plaintiff,

v.

Civil Action No. 2015-CP-08-2380

JOSHUA S. WHITLEY and
KAREN WHITLEY in her
Individual Capacity,

Defendants.

JOSHUA S. WHITLEY,

Defendant/Counterclaimant,

v.

AMY KOVACH,

Plaintiff/Counterclaim Defendant.

JOSHUA S. WHITLEY,

Defendant/Third-Party Plaintiff,

v.

RODNEY THOMPSON,

Third-Party Defendants.

PETITION FOR ATTORNEYS' FEES

Defendant Joshua S. Whitley petitions this Honorable Court for an award of attorneys' fees and costs incurred by the law firm of Breit Drescher Imprevanto, P.C. ("Breit Drescher")

00599

and Smyth Whitley, LLC ("Smyth Whitley") in the defense of this matter. In support of this Petition, the Defendant states as follows:

1. Attorneys Jeffrey Breit and Billie Leeth of Breit Drescher and Joshua S. Whitley of Smyth Whitley have expended a great number of hours in the defense of this matter and in defense of the profession to protect against false accusations and patently frivolous claims.
2. Joshua Whitley was instrumental in exposing corruption within the Berkeley County School District, in particular, that of Ms. Kovach. The Attorney General brought charges against Ms. Kovach for her criminal conduct, and she ultimately entered pleas of guilty. Plaintiff, by her counsel, Nancy Bloodgood ("Ms. Bloodgood"), filed this action on October 15, 2015, alleging a cause of action for civil conspiracy against Joshua Whitley, Dr. Karen Whitley, and others, for their alleged efforts in bringing Ms. Kovach's misconduct to the attention of the authorities.
3. Upon perfection of service of the Complaint, the above-mentioned firms immediately commenced work and have contributed significant time and expense for the past year towards having this matter resolved. In fact, in combination with Dr. Karen Whitley's attorneys, it was the efforts expended by the undersigned counsel that caused a dismissal to occur as against all other Defendants; thereby, saving the Court judicial resources from this frivolous filing and saving co-Defendants significant defense costs.
4. The total number of hours expended by the above-listed attorneys is 357 hours. See Exhibit A, Affidavits of Joshua S. Whitley and Jeffrey Breit with attached invoices of time.

5. Attorney Jeffrey Breit's hourly rate is \$600.00 and Attorneys Billie Leeth and Joshua S. Whitley's hourly rates are \$350.00.
6. An award of attorneys' fees at the minimum hourly rate of \$350.00 would be appropriate in this matter, based on the above-stated rates and in light of the 2014 nationwide average of \$604 for partners and \$370 for associates.
7. The undersigned respectfully requests this Court to find that \$124,950.00 is a reasonable fee award in light of the patently frivolous and egregious conduct of both Amy Kovach and Attorney Nancy Bloodgood.
8. However, the undersigned counsel believes the strength and articulation of this Court's Order is more meaningful to the legal profession than any fee that may be recovered by the undersigned counsel.
9. The undersigned counsel Joshua S. Whitley did not oppose the bond referendum out of opposition to public education, but rather his belief that maintaining integrity and character in following the law was the most important example to be set for the District's school children.
10. The undersigned counsel appreciate the difficult task with which the Court was presented, but given the significance of the issues to the bench, bar, and public, the former Chief Justice of the South Carolina Supreme Court was the best jurist to render a decision in this case. Using the courts to exact revenge on perceived enemies with patently false claims undermines the sanctity of the civil legal process, and the Court's Order fully informs attorneys in South Carolina that such conduct will not be tolerated.
11. Further, each of the undersigned counsel did not pursue this motion for sanctions for personal profit but rather in the defense of the profession, which they regard as the strength of the fabric of our nation and rule of law. Each of the undersigned counsel are

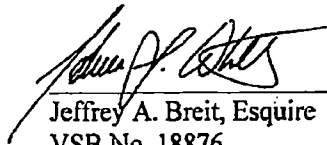
willing to forfeit their total fees, in exchange for a personal check to be written by both Ms. Kovach and Ms. Bloodgood in the amount of \$1.

12. Further, under this Court's inherent power to award sanctions for deterrent and punitive effect, the undersigned would respectfully request the Court order, in lieu of awarding total attorney fees, that Nancy Bloodgood remit \$10,000 to the Berkeley County Friends of the Library foundation for a Freedom Reigns civic event to be held in Berkeley County, and that Amy Kovach remit \$10,000 to the Dorchester Children's Center that serves more than 600 Berkeley County children annually who have been abused.
13. Finally, the undersigned would ask the Court to take notice that although each of the below are in the position to waive our fees and consume the hours pro bono, Nancy Bloodgood and Amy Kovach had bad motives and poor judgment and intentionally sued Dr. Karen Whitley in her individual capacity, which has improperly led the school district to deny coverage. Then, at the hearing, the only "fact" suggested against Dr. Whitley (and which was not in the Complaint) was an act she took while at work – or in her official capacity. Dr. Whitley is a career and award-winning educator who has devoted her talents to education, but is necessarily not in the position of waiving her substantial defense costs. Respectfully, her costs should be awarded in full. Further, Defendant Joshua S. Whitley requests this resolution and Order be contingent on payment of Dr. Karen Whitley's fees within 30 days, as ordered by this Court, and by the Kovach and Bloodgood's full payment herein of \$1 and the above-outlined contribution to charity. Finally, should the Plaintiff Appeal the Order(s) or fail to remit payment in accordance with the Court's Order, the undersigned respectfully requests payment of the full fee of \$124,950.00. *See Exhibit A.*

14. This petition is submitted with appreciation for the Court's concern for the profession in awarding sanctions that will undoubtedly have a positive effect on the practice of law in our state.

Respectfully submitted,

JOSHUA S. WHITLEY



Jeffrey A. Breit, Esquire
VSB No. 18876

Breit Drescher Imprevanto, P.C.

Town Pavilion Center II

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Virginia Beach, Virginia 23451

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Counsel for Defendant, Joshua S. Whitley

Joshua S. Whitley, Esquire

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Charleston, SC 29492

Phone: 843-606-5635

Fax: 843-654-4095

jwhitley@smythwhitley.com

November 1, 2016
Charleston, South Carolina

EXHIBIT A

00604

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Amy Kovach,

Plaintiff,

vs.

Joshua S. Whitley and Karen Whitley in her
Individual Capacity,

Defendants.

) IN THE COURT OF COMMON PLEAS

) C.A. No.: 2015-CP-08-2380

**AFFIDAVIT OF
JOSHUA S. WHITLEY**

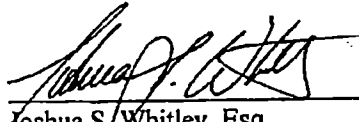
PERSONALLY APPEARED BEFORE ME Joshua S. Whitley, who, being duly sworn, deposes
and states as follows:

1. I am an attorney at Smyth Whitley, LLC and a member in good standing of the South Carolina Bar. I appeared *pro se* in the above-captioned matter. I am over 18 years of age and fully competent to make this affidavit.
2. I have personal knowledge of the facts stated in this affidavit and the information stated herein is true and accurate to the best of my knowledge.
3. Following law school, I clerked for two years for the United States Court of Appeals for the Fourth Circuit. Following my clerkship, I joined Haynsworth Sinkler Boyd, PA as litigation associate and then later founded the law firm Smyth Whitley, LLC, where I am a partner and focus on civil litigation.
4. I have practiced in state and federal courts and have argued at the South Carolina Supreme Court.

00605

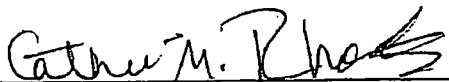
5. I am a member in good standing of the South Carolina Bar, a member of the Berkeley County Council, and a permanent member of the United States Judicial Conference for the Fourth Circuit.
6. To date, I have worked 125 hours on the above-referenced case.
7. Based on my trial and appellate experience, \$350.00 is a reasonable hourly rate for my services.
8. I certify and acknowledge that I am signing this affidavit and under penalty of perjury. If called for a deposition or to testify at the trial of this case, my testimony would reflect the information expressed in the affidavit.

FURTHER AFFIANT SAITH NAUGHT.


Joshua S. Whitley, Esq.

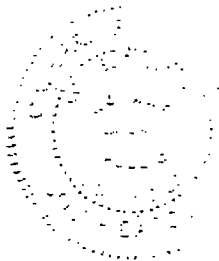
SUBSCRIBED AND SWORN TO BEFORE ME

on this 1st day of November, 2016


Notary Public in and for

the State of South Carolina

My Commission Expires: 11/16/2022



Smyth Whitley, LLC - User Summary

Date Start: 10/1/2015 | Date End: 11/1/2016 | Clients: Whitley, Joshua | Matters: Amy Kovach v. Berkeley County School District et al. | Users: | Account Managers: AR

Date	Client	Matter	Description	Rate/ Unit Price	Labor Time/ Quantity	Billable Time/ Cost Price	Bill Amt/ Sell Price
Joshua Whitley							
10/26/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Drafted extensive Answer to Complaint.	\$0 hr	9.50	\$9.50	\$0.00
10/29/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Meeting in Columbia re: case with Attorney General and senior staff regarding perjured affidavit.	\$0 hr	6.20	6.20	\$0.00
10/30/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Revised and edited motion to dismiss.	\$0 hr	5.50	5.50	\$0.00
10/30/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Revised and edited complaint.	\$0 hr	9.50	9.50	\$0.00
10/30/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Revised and edited requests to admit.	\$0 hr	0.50	0.50	\$0.00
10/31/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Correspondence with B. Leeth re: answer.	\$0 hr	1.20	1.20	\$0.00
11/03/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	T/c with Billie Leeth re: motion to dismiss; motion for sanctions; complaint; correspondence with Stephen Brown re: answer; correspondence with Howell Morrison re: answer	\$0 hr	0.60	0.60	\$0.00
11/02/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Edited and finalized Answer, motion to dismiss, motion for sanction, etc. etc.	\$0 hr	6.80	6.80	\$0.00
11/03/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Reference SW Check #2514 for payment of service Countersuit	\$40.00 ea	1.00	\$40.00	\$40.00
11/03/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Supreme Court Filing fee Application for pro hac vice for Jeffrey Brett	\$250.00 ea	1.00	\$250.00	\$250.00
12/01/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Revised amended complaint; t/c with Howell Morrison (x3); correspondence with B. Leeth	\$0 hr	2.20	2.20	\$0.00
12/29/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Meeting with attorneys re: hearing; prep for hearing.	\$0 hr	4.50	4.50	\$0.00
12/30/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Attended status hearing with Judge Young and preparation and travel re: same.	\$0 hr	3.50	3.50	\$0.00
02/08/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.		\$0 hr	0.00	0.00	\$0.00
02/08/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Travel to and from and attended A. Kovach criminal hearing.	\$0 hr	2.50	2.50	\$0.00
02/08/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Multiple correspondence to opposing counsel re: motion to dismiss (to no avail) and no response from N. Bloodgood herself.	\$0 hr	1.80	1.80	\$0.00

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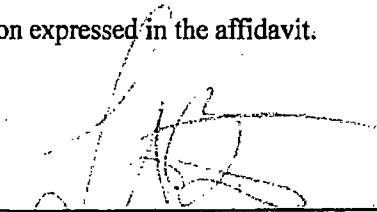
02/03/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	T/c with J. Breit re: motion to dismiss.	\$0 hr	0.70	0.70	\$0.00
02/09/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	T/c with J. Breit and continued correspondence with N. Bloodgood office (x10)	\$0 hr	1.10	1.10	\$0.00
02/10/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Reviewed transcript from criminal hearing.	\$0 hr	0.80	0.80	\$0.00
02/10/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Continued discussion with J. Breit re: next steps; edit letter to Court re: motion to withdraw; correspondence to N. Bloodgood re: motion to dismiss.	\$0 hr	1.50	1.50	\$0.00
02/11/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Edited letter to court re: motion to withdraw; multiple correspondence within counsel re: same; reviewed correspondence from Young law clerk and the counsel replying to same; edited motion for sanctions and other filings, including letter for continuance.	\$0 hr	2.50	3.50	\$0.00
03/10/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Filing fee	\$25.00 ea	1.00	\$25.00	\$25.00
03/16/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Prepared for hearing with H. Morrison.	\$0 hr	3.50	3.50	\$0.00
03/16/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Prepared for hearing with J. Breit.	\$0 hr	2.50	2.50	\$0.00
03/25/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Prepared for hearing - chronology and opening remarks, and exhibits.	\$0 hr	8.50	8.50	\$0.00
03/30/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	T/c with Howell Morrison; work on hearing prep.	\$0 hr	0.50	0.50	\$0.00
03/31/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	T/c with Howell Morrison (x2); T/c with Amelia Waring and correspondence (x2); drafted pleading for hearing.	\$0 hr	1.50	1.50	\$0.00
03/31/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Reviewed and edited supplemental drafts.	\$0 hr	0.80	0.80	\$0.00
03/12/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Travel to MC to file affidavit and reply brief.	\$0 hr	1.10	1.10	\$0.00
03/12/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	T/c with Howell Morrison re: strategy; meeting with attorney general re: motion to Intervene; and t/c with J. Breit re: same; follow up t/c with Alan Wilson and staff (x2)	\$0 hr	2.00	2.00	\$0.00
03/13/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Reviewed and edited reply brief.	\$0 hr	1.50	1.50	\$0.00
03/13/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	T/c with co-counsel T/c with Howell Morrison and J. Breit.	\$0 hr	0.60	0.60	\$0.00
03/15/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Prepared for and travel to and from Mondak Corner to attend Nancy Bloodgood and Amy Kovach Sanctions Hearing.	\$0 hr	7.20	7.20	\$0.00
03/23/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Researched rule 11 cases	\$0 hr	3.50	3.50	\$0.00
03/27/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Drafted order for court regarding sanctions as against Bloodgood and Kovach.	\$0 hr	8.20	8.20	\$0.00

09/28/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Continued draft of proposed order and reviewed brief of research requested by J. Toal	\$0 hr	6.50	6.50	\$0.00
10/03/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Finalized proposed order and research brief.	\$0 hr	3.20	3.20	\$0.00
10/04/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Reviewed, analyzed, and annotated both proposed orders from Kovach and Bloodgood.	\$0 hr	1.80	1.80	\$0.00
10/10/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Reviewed Bloodgood affidavit to assist in response to proposed order.	\$0 hr	0.40	0.40	\$0.00
10/11/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Revised reply brief to Justice Toal.	\$0 hr	1.10	1.10	\$0.00
10/17/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Reviewed and analyzed proposed order submitted by Howell Morrison	\$0 hr	0.50	0.50	\$0.00
10/17/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Finalized brief to court.	\$0 hr	1.50	1.50	\$0.00
10/26/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Reviewed and analyzed Court's order (x2)	\$0 hr	0.80	0.80	\$0.00
10/28/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Drafted petition for attorneys' fees.	\$0 hr	4.50	4.50	\$0.00
10/31/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Drafted affidavits in support of petition for fees.	\$0 hr	1.40	1.40	\$0.00
Total Labor For Joshua Whitley					125.00	125.00	\$0.00
Total Expense For Joshua Whitley						\$315.00	\$315.00
Total For Joshua Whitley							\$315.00
Mallory Haber							
11/03/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Postage	\$8.95 ea	1.00	\$8.95	\$8.95
11/04/2015	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Postage	\$9.35 ea	1.00	\$9.35	\$9.35
02/12/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Mileage from Charleston, SC to Moncks Corner COC office to file pleadings	\$0.96 ea	76.30	\$42.73	\$42.73
02/12/2016	Whitley, Joshua	Amy Kovach v. Berkeley County School District et al.	Postage	\$20.40 ea	1.00	\$20.40	\$20.40
Total Labor For Mallory Haber					0.00	0.00	\$0.00
Total Expense For Mallory Haber						\$81.43	\$81.43
Total For Mallory Haber							\$81.43
Grand Total Labor					125.00	125.00	\$0.00
Grand Total Expenses						\$396.43	\$396.43
Grand Total							\$396.43

and her work product in this matter has been outstanding. Billie has expended 172.25 hours in this matter.

6. I certify and acknowledge that I am signing this affidavit and under penalty of perjury. If called for a deposition or to testify at the trial of this case, my testimony would reflect the information expressed in the affidavit.

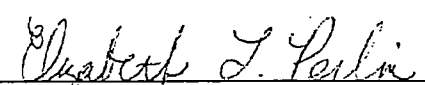
FURTHER AFFIANT SAYETH NOT.



Jeffrey Breit, Esq.

SUBSCRIBED AND SWORN TO BEFORE ME

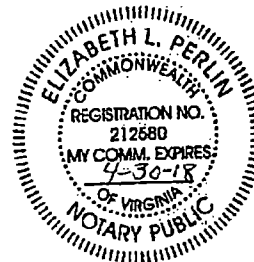
on this 31st day of October, 2016.



Notary Public in and for

the Commonwealth of Virginia

My Commission Expires: 4/30/18



**BREIT DRESCHER IMPREVENTO, PC
TIME SHEET**

**Joshua Whitley v. Amy Kovach
#15-185**

DATE	TIME	DESCRIPTION OF SERVICES
10/20/15	3.5	Review pleadings, conference
10/21/15	2.5	Review criminal transcript and discuss response
10/26/15	3.0	Review and conference re: Counterclaim
10/27/15	2.5	Review law/review edit – Answer and Counterclaim
11/01/15	2.0	Review latest pleading and Third party position
11/02/15	2.5	New sanctions brief; review pleadings
11/03/15	1.0	Conference with Josh Whitley and Billie Leeth
11/04/15	1.0	Review our pleadings and discuss with Josh Whitley
11/04/15	2.0	Review of letter re: criminal case; PI lawyer claim of improper contact
11/12/15	4.0	Review of pleadings and law – evaluation of discussions
11/16/15	1.5	Review settlement proposal; release of all; discussions; review our counter proposal;
11/19-23/15	2.5	Review and discuss sanctions, dismissal, service of subpoena duces tecum
11/23-12/02/15	4.0	Discuss dismissal – write PI lawyer – review new amended Complaint

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BREIT DRESCHER IMPREVENTO, PC
TIME SHEET

Joshua Whitley v. Amy Kovach
#15-185

DATE	TIME	DESCRIPTION OF SERVICES
12/28/15	2.5	Preparation for status conference. Attend status conference by telephone.
02/07/16	1.0	Discussions with Whitley/Leeth re Show Cause and Stipulation of Dismissal. Review proposed Stipulation of Dismissal.
02/08/16	1.5	Review of revised Stipulation of Dismissal. Emails to and from Whitley/Leeth.
02/09/16	.5	Emails to and from Whitley/Leeth re Stipulation of Dismissal.
02/10/16	2.0	Review show cause transcript. Draft/revise letter to Court re Bloodgood's motion to withdraw, sanctions, and show cause hearing. Discussions re motion to amend motion for sanctions to include Kovach.
02/11/16	1.5	Revise and revise amended motion for sanctions to include Kovach.
02/11/16	.5	Review revisions to letter to Court.
02/12/16	.25	Emails to and from Whitley/Leeth re plan for hearing.
08/25/16	.25	Review Theos Affidavit.
09/07/16	.25	Review of Bloodgood Supplemental Memorandum.
09/16/16	2.5	Preparation for hearing.
09/17/16	3.5	Preparation for hearing.
09/18/16	9.0	Travel to Charleston. Attend hearing. Discussions with Whitley and Leeth re supplemental briefing and draft Order.
09/23/16	.5	Review transcript of 9/18 hearing.

00613

**BREIT DRESCHER IMPREVENTO, PC
TIME SHEET**

**Joshua Whitley v. Amy Kovach
#15-185**

DATE	TIME	DESCRIPTION OF SERVICES
09/26/16	.5	Review research of the guilty plea issue raised by the Court; Emails to and from Whitley/Leeth.
09/27/16	.5	Review draft order and brief on guilty plea issue; revisions.
10/04/16	.25	Review proposed orders from Plaintiff and Bloodgood and Bloodgood's brief.
10/10/16	.5	Review Reply Brief.
10/17/16	.25	Review revised Reply Brief.

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KOVACH v. WHITLEY, et als.

**Timesheet for Billie Hobbs Leeth, Esq.
Associate
Breit Drescher Imprevento, P.C.**

10/25/15	Email discussion with counsel. Review and Revision of Complaint. Draft Counterclaims and Third Party Complaints. Research. 8.5 hours
10/26	Telephone conference with Breit and Whitley. Research collateral estoppel issue. Email to Breit and Whitley. Begin drafting 12(b)(6) motion/brief in support. 10.25 hours
10/27	Drafting Brief in Support of MTD. Research. 8.5 hours
10/28	Revisions to Brief in Support of MTD; revisions to Answer, etc. Research. 9.0 hours
10/29	Research punitive damages for MTD. Review Counterclaims. 8.0 hours
10/30	Revisions to MTD and Answer/Counterclaim/Third Party Complaint. Research immunity and unclean hands. 10.5 hours
11/1	Drafting sanctions memo. 9.5
11/2	Finalize sanctions memo. 9.0
11/3	Emails between counsel re filing and service. 1.0
11/10	Emails between counsel re communication with superintendent's counsel; actions of AG. .5
11/13	Emails between counsel concerning assignment of judge. Review show cause filed by AG, with attachments. 1.5

00615

11/16	Review emails re settlement discussion. .5
11/17	Research summons issue raised by counsel for Thompson. 3.5
11/18	Research summons issue. 7.5
11/19	Email discussion re civil conspiracy and covert acts. Discussion with JW. Research. Email to counsel re summons issue. 5.0
11/23	Emails re withdrawal of suit. .25
11/25	Review Plaintiff's draft of Stipulation of Dismissal. Drafting response letter in response to draft Stipulation of Dismissal. 1.5
11/26	Emails including revisions to Stipulation of Dismissal. Revisions. 3.5
12/1	Revisions to Counterclaim/Third Party Claim 2.5
12/3	Discussions with Whitley concerning Thompson Third Party Claim. .5
12/28	Draft letter to Court ahead of Status Conference. Discussions with Counsel concerning Status Conference. 1.5
2/5/16	Review of Motion for Sanctions ahead of Oral Argument. Discussion with Whitley re supplemental brief. 1.0
2/7	Email Discussions with Breit and Whitley re Show Cause hearing. And draft of Stipulation of Dismissal. Revisions to Stipulation of Dismissal. Forward to Whitley/Breit. 1.5
2/8	Email Discussion with Counsel concerning Show Cause Hearing Research and Review Rules of Professional Conduct. Begin Draft of Supplemental Brief in Support of Motion for Sanctions. Revise

Stipulation of Dismissal. Emails to and from Breit and Whitley re Stipulation of Dismissal.
5.0

2/9 Emails to/from Whitley and Breit regarding revisions to Stipulation of Dismissal.
.5

2/10 Review Kovach testimony during show cause hearing. Discussions regarding show cause hearing and opposition brief to sanctions motion. Research re Rule 11. Draft letter to Judge. Revisions to draft.
5.5

2/11 Additional revisions to letter to Judge. Research. Draft amended motion for sanctions to include Kovach.
5.25

2/12 Emails to and from counsel to discuss plan for hearing.
.25

8/25 Review of Theos Affidavit. Emails to and from Whitley.
.25

9/8 Draft reply to Bloodgood Supplemental Memorandum in Opposition. Research.
4.0

9/9 Finalize reply to Bloodgood Supplemental Memorandum in Opposition.
2.5

9/18 Research issue raised during hearing regarding guilty pleas and subsequent civil litigation.
3.5

9/19 Additional research on guilty plea issue.
2.5

9/22 Additional research on guilty plea issue. Exchanged emails with Whitley re authorities located.
2.0

9/23	Review transcript of hearing before Judge Toal. .50
9/24	Research and drafting brief on the guilty plea issue. 5.25
9/26	Additional research and revisions to brief on the guilty plea issue. Forward to Breit/Whitley. 4.0
9/27	Review draft Order and revise. Revise brief on guilty plea including Whitley's additions. Research for authorities on the publicity/harassment issue. Conference call with Morrison and Whitley. 7.0
9/28	Additional review of proposed Order and revisions. 3.0
10/3	Gather authorities and forward to Whitley for filing. Final Revisions to proposed Order. Emails to and from Whitley. 1.0
10/4	Review Plaintiff and Bloodgood's proposed Orders and Bloodgood's brief. Emails to and from Whitley re Bloodgood's new "conspiracy to terminate" theory. 1.5
10/8	Draft reply to Defendant and Bloodgood's proposed Orders and Bloodgood's brief. Review of documents. 6.0
10/10	Revisions/additions to reply brief. Forward draft to Whitley/Breit. 7.5
10/17	Additional revisions to reply brief. Forward to Whitley/Breit. 1.5

and also alter or amend its Order entered October 24, 2016. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21-22, 602 S.E.2d 772, 778-79 (2004) ("it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments."). Attorney Bloodgood received written notice of the entry of the Order Granting the Joshua S. Whitley's and Karen Whitley's Motions for Sanctions on October 26, 2016. Attorney Bloodgood respectfully submits that the Court may have overlooked or misapprehended the following points in reaching its decision:

- I. There was no Rule 11 conference as to either of the Whitley Defendants. A preponderance of the evidence demonstrates that a Rule 11 conference could have served a useful purpose.**

An issue raised but not ruled on involves the moving parties' failure to comply with Rule 11 of the South Carolina Rules of Civil Procedure. *See* Rule 11(a), S.C. R. Civ. P. ("All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose or could not be timely held. . . If a motion . . . does not comply with this Rule, it shall be stricken . . . If a . . . motion . . . is signed in violation of this Rule, the court, upon motion or its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the . . . motion. . . including a reasonable attorney's fee."); *Anderson County v. Preston*, 2013 WL 10154806 (S.C. Ct. C.P.) (recognizing that failure to comply with Rule 11(a) strikes the motion such that the motion is not properly before the court where the party neither consulted opposing counsel before filing nor attached a certification confirming consultation would serve no useful

purpose). Neither Whitley nor Morrison conferred with Bloodgood regarding the substantive issues set forth in their Motions for Sanctions. *See Bloodgood Aff.*, p. 12. To the extent that nine months later on August 26, 2016, via a Second Amended Motion for Sanctions, Whitley certified that a consult would have served no useful purpose, the only proof in the record supports that a Rule 11 conference **could have served a useful purpose.** *Bloodgood Aff.*, ¶ 25. Accordingly, as a matter of law and equity, an award of sanctions should not stand.

II. Attorney Bloodgood respectfully requests that the Court reconsider its ruling under the complete applicable standard.

A. The Order misstates a portion of the Frivolous Civil Proceedings Sanctions Act ("The Act") when addressing the legal standard.

Citing South Carolina Code Section 15-36-10(2005), the Order states, "The FCPSA provides that any person who takes part in the procurement, initiation, and continuation of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney fees and court costs of the other party if . . . (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs." (Order, p. 15.) While the 2005 version of the Act does not contain this language, it defines which forms of termination could trigger sanctions:

(C)(1) At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.

S.C. Code Ann. § 15-36-10 (2005). *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.") (internal citations omitted). Because the case was neither

terminated nor did it reach the merits, as a matter of law and equity, the findings for sanctions should not stand.

B. A preponderance of the evidence demonstrates that sanctions are not warranted pursuant to the applicable legal standard.

In order to impose sanctions, the requesting party must prove by a “preponderance”² of the evidence that an attorney, party, or pro se litigant engaged in advancing a frivolous³ claim or

² It should be noted that several factual findings are not supported by the evidence. For example, paragraph 29 of the Order states: “Shortly after the hearing on the Rule to Show Cause, Ms. Kovach and Ms. Bloodgood began the process of trying to dismiss the lawsuit against all of the Defendants.” The record demonstrates that, prior to any Answers having been filed (with the exception of Josh Whitley), Kovach and Bloodgood attempted the dismissal of all Defendants starting in November of 2015, several months before the Rule to Show Cause hearing in February of 2016. In addition, the factual determination “Bloodgood had knowledge of the claim’s lack of viability prior to filing the complaint” found on page 21 of the Order is unsupported by the evidence.

³ Other jurisdictions provide some guidance as to how the term “frivolous” is defined in its ordinary legal sense. See, e.g., *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S. Ct. 1827, 1831-1832, 104 L.Ed.2d 338 (1989) (United States Supreme Court defined a “frivolous” complaint as follows: “A complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact.”); *United States v. Morris*, 248 F.Supp.2d 1200 (M.D. Ga. 2003) (Court noted the terms “vexatious” and “frivolous” were not defined in federal statute allowing criminal defendant to recover legal fees and expenses against governmental prosecution; Court applied definition of “frivolous” from *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999) and noted “frivolous” means “a groundless position with little prospect of success; often brought to embarrass or annoy the defendant”); *Leaf River Forest Products, Inc. v. Deakle*, 661 So.2d 188, 197 (Miss. 1995) (Mississippi Supreme Court noted the term “frivolous,” which is not expressly defined in Mississippi’s Litigation Accountability Act, is the same as frivolity for Rule 11 purposes; a claim is frivolous “only when, objectively speaking, the pleader or movant has no hope of success”); *Sherman v. Regan*, 1984 WL 2808 (D.C. Az. 1984) (“frivolous” not defined in federal tax statute; court stated “frivolous” as used in a legal context means “a position that is legally insufficient on its face,” citing Black’s Law Dictionary 795 (4th Ed. 1968)); *Bilbo v. Thigpen*, 647 So.2d 678 (Miss. 1994) (if a complaint lacks an arguable basis either in law or fact, it is properly characterized as “frivolous”); *Taulung v. State*, 979 S.W.2d 854 (Tx. 1998) (for purpose of determining whether appeal was “wholly frivolous,” Texas Court of Appeals stated “if the only theories that the attorney can discover after a conscientious review of the record and law are arguments that cannot conceivably persuade the court, then the appeal should be considered frivolous). These definitions demonstrate that for a claim or position to be “frivolous,” there must be some level of bad faith, no hope of success, no conceivable way to persuade the court, positions that are

defense." S.C. Code Ann. § 15-36-10(C)(2). However, where an attorney establishes a "basis to proceed with litigation, or to assert to controvert an issue therein, that is not frivolous, [or] which includes a good faith argument for an extension, modification, or reversal of the existing law," sanctions are inappropriate. S.C. Code Ann. § 15-36-10(J).⁴ As set forth more fully *infra*, Bloodgood should not be sanctioned because there was a basis to include a civil conspiracy claim, as well as a basis to controvert the legal theories raised in defense of that claim (notwithstanding the fact that the merits were never reached in this case).

Next, the Order does not contemplate the complete standard set forth in the Act.⁵

(4) An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:

- (a) filing a frivolous pleading, motion, or document if:
 - (i) the person has not read the frivolous pleading, motion, or document;
 - (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
 - (iii) a reasonable attorney presented with the same circumstances would believe that the procurement,

groundless and often brought to embarrass or annoy another, or positions that lack an arguable (*i.e.* good faith) basis in law or in fact.

⁴ It is also worth noting that precedent relied upon by the Movant requires that all doubts must be construed in favor of the signor. *See Chien v. Skystar Bio Pharmaceutical Co.*, 256 F.R.D. 67, 2009 U.S. Dist. LEXIS 8627.

⁵ *Compare* Order, page 15, (enumerating only two factors, the length of time available for investigation and the information disclosed) *with* the Act (mandating that the Court shall review the following: (1) the number of parties; (2) the complexity of the claims and defenses; (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4); (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation; (5) previous violations of the provisions of this section; (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and (7) other factors the court considers just, equitable, or appropriate under the circumstances. S.C. Code Ann. § 15-36-10 (E). Bloodgood respectfully requests that the Court reconsider its decision in light of all factors and standard set forth in the Act.

initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
(iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;

(b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or

(c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith⁶ argument that exists for the extension, modification, or reversal of existing law.

S.C. Code Ann. § 15-36-10(B). The Order does not appear to rule as to which subsection(s) of the Act Bloodgood has violated.

The criteria for SCRPC 11 sanctions “are essentially the same” as those for sanctions under the Act. *In re Beard*, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004). The revisions to the

⁶ While the undersigned counsel has not found the Court’s definition of good faith in this context, bad faith has been defined by the Court as “[t]he opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.” *State v. Griffin*, 100 S.C. 331, 84 S.E. 876, 877 (S.C. 1915) (quoting Black’s Law Dictionary, 112). Black’s Law Dictionary defines acting in good faith as “behaving honestly and frankly, without any intent to defraud or to seek an unconscionable advantage.” ACTING IN GOOD FAITH, Black’s Law Dictionary (10th ed. 2014).

Hence, in its usual sense, “good faith” indicates a state of mind, an honesty in the belief that there is a basis for pursuing the claim or argument, lacking intent to defraud or take undue advantage. The lack of “good faith,” on the other hand, indicates some motive beyond pursuing a remedy on behalf of a client. The lawyer would have to act with the actual knowledge that there is no hope of prevailing, or without conducting sufficient due diligence to ensure there is some factual and legal basis to assert the position being challenged as frivolous or “not in good faith.”

Trial Handbook for South Carolina Lawyers § 10:5.

The legislature has also defined “good faith” for purposes of the South Carolina Uniform Commercial Code as, “‘Good faith’ means honesty in fact in the conduct or transaction concerned.” S.C. Code Ann. § 36-1-201(19) (1976 & Cum. Supp.).

FCPSA created a "reasonable attorney" standard to determine whether sanctions are warranted. *Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011). "While Rule 11 is evaluated by a subjective standard, the rule still may be violated with a filing that is so patently⁷ without merit that no reasonable attorney could have a good faith belief in its propriety." *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.* 393 S.C. 590, 598, 713 S.E.2d 624, 628 (S.C. 2011).

Even under a more stringent "objective" standard set forth in the federal rule:

maintaining a legal position to a court is only sanctionable when, in "applying a standard of objective reasonableness, it can be said that a reasonable attorney in like circumstances could not have believed his actions to be legally justified." That is to say, as Judge Wilkins recently explained, the legal argument must have "absolutely no chance of success under the existing precedent." Although a legal claim may be so inartfully pled that it cannot survive a motion to dismiss, such a flaw will not in itself support Rule 11 sanctions—only the lack of any legal or factual basis is sanctionable. We have aptly observed that "[t]he Rule does not seek to stifle the exuberant spirit of skilled advocacy or to require that a claim be proven before a complaint can be filed. The Rule attempts to discourage the needless filing of groundless lawsuits." And we have recognized that "[c]reative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment."

Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 153 (4th Cir. 2002) (internal citations omitted) (emphasis added). As discussed in subsection III, *infra*, and based on the record, arguments exist

⁷ Black's Law Dictionary defines "patent" as "obvious" and "apparent." Black's Law Dictionary (10th ed. 2014). Bloodgood submits that the filing is not patently without merit as demonstrated by (for example) the extensive briefing, that her good faith arguments are supported by legal authority, and that a claim of civil conspiracy may be warranted even if some allegations are subject to issue preclusion. Even if the Court thinks she got it wrong, she should not be sanctioned where there is sufficient legal authority supporting her positions legal claims based on the facts which would survive any preclusion arguments and where there is an absence of legal authority deeming the allegations sanctionable. This is the case especially when considered the abbreviated life of this lawsuit, which did not make it past the very initial pleading stage. The affidavits of Bloodgood and Sanders demonstrate the research, due diligence, consultations, and good faith effort (including the removal of unsupported claims) undertaken to prepare this lawsuit, which was dismissed mere weeks after its filing.

which support the claim. This is not a situation where all arguments have "absolutely no chance of success under existing precedent" or lack "any legal or factual basis."

The factual basis behind the Court's ruling appears to be largely if not entirely premised on Assistant Attorney General Waters's statements made at Kovach's plea hearing and in his correspondence to the Berkeley County School Board. The Court's Order overlooks the proof set forth in the Affidavits of Bloodgood, Sanders, and Fabri in its determination that sanctions were appropriate against both Kovach and Bloodgood. (Order, p. 13). As discussed thoroughly in her Affidavit, Bloodgood reviewed and considered these documents, but her investigation and evaluation did not end there. In crafting the Complaint, she relied on the expert legal opinion of Judge Vic Rawl, who concluded that Kovach's activities, even if subject to criminal prosecution, "were clearly within the course and scope of her employment and clearly performed in good faith with her only concern being the benefit and best interests of the Berkeley County School District." (emphasis added), as well as the opinion of Professor John Freeman, a noted ethics expert, who opined that it was his "professional opinion that Mrs. Kovach's indictment does not preclude the board from appearing or defending the action on her behalf." In addition to considering expert legal opinions, Bloodgood and Sanders consulted directly with Kovach's criminal attorney, Jerry Theos, who was present and represented her at the criminal plea. Theos received drafts of the Complaint and even provided revisions which were incorporated into the final Complaint. *See Aff. of Sanders, Aff. of Bloodgood.*

In fact the only attorney affidavit filed which opines as to the reasonableness of Bloodgood's actions supports the conclusion that Bloodgood acted as a reasonable attorney would in bringing the claim for civil conspiracy. *See Aff. of Fabri at ¶5.* ("It is my opinion that there is voluminous, not only a preponderance, of evidence from which I, or any other reasonable

attorney in the same circumstances, would believe that a claim for civil conspiracy was clearly warranted against Joshua Whitley (and his mother) based on the facts.”).

A preponderance of the evidence supports the conclusion that sanctions must not be issued because Bloodgood had a “basis to proceed with litigation, or to assert to controvert an issue therein, that is not frivolous, [or] which includes a good faith argument for an extension, modification, or reversal of the existing law.” S.C. Code Ann. § 15-36-10(J). A preponderance of the evidence supports that a reasonable attorney in the same circumstances would believe that a civil conspiracy claim against the Whitleys was warranted at the time of the pleading. *See Aff. of Fabri, Aff. of Bloodgood*. No attorney affidavits or expert witness affidavits were submitted to dispute the facts in Fabri’s affidavit, *i.e.*, that a reasonable attorney thought there was a good faith basis to proceed with the claim. *See generally McMamus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473, 475 (1933) (“This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.”).

C. *The Court’s Order goes beyond the express holding in Ex Parte Gregory.*

In finding sanctions were warranted because Rule 11 requires a reasonable investigation, the Court relies exclusively on *Ex Parte Gregory*, a case with an expressly limited holding to “situations where a client is alleging conversion against his or her former attorney for misappropriation of client funds or legal malpractice,” and tortures it to impose sanctions on Bloodgood. *Ex parte Gregory*, 378 S.C. 430, 439, 663 S.E.2d 46, 51 (2008). This case is not without controversy and indeed expressly limited its holding to an exact fact pattern not present here.

In his concurrence, now-Chief Justice Pleicones was "troubled by the imposition of a new duty forcing an attorney to conduct a 'reasonable' investigation so as to comply with § 15-36-20." The Order states:

In my opinion, this new responsibility places upon an attorney an additional requirement not currently required by statute. I would not create a blanket rule that precludes an attorney from obtaining a reasonable belief in the merits of a case based solely on information related to him by a client. I agree that, based on the facts of this case, appellant filed the action primarily for a purpose other than securing the proper adjudication of the claim upon which the proceedings were based. I would affirm the lower court but see no need to impose additional duties on an attorney beyond that which is required by statute.

Footnote 3 of the Order then provides:

The concurrence indicates that we have imposed an additional duty upon an attorney by creating a blanket rule that an attorney is precluded from obtaining a reasonable belief in the merits of a case based solely on information related to him by a client. **However, we have not created such a blanket rule. Our conclusion that an attorney must conduct a reasonable investigation beyond what is related to the attorney by his client is limited to the situation where a client is alleging conversion against his or her former attorney for misappropriation of client funds or legal malpractice.**

Id. at 439, 663 S.E.2d at 51 (emphasis added). Bloodgood requests that the Court reconsider imposing sanctions based on precedent which expressly does not apply to this case.

Moreover, *Gregory* is procedurally distinguishable from the present case because in *Gregory* (1) discovery was conducted and (2) the lower court issued an order on the merits of the case in granting defendant's motion for summary judgment. *Id.* at 436, 663 S.E.2d at 50.⁸ In

⁸ In *Gregory*, plaintiff and her new attorneys, filed suit against her previous attorney for negligence, conversion, breach of contract, breach of contract accompanied by fraudulent act, and contrastive trust for allegedly withholding settlement funds. *Ex Parte Gregory*, 378 S.C. at 432, 663 S.E.2d at 47. The previous attorney answered and counterclaimed that the suit was frivolous and in violation of Rule 11, SCRPC, and the SCFPSA. *Id.* Plaintiff filed a motion to dismiss the counterclaims. *Id.* Thereafter, the previous attorney filed a motion for summary judgment as to plaintiff's causes of action. After depositions were taken, plaintiff voluntarily filed a stipulation of dismissal of the complaint seven weeks after filing. *Id.* (emphasis added). The previous attorney dismissed his counterclaims and then filed a motion seeking

that case, which was contested beyond the pleadings stage, the trial court concluded the cause of action for conversion was frivolous and awarded sanctions against the new attorney.

D. The Motion before the Court was for Sanctions under the Act and Rule 11. A decision on the merits of the underlying matter goes beyond that scope. Notwithstanding, Bloodgood had an arguable basis for asserting the civil conspiracy claim.

The inquiry on a Motion for Sanctions is whether Nancy Bloodgood acted as a reasonable attorney when the pleading was filed and whether the pleading was frivolous. See Rule 11, SCRPC (requiring an attorney to sign every pleading, motion, or other court paper to certify that he has read the court paper; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay). See also Rule 3.1, RPC ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); S.C. Code Ann. § 15-36-10 (A) (3)(b), 4(c)(same language as Rule 3.1).

The Order should be reconsidered because merits determinations were made by the Court even though the case did not reach the merits. Nor did the underlying matter reach a juncture for factual findings.⁹ The question is not whether or not the case should be dismissed (Kovach

sanctions against plaintiff and one of her attorneys. The trial court granted the previous attorney's motion for summary judgment finding there was no dispute the funds remained in the previous attorney's trust account from the time of the settlement.

⁹ For example, the Court held that "even if the Complaint centered on Defendants' role in Ms. Kovach's termination, Ms. Kovach's admissions in her guilty plea of misconduct in office and illegal use of BCSD funds and resources would fully justify – and even mandate – her termination." (Order, p. 13, n. 5.) This is necessarily a question of law and fact that would have been explored through the usual course of discovery and litigation, which never occurred in this case. As it relates to the present motion and Bloodgood's impressions at the outset of the lawsuit based on the information before her, the evidence suggests Bloodgood acted reasonably and that claims arising from Kovach's termination were not frivolous. For example, the information before Bloodgood during her review of the matter included Judge Vic Rawl's conclusion that

and Bloodgood attempted to do just that within weeks after the case was filed); rather, whether an arguable basis for alleging the claims exists. Did law and facts exist that arguably pled a cause of action at the outset? As set forth in Comment 2 to Rule 3.1 of the Rules of Professional Conduct:

What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by good faith argument for an extension, modification or reversal of existing laws.

Id. Here, the record demonstrates that Bloodgood did just that — she reasonably believed law and facts existed to support the causes of action including the school district's alleged breach of its covenant of good faith and fair dealing and the civil conspiracy claim alleged against the Whitleys and others. Because arguable bases exist to support the claim, even if the Court prefers

Kovach's activities, even if subject to criminal prosecution, "were clearly **within the course and scope of her employment and clearly performed in good faith** with her only concern being the benefit and best interests of the Berkeley County School District." (emphasis added). In addition, Professor John Freeman, a noted ethics expert, opined that it was his "professional opinion that Mrs. Kovach's indictment does not preclude the board from appearing or defending the action on her behalf." Bloodgood reasonably found it significant that the School Board continued to defend Kovach based on its opinion she was acting in good faith and within the course and scope of her employment then subsequently terminated her employment for the same actions it believed she took in good faith and within the scope of her employment. The Board's seemingly inconsistent actions provided factual support for Kovach's claims. The law is clear that in every contract there is an implied covenant of good faith and fair dealing and the evidence could have shown that this covenant was breached by the district when they terminated her on the basis of a guilty plea arising out of actions she took at the district's direction and in furtherance of her job duties as dictated by the district. A jury could have found that the district breached Kovach's contract when it fired her before her contract ended. That the Whitleys allegedly played a role in this termination and had improper influence in this termination was information to be discovered, opined on, and fleshed out in the merits of this lawsuit, had it reached the merits. This is so even if the allegations regarding the criminal plea were stricken and never considered by a jury.

the Whitleys' position on the law and the facts, as demonstrated by the Order, Bloodgood should not have been sanctioned as a matter of law.

At the earliest pleading¹⁰ stage (which is the relevant time when considering this motion), Bloodgood had an arguable basis for the civil conspiracy claim under existing law, which should not be barred at the outset because affirmative defenses and legal theories may have been

¹⁰ Compare 71 C.J.S. Pleading § 2 ("The purpose of pleadings is to frame, present, define, and narrow the issues and to form the foundation of, and to limit, the proof to be submitted on the trial. Furthermore, a pleading's purpose is to eliminate from consideration contentions that have no legal significance and to guide the parties and the court in the conduct of cases. The purpose of a pleading has also been held to give notice of the nature and basis of the specific claims or causes of action that will be heard. In other words, an essential purpose of a pleading is to give notice of the issues to be tried so that the opposing party will be able to prepare for trial. The purpose of a pleading is to notify a defendant that he or she is being sued and what he or she is being sued for; due process demands nothing less. Pleadings are calculated to prevent surprise. Also, pleadings serve to define the approximate time frame in which the complained-of conduct, or lack of conduct, took place.") with 27 C.J.S. Discovery § 2 ("The purpose of discovery is to enable one who is asserting a right or claim to determine the exact nature of such right or claim and the extent thereof. Its objectives are to enhance the truth-seeking process, to enable the attorneys to better prepare for trial, to eliminate surprise, and to promote an expeditious and final determination of controversies in accordance with the substantive rights of the parties."); Cf. *Samples v. Mitchell*, 329 S.C. 105, 113-14, 495 S.E.2d 213, 217 (Ct. App. 1997) (internal citations omitted) ("The entire thrust of the discovery rules involves full and fair disclosure, 'to prevent a trial from becoming a guessing game or one of surprise for either party.' Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed.").

These distinct stages in the life cycle of litigation are especially significant where, as here, the subject cause of action is civil conspiracy. See *McMillan v. Oconee Memorial Hospital, Inc.*, 367 S.C. 559, 626 S.E.2d 884 (2005) (recognizing civil conspiracy "involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence"); *Adcock v. Brakegate, Ltd.*, 645 N.E.2d 888 (Ill. 1994) (recognizing civil conspiracies are "often purposefully shrouded in mystery" and can only be proven by seeking knowledge within the alleged conspirators knowledge and control); *Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439 (1992) (recognizing that proof of conspiracy is largely in the hands of alleged conspirators or otherwise out of the lawyer's reach at the pleading stage, that Rule 11 "must not bar the courthouse door to people who have some support for a complaint but need discovery to prove their case," and that "[w]ithout access to such discovery, proving the existence of a conspiracy is usually difficult and often impossible"). For example, witnesses who may have only been available through discovery would have either validated or negated the pleadings. Through that course, Bloodgood could have then advised in favor of amending the complaint, pursuing additional discovery, dismissing causes of action, and other strategic decisions based on the information gleaned at that time.

available. Indeed, Bloodgood has demonstrated that those defenses and theories raised are controvertible based on existing precedent. As set forth in subsection III, there is an arguable basis for the civil conspiracy claim, there are good faith arguments supported by precedent, and there are good faith arguments for any extension, modification, or reversal of existing law. For these reasons, the claim should not be deemed "frivolous" and Bloodgood should not be sanctioned.

III. Bloodgood should not be sanctioned because the case is not frivolous or patently without merit. When drafting the Complaint, there was a basis to proceed with the litigation. Arguable affirmative defenses raised by the Movants should not be a basis for sanctions.

A. The case is not frivolous or patently without merit based on Kovach's criminal plea testimony or Assistant Attorney General Waters's August 31, 2015 letter to the Berkeley County School Board.

The Court should reconsider its holding that sanctions are appropriate because of Kovach's criminal plea testimony and the August 31, 2015 letter from Assistant Attorney General Waters.¹¹

¹¹ To the extent the Court relies on *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) and *Tozier v. City of Temple Terrace*, No. 8:10-CV-2750-T-33EAJ, 2011 WL 3961816 (M.D. Fla. Sept. 8, 2011), they are inapposite. *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) involved 1983 and habeus corpus federal-court prisoner litigation. In that case, the United States Supreme Court held that a state prisoner seeking damages under Section 1983 may proceed where the district court finds that "the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed in the absence of some other bar to the suit." *Id.* at 487, 114 S. Ct. at 2372-73. Conversely, a 1983 damages claim is not cognizable if it calls in to question the lawfulness of a conviction or confinement that has not been invalidated. *Id.* at 487, 114 S. Ct. at 2372. The United States Supreme Court articulated: "We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments **applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it always applied to actions for malicious prosecution.**" *Id.* at 486, 114 S. Ct. at 2372 (emphasis added). While it is obvious this is neither a 1983 nor a malicious prosecution claim and law enforcement are not named defendants and this is not federal court prisoner litigation, even if the law were be considered by analogy, it should be noted that the present case does not

Bloodgood contends that it was reasonable for her to rely on Kovach's statements at the plea hearing. A review of the plea transcript demonstrates that following Waters's lengthy argument which included some facts, the judge apparently sought to gain more specificity and clarity and asked Kovach to state in her own words what she had done (*i.e.*, the factual basis for the plea), and her own recitation was substantively and substantially different from Waters's recitation. Bloodgood reasonably relied on Kovach's own words in establishing the scope of her admissions that could be interpreted as the factual basis. *See Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000) (recognizing that before a guilty plea may be accepted, the court must be certain the defendant understands the charge and the consequences of the plea and that the record indicates a factual basis for the plea).

Although the Court's Order appears to suggest that the correspondence from Assistant Attorney General Waters has some precedential value, it cites no authority to support this proposition and apparent finding of fact. Our research shows that there is none. *See Anders v. S.C. Parole & Cmty. Corr. Bd.*, 279 S.C. 206, 209–10, 305 S.E.2d 229, 231 (1983) (recognizing that opinions of the Attorney General are not binding precedent). Moreover, the record indicates

challenge the validity of Kovach's plea – **the validity of her plea is not disputed**. Kovach's action, even if successful, would not demonstrate the invalidity of any outstanding criminal judgment against her and therefore, under *Heck*, would be allowed to proceed. This is particularly the case if the criminally related allegations had been stricken under a motion to strike, for example. In *Tozier v. City of Temple Terrace*, No. 8:10-CV-2750-T-33EAJ, 2011 WL 3961816 (M.D. Fla. Sept. 8, 2011) Tozier entered a guilty plea to the charges that arose out of his arrest and, in his civil case, sought to review the constitutionality of his seizure under § 1983, which "necessarily implicate[s] the validity of the charges for which he has already admitted guilt." *Id.* at *6. The court held that the claims in *Tozier* were frivolous because Tozier pled guilty such that his plea amounted to conclusive proof of probable cause for his arrest and prosecution, **which forecloses as a matter of law claims that rely upon the nonexistence of probable cause as an element of the claim.** *Id.* By contrast, the guilty plea and indictment in the present case do not foreclose a claim for civil conspiracy against the Whitley Defendants. None of the well-established elements of civil conspiracy are foreclosed by anything conclusively established by Kovach's plea.

Waters's letter was inapposite as he told the Board Kovach was guilty of a crime of moral turpitude and compared her to an Horry County Magistrate who sexually assaulted several women. As Bloodgood states in her Affidavit attached to her Supplemental Memorandum in Opposition to the Whitley Defendants' Motions for Sanctions (*Bloodgood Aff.*, ¶¶ 8, 9), the case cited by Waters had nothing to do with Kovach's situation and was inflammatory. Bloodgood requests that the Court alter its Order to reflect that the letter is not precedential or binding and, further, is not persuasive as it was not supported by relevant case law or facts.

In light of these arguments, the claim was not frivolous, and therefore is not sanctionable.

B. The Civil Conspiracy claim is not patently without merit.

The "sum total" of conspiracy allegations¹² set forth in the Order is not actually the "sum total" of conspiracy allegations. *See* Order, pp. 16-17. The Complaint sets forth sufficient allegations which satisfy the elements of civil conspiracy: (1) two or more persons (2) who intend to injure another person and (3) cause her special damage. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 SC 559, 626 SE 2d 884, 886 (2006). *See also LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988) (recognizing civil conspiracy where the object is to ruin or damage the business of another). *See also Stroud v. Riddle*, 260 S.C. 99, 102-03, 194 S.E.2d 235, 237 (1973) (stating that complaints must plead only ultimate facts and recognizing that pleadings should be liberally

¹² To the extent the Order states that the fact that this matter was an employment action is a new theory, it should be noted that Bloodgood pointed these facts out in the initial briefing of these sanctions: "Plaintiff's civil suit was filed after she was terminated by her employer, Berkeley County School District. The Complaint contained three (3) causes of action against the School District: breach of the covenant of good faith and fair dealing; gross negligence and/or intentional misrepresentation; and breach of fiduciary duty. The cause of action against Whitley and several other individuals for civil conspiracy was taken based on their personal actions taken to harm Plaintiff. The Attorney General's Office is not a named Defendant and was not accused of attempting to harm Plaintiff." (Initial Br., p. 8.)

construed against the moving party, in the favor of the pleader, and that the litigant is not required to plead evidentiary matter); *Moore v. City of Columbia*, 284 S.C. 278, 283, 326 S.E.2d 157, 160 (Ct. App. 1985)(“In our State, the complaint is sufficient if it informs the defendant of the ultimate facts supporting each element of the cause of action; there is no necessity that the complaint state all the evidence to be presented upon the trial of the case.”).

With respect to the second element, intent to injure another, allegations exist which go beyond the Whitleys’ reporting of illegal activity that is the subject of the plea and which taken together and in the context of the entire Complaint speak to an independent intent to harm Kovach. For example, the Complaint alleges:

- That Joshua Whitley led an organized bond referendum group and led the Berkeley County Republican Party, which allegedly was critically involved in opposing the bond referendum and whose official Facebook page provided a forum for vitriolic commentary about the Plaintiff and actively publicized efforts relating to such opposition. (Compl. ¶¶ 3, 41, 52, 121, 124, 161, 162.)
- That Joshua Whitley posted comments about Plaintiff or spoke out against her in public. (Compl. ¶ 124.)
- With respect to Dr. Whitley, Joshua Whitley’s mother, the Complaint alleges that the then-associate superintendent was laterally transferred into a position with less authority upon the hiring of Dr. Rodney Thompson. (Compl. ¶¶ 42-43.)
- That Dr. Whitley expressed dissatisfaction with the situation publicly and further that Dr. Whitley had a personal vendetta against Plaintiff because she wanted one of her direct reports to have Plaintiff’s job responsibilities. (Compl. ¶¶ 43-44.)
- That, upon information and belief, Dr. Whitley had an objective to cause harm and embarrassment to her supervisors so that would rise in leadership with BCSD. (Compl. ¶ 45.)
- That the Whitley Defendants (and others) communicated directly with the BCSD Board Members in order to turn them against Plaintiff. (Compl. ¶ 162.)
- That Defendant Joshua S. Whitley threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support Plaintiff. (Compl. ¶ 171.)

- That Defendant Joshua S. Whitley bragged publically that he hoped to harm the School District.¹³ (Compl. ¶ 172.)
- That Defendants took the actions stated in the Complaint solely for the purpose and with the intent of intimidating and harming Plaintiff. (Compl. ¶ 178.)

The Complaint alleges that the Plaintiff suffered and continues to suffer special damages¹⁴ due to this conspiracy in the form of injury to her personal and professional reputation and injury to her 22 year career and the loss of future Marketing and Communication career opportunities. (Compl. ¶ 179.) The Court's reliance on *Lawson v. S.C. Dep't of Corr.*, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000) to hold that the damages alleged by Kovach "cannot qualify as special damages supporting a claim for civil conspiracy" is misplaced. That case lacked any allegation of special damages whatsoever. *Id.* ("Because no special damages are alleged, the trial court correctly granted Department summary judgment on the conspiracy cause of action."). By contrast, Kovach did plead special damages: injury to her personal and professional reputation and injury to her 22 year career and the loss of future Marketing and Communication career opportunities. These are not injuries which merely flow from a personal injury and they were specifically pled in accordance with the Rules of Civil Procedure. See *Benedict Coll. v. Nat'l Credit Sys., Inc.*, 400 S.C. 538, 548, 735 S.E.2d 518, 523 (Ct. App. 2012) (recognizing that special damages are the natural but not the usual consequence of the defendant's conduct and must be specifically stated to avoid surprise to the other party).

¹³ (Kovach's then-employer.)

¹⁴ The fact that Kovach did not allege and could not allege special damages is another example of a finding on the merits that is not properly before the Court. In its Order, the Court concluded that the special damages alleged did not proximately flow from the civil conspiracy but instead from the criminal facets of this case. Whether the damages were proximately caused by the civil conspiracy claim is a question of fact that would have taken shape over the normal course of litigation, which did not occur in this case.

Accordingly, the special damages alleged are not frivolous or so patently without merit that they should subject Bloodgood to sanctions for having alleged them on behalf of her client.

Again, the “frivolous” inquiry isn’t whether the claim ultimately succeeds or fails but whether there was a good faith basis to proceed with the claim. Bloodgood submits, and Fabri concurs, that based on the information before her at the time of the pleading, there was. *See Aff. of Fabri, Aff. of Bloodgood.*

C. Bloodgood has established an arguable basis to maintain a claim for civil conspiracy notwithstanding the availability of affirmative defenses and legal theories. The affirmative defenses and legal theories raised by the defendants (even though the case did not reach the merits) are controvertible or subject to good faith arguments for extension, modification, or reversal.

The Court should reconsider sanctioning a lawyer based on an affirmative defense which, according to South Carolina precedent, is limited to a cause of action not alleged in this case. Judicial immunity is recognized in South Carolina as an affirmative defense to a defamation claim. *See Crowell v. Herring*, 301 S.C. 424, 2430 (Ct. App. 1990) (recognizing the “common law rule protecting statements of judges, parties and witnesses offered in the course of judicial proceedings from a *cause of action in defamation* is well recognized in this jurisdiction.”) (emphasis added). To the extent a court may in the future expand judicial immunity to encompass civil conspiracy, it has not yet done so.

There was an arguable basis for a civil conspiracy claim in this case notwithstanding *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261 (2006) (*Angus II*). The rule set forth in *Angus II* is not absolute because it is limited by *Reed v. Aiken Cty.*, No. C.A. 1:09-1744-MBS, 2010 WL 2985805, (D.S.C. July 26, 2010) and creates a question of law and fact.¹⁵

¹⁵ In *Reed*, the court interpreted *Angus II* as prohibiting a public official, the county tax assessor who was also employed at-will, from maintaining a civil conspiracy claim with regard his termination *against members of the public*. The court held that the at-will public official could

As such, it should neither be an absolute bar to Kovach's claim nor reach the level where Kovach's attorney should be sanctioned for pursuing a claim which may or may not be limited by this defense theory.

As a matter of law and equity, it does not seem plausible that an entire action should be barred where some but not all of the allegations may be subject to collateral estoppel. The Order says that the claim is foreclosed, *i.e.*, entirely barred, because there were allegations which materially contradict what was said under oath. Even if the plea forecloses certain allegations, the doctrine of collateral estoppel should not foreclose allegations outside the scope of the plea:

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1)

maintain a claim for civil conspiracy against individual defendants, the Council Chairman for Aiken County and the County Administrator, who allegedly "engaged in misconduct in the context of their positions within Aiken County and not as members of the public." Whether the Whitleys were engaged in the alleged conspiracy as public officials or a member of the general public is a question of fact which would have been fleshed out in the usual course of litigation (*i.e.*, discovery, experts, merits' motions, jury). Unfortunately, neither *Angus II* nor *Reed* provides guidance in defining a "public official" as a matter of law. However, there is both statutory and case law authority to support the argument that the Whitleys were public officials or figures. See SC Ethics Reform Act, S.C. Code Ann. § 8-13-100 (25) ("Public employee" means a person employed by the State, a county, a municipality, or a political subdivision thereof); S.C. Code Ann. § 8-13-100 (27) ("Public official" means an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 326, 94 S. Ct. 2997, 3000, 41 L. Ed. 2d 789 (1974) ("A limited public figure, the type more commonly found, is an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.'") In engaging in the alleged conspiracy, Josh Whitley was allegedly acting in the capacity of his role with the Berkeley County Republican Party (BCRP) and his actions were affected by his role as Chairman and his political opinions regarding the referendum. Karen Whitley was employed as an assistant superintendent in the Berkeley County School District (BCSD) and, if the Whitleys allege that Kovach (in her prior employment role) was a "public official," then certainly Karen Whitley would be categorized as such, as well. Again, these types of questions of fact are ones which could have been explored through the usual course of litigation (*i.e.*, merits' motions, experts, etc.) which did not occur here.

actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." The doctrine of collateral estoppel should not be rigidly or mechanically applied. Thus, even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it.

Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554–55, 684 S.E.2d 779, 782 (Ct. App. 2009) (internal citations omitted). The Order does not address these elements.

While it is true that collateral estoppel applies to guilty pleas, the person is bound in a subsequent civil proceeding to the extent it is based on the same facts. As a matter of law, collateral estoppel should not bar the entire lawsuit. Even if certain allegations which arguably overlap with Waters's colloquy at the plea are barred,¹⁶ allegations remain which satisfy the elements of civil conspiracy – i.e., that the Whitleys took actions with an aim at injuring Kovach such that she would ultimately be terminated from her position with the BCSD.¹⁷ At the initial pleading stage, these facts, including those facts outlined in Bloodgood's Affidavit and accompanying exhibits,¹⁸ support a civil conspiracy claim. Because there is an arguable basis in the law to find that a civil conspiracy claim against the Whitleys *may* have been warranted, Bloodgood should not have been sanctioned.

¹⁶ What constitutes Kovach's plea is disputed and is another issue which could have been explored via expert testimony in the usual course of litigation leading up to a summary judgment motion, for example, had the case reached that point. Again, to the extent the Movants took the position that Waters's colloquy constituted the facts of her plea and that those facts are materially contradicted in the Complaint, a Rule 11 conference would have served a useful purpose. This is not a situation where the case proceeded beyond that information coming to light.

¹⁷ This also demonstrates the immateriality of the criminal-related allegations on a claim for civil conspiracy.

¹⁸ See *Moore v. City of Columbia*, 284 S.C. 278, 283, 326 S.E.2d 157, 160 (Ct. App. 1985) ("... there is no necessity that the complaint state all the evidence to be presented upon the trial of the case.").

IV. The Order as written could set a "dangerous precedent."

The United States Supreme Court and the Fourth Circuit have noted that, "[i]n searching for the strongest arguments available, the attorney must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client." *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 156 (4th Cir. 2002) (quoting *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 444, 108 S.Ct. 1895, 100 L.Ed.2d 440 (1988)(discussing criminal defense attorneys)). To *sanction* a lawyer for merely bringing a cause of action which *may* ultimately be limited by an affirmative defense or other legal theory would have a chilling effect on the profession and is not likely the intended result. To *sanction* a lawyer where allegations could have been subject to a motion for a more definite statement or a motion to strike similarly would have a chilling effect on the profession. Defense attorneys will have no choice but to pursue sanctions from the outset. Attorneys will hesitate to zealously pursue claims, defenses, or counterclaims out of fear that they could be sanctioned without being given the opportunity to use discovery and the normal litigation process to flush out the merits of their claims, defenses, or counterclaims. The import of the Order is that the pursuit of sanctions may be a more effective vehicle to terminate allegations or a lawsuit rather than utilizing pre-discovery tools available to parties within the Rules of Civil Procedure, such as motions to make more definite and certain, motions to strike, and motions to dismiss. For this additional reason, Bloodgood urges the Court to reconsider its decision.

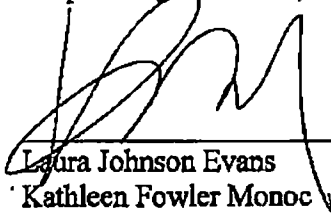
CONCLUSION

In conclusion, the Court's Order analyzed this case as if it had proceeded beyond the initial pleading stage. The Order relies on facts which were not supported by the evidence and case law which does not comport with the procedural posture of this case. The question before

the Court was whether a lawyer should be sanctioned at the outset of a civil lawsuit based on the potential success of affirmative defenses and legal theories which might be raised, even if the case did not proceed such that allegations and affirmative defenses were tested in the usual course of litigation. Here, a preponderance of the evidence revealed that the entire pleading was not patently frivolous and that at the time of the pleading, a reasonable attorney would have believed there were good grounds to support a civil conspiracy claim.

Bloodgood respectfully requests that the Court reconsider facts, case law, and equities before proceeding with the drastic and unprecedented measure of sanctions and also in light of the fact that none of the movants discussed the merits of this motion or their specific concerns about the allegations via a Rule 11 conference in advance of seeking these sanctions.

Respectfully submitted,



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Attorneys for Nancy Bloodgood

November 7, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS FOR
THE NINTH JUDICIAL CIRCUIT

Amy Kovach,)
Plaintiff,)
vs.)

Case No.: 2015-CP-8- 2380

Joshua S. Whitley,)
Defendant.)

Joshua S. Whitley,)
Defendant/Counterclaimant)
vs.)

Amy Kovach,)
Plaintiff/Counterclaim)
Defendant.)

Affidavit of Lucy Sanders, Esquire

Joshua S. Whitley,)
Defendant/Third-Party)
Plaintiff,)

vs.)

Rodney Thompson,)

Third-Party Defendant.)

FILED
2016 NOV -2 PM 2:34
HARRY P. BROOKIN
CLERK OF COURT
BERKELEY COUNTY, SC

Personally appeared before me, Lucy Sanders, Esquire, who first being duly sworn
deposes and states that:

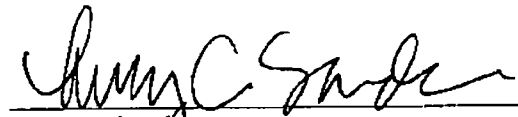
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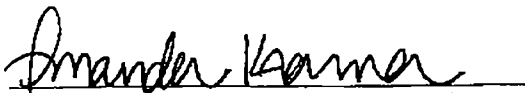
1. I am an attorney licensed to practice in the State of South Carolina.
2. I have practiced law with Nancy Bloodgood for six (6) years.
3. I have observed Ms. Bloodgood to be honest, reliable, trustworthy, diligent, and competent in her professional endeavors.
4. On the morning of October 13, 2015, Ms. Bloodgood told me that she was waiting on a call from Jerry Theos. She further communicated to me that she was worried she would miss the call from Mr. Theos while she was in a meeting with a potential client. Before walking into her meeting, Ms. Bloodgood asked me to interrupt her meeting if Mr. Theos called or take the call myself and make notes of his suggested changes to the draft complaint in the Amy Kovach matter.
5. Mr. Theos called while Ms. Bloodgood was meeting with the potential client. I spoke with him at length and made detailed notes regarding his suggested changes to the Complaint. My notes are attached as Exhibit A.
6. It is my recollection that Mr. Theos' suggested changes were fully incorporated into the Kovach complaint before it was filed.
7. Some of Mr. Theos' suggested changes were minor. For example, my notes reflect that he suggested changing "he" to "she" in draft paragraph 132, deleting an extra preposition ("to") in draft paragraph 135, and correcting a typo related to subject/verb agreement in the prayer for relief.
8. Some of Mr. Theos' suggested changes were substantive. The paragraph numbers in my notes referred to a draft complaint and, thus, do not match the paragraph numbers in the final Complaint. However, the incorporated changes from Mr. Theos are evident if my notes (Exhibit A) and the Final Complaint (Exhibit B) are carefully compared. The following comparisons demonstrate some of the incorporated changes:
 - a. My notes reference changes to draft paragraph 106. These changes are found in final paragraph 104. "Criminal attorney" was changed to "criminal defense attorney" and facts were edited to reflect that the analyst who reviewed the documents was a "forensic analyst/scientist" and opined that the document was not backdated.
 - b. My notes reference a change to draft paragraph 108. These changes are found in final paragraph 106. The clause "had to be dismissed" was replaced with "and were later dismissed."
 - c. My notes state that the clause "and it was never in her possession" should be added to draft paragraph 110. This change is shown in final paragraph 107.

- d. My notes reflect that draft paragraph 109 should be deleted. This paragraph was deleted as evidenced by the fact that the Final Complaint does not contain a paragraph in between draft paragraph 108/final paragraph 106 (which includes the clause "and were later dismissed") and draft paragraph 110/final paragraph 107 (which includes the clause "and it was never in her possession").
- e. My notes include edits to draft paragraph 111. These are reflected in final paragraph 108.
- f. The suggested changes to draft paragraph 114 are found in final paragraph 111. From reviewing my notes and the Complaint, it appears that the clause "and the Attorney General's office" may have been inadvertently left in this paragraph, but I do specifically recall adding the last sentence Mr. Theos suggested related to the indictment being false and unfounded and ultimately being dismissed. I specifically recall Mr. Theos adding this sentence because he had already made a similar change in other paragraphs (in which he suggested that the Complaint use the terms "were dismissed" as opposed to "had to be dismissed").
- g. The suggested changes to draft paragraph 115 are found in final paragraph 112.
- h. The suggested changes to draft paragraph 180 are found in final paragraph 177.

FURTHER DEPONENT SAYETH NOT.


Lucy C. Sanders

SWORN AND SUBSCRIBED BEFORE ME
THIS 13 DAY OF SEPTEMBER 2016.


NOTARY PUBLIC FOR THE STATE OF
SOUTH CAROLINA
My Commission Expires: 4/23/23

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS FOR
THE NINTH JUDICIAL CIRCUIT

Amy Kovach,

Case No.: 2015-CP-8- 2380

Plaintiff,

vs.

Joshua S. Whitley,

Defendant.

Joshua S. Whitley,

Defendant/Counterclaimant

vs.

Amy Kovach,

Plaintiff/Counterclaim
Defendant.

Affidavit of Nancy Bloodgood, Esquire

Joshua S. Whitley,

Defendant/Third-Party
Plaintiff,

vs.

Rodney Thompson,

Third-Party Defendant.

FILED
16 NOV 16 PM 3:58
CLERK OF COURT
BERKELEY COUNTY, S.C.

Personally appeared before me, Nancy Bloodgood, Esquire, who first being duly sworn deposes and states that:

THE KOVACH REFERRAL AND THE GRIEVANCE PROCESS

1. On September 3, 2015, I received a referral from an attorney who I frequently work with. He asked if I would meet with Amy and Chris Kovach to discuss

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assisting with a grievance to be filed with the Berkeley County School District in light of her having been told by the Interim Superintendent the day before (on September 2, 2015) that he was going to recommend her termination to the District's Board. I was personally unfamiliar with the matter or the parties involved except for what I knew generally based on the news reports.

2. When we met, I was informed by Ms. Kovach and her husband, who is a lawyer, that although Mrs. Kovach's employer Berkeley County School District had paid the attorney fees associated with the criminal matter on the basis that Ms. Kovach had acted in good faith and within her job duties, the District was now going to terminate her before her employment contract was over because she had pled guilty to two (2) criminal charges. After meeting with Mr. and Mrs. Kovach, I agreed to help with the grievance matter and possible subsequent legal action. Ms. Kovach had brought voluminous documents with her and I reviewed those documents and met with her and her husband for almost two hours. After this meeting, I called the District's lawyer to ask for an extension and emailed the criminal lawyer who had represented Ms. Kovach (Jerry Theos) for more information. The next day I reviewed more documents from Ms. Kovach including chronologies associated with the criminal matter; expert opinions prepared by Judge Vic Rawl, John Freeman, and a forensic computer expert; criminal pleadings; pertinent Berkeley County School District's Policies and Grievance procedures; District Board minutes; emails; invoices; a Terry Hardesty Resolution; Referendum documents; the Personnel Handbook; Ms. Kovach's contract; texts; Facebook messages; and correspondence from the District to Ms. Kovach.
3. Ms. Kovach's grievance package was due to the District Board within five (5) days, or by Monday September 8, 2015 per the District's Grievance Policy. On September 4, 2015, Kathy Mahoney (who I knew represented the District Board) sent me a copy of the Interim Superintendent's recommendation to terminate Ms. Kovach and confirmed I could not have an extension to file the grievance Memorandum. (Ex. 1.) I therefore worked over six hours that weekend to timely prepare a Memorandum in advance of the District's hard deadline. Ms. Kovach prepared an Affidavit, which I revised and she then signed. I revised and finalized the Grievance documents and sent them to Ms. Mahoney on September 8th.
4. I worked diligently to learn the key facts and posture of the case to meet the Board-set deadline. The Grievance Memorandum was intended for the Board Members only. Ms. Kovach provided me with the substance of her affidavit. Her Affidavit was drafted prior to any criminal hearing transcripts being made public, and she and her husband, who had been very involved in the criminal process, read and revised her Affidavit and the Memorandum. In preparing the Grievance Affidavit and Memorandum, I relied entirely on my client's statements and the documents she provided me because, again, as there was no transcript of the recent criminal hearing yet available. In addition to Ms. Kovach's statements, I further relied on statements made by her husband who happens to be an

attorney in town.¹ In getting to know him, I found him to be an excellent narrator and I believed then, and still believe, his rendition of the facts from the criminal proceedings was accurate. They both insisted Ms. Kovach had never done anything independently from or other than what she was asked by the District's Board and District administrators. The Kovachs' contention that Ms. Kovach was acting in accordance with the District Board and Administrators' instructions was supported by all of the documents they provided to me.

5. I timely sent the grievance brief, Ms. Kovach's Affidavit, and various exhibits to the School Board's attorney, Kathy Mahoney. I requested that these materials be provided to the School Board and also requested that the Board consider a public hearing. The request for a public hearing was denied almost immediately. I also requested that one of the Board members (Mac McQuillin, an attorney in Howell Morrison's law firm Haynesworth Sinkler Boyd) recuse himself because he had publicly stated his opinion that Ms. Kovach should be terminated by way of the news media. (Although, I don't know if Mr. McQuillin ever actually recused himself from the matter.)
6. I did not receive a formal letter denying Ms. Kovach's grievance appeal; however, she knew immediately after the Board meeting on the evening of September 8, 2015 that the Interim Superintendent's recommendation for termination had been upheld by the Board. The next day, the School Board's attorney Kathy Mahoney called me and confirmed the Board had upheld Ms. Kovach's termination.

MY ACTIONS, DUE DILIGENCE, AND EFFORTS LEADING UP TO THE COMPLAINT

7. After September 9, 2015, I spoke with Ms. Kovach and her husband about next steps. About a week later, the clients decided to pursue litigation and I agreed to assist based on the law and the facts before us. I began working on Ms. Kovach's civil complaint based on the information provided to me by Ms. Kovach and her husband. In addition, throughout my drafting process, I reached out to her criminal attorney Jerry Theos, Joe Griffith (who represented the former Superintendent), and to others involved to ask questions or to request information. The individuals were professional and responsive to my specific requests. My partner and I also spent a great deal of time researching the applicable law.
8. I subsequently received a formal letter signed by the District Board Chair, who is not an attorney, dated September 16, 2015. (Ex. 2.) The letter formally terminated Ms. Kovach and cited several legal cases, including one which compared Ms. Kovach's situation to the *Matter of Lee* case. (Ex. 3.) I pulled the case and saw that the *Lee* case involved a 1993 magistrate who had sexually assaulted several women—the case had nothing whatsoever to do with Ms. Kovach's situation and was inflammatory in my opinion. Given my experiences

¹ Mr. Kovach, however, did not review the grievance before filing because there was not time.

working with School District attorneys in other cases, I was surprised that they would think the *Lee* case was relevant but I did not discuss the matter with them. I did not know then that the information in this letter had not come from those attorneys but, rather, from the Attorney General's Office.

9. After Ms. Kovach's grievance process concluded, a Board member contacted Mr. Kovach and told him the Attorney General's Office had provided a letter to the Board after the criminal hearing and prior to the Interim Superintendent's recommendation for termination. Even though it was apparently provided to the Board before they made their final grievance decision, I was neither told about this letter nor provided a copy. I asked one of the District attorneys for a copy, and I was surprised that they required me to make a formal FOIA request to receive it, which I did. (Ex. 4) I was further shocked to find that this seven (7) page letter (summarizing this particular Assistant Deputy Attorney General's opinion of the events involving Ms. Kovach) stated Ms. Kovach was guilty of a crime of moral turpitude. He compared Ms. Kovach to the magistrate in the *Lee* case, the same case cited by the Interim Superintendent in his subsequent September 16th letter to Ms. Kovach. (Ex. 5.) Based on these facts, I then knew that the substance of the Interim Superintendent's information had come from the Attorney General's office and not from the School Board.
10. I more than reasonably investigated the matter prior to filing the lawsuit. I met with Ms. Kovach in person 4 times (9-3-15, 9-7-15, 9-22-15, 9-23-15) and spoke with or emailed her 8 times (9-9-15, 9-17-15, 9-18-15, 9-18-15, 9-28-15, 9-30-15, 10-07-15, 10-13-15) before I filed the Complaint. In addition, I spoke with others with knowledge of the underlying facts and criminal proceedings. Copies of email communications relating to the same, including circulation of the draft Complaint, are in Exhibit 6.
11. Ms. Kovach was eager to file the suit, and I let her know that I was waiting to file to be sure there were no additional suggested changes from the criminal counsel who were reviewing the Complaint for accuracy. Additionally, I understood that the criminal transcript would be transcribed shortly and was waiting for Jerry Theos to forward a copy of it to me so that I could review before filing, which I did.
12. On October 13, 2015, Jerry Theos' assistant sent me the transcribed copy of the criminal hearing. (Ex. 6.) I reviewed the transcript in full, again went through the Complaint – piece by piece (my then-associate and now-partner had a long telephone call with Jerry Theos on October 13th (see notes in Ex. 6). Mr. Theos provided my office with those allegations and factual recitations which were inaccurate and recommended that they be deleted. He further reiterated that we should review the criminal transcript before filing, which we did.

13. Prior to filing, the Complaint had been revised eight times: September 18th; September 21st; September 22nd; September 23rd; September 28th; September 29th; October 10th; and October 14th.
14. A copy of my billing records, a sample of post-grievance/ pre-suit related emails, and my partner's notes from her call with Theos are attached hereto as Exhibit 6. Throughout this time, my client and her husband were providing additional information and answering questions I had. I was careful in seeking out additional information to confirm the pleading was accurate. In addition, I identified witnesses and confirmed which ones my client and her husband felt would tell the truth under oath.
15. The final version of the Complaint was filed on October 14, 2015. It was filed for the primary purpose of adjudicating the merits of the civil matter. There were ample factual allegations (supported by documents, emails, and witness statements) alleged in the Complaint to support the elements for a cause of action for civil conspiracy against the Whitley Defendants. See, e.g., *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 SC 559, 626 SE 2d 884, 886 (2006) (the elements of a civil conspiracy claim are a combination of two or more persons who intend to injure another person and cause her special damage.)
16. The type of conduct alleged by Ms. Kovach to support her civil conspiracy claims is similar to conduct alleged in other reported civil conspiracy cases. In *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 326, 701 S.E.2d 39, 46, (Ct. App. 2010), a civil conspiracy claim was stated when "[i]t may be reasonably inferred from the complaint as a whole that Cricket Cove is alleging Respondents had a personal stake in preventing Cricket Cove from moving forward with its development plans." In *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. at 545, 677 S.E.2d at 579, the allegation of conspiracy concerned an agreement between two entities to sell property at an inflated price. In *Coleman v. Stevens*, 124 S.C. 8, 117 S.E. 305 (1923), the Court found that documents did constitute evidence of a conspiracy to breach the confidential relations of persons which resulted in the conversion of money. In *Gynecology Clinic, Inc. v. Cloer*, 334 S.C. 555, 556, 514 S.E.2d 592, 592, (1999), a civil conspiracy was alleged against appellants after appellants picketed respondent, an abortion services provider.
17. Based on this case law, a reasonable attorney in the same circumstances would believe that the conspiracy claim here was not intended merely to harass or injure Whitley, but was in fact a valid and well supported claim against Whitley.
18. The following allegations reasonably support Ms. Kovach's allegation of civil conspiracy against Josh Whitley and are separate and apart from the Attorney General's actions:

- a. Par. 41: Whitley led a group opposing the BCSD (Berkeley County School District) referendum – during part of the time he opposed the referendum, he was Chair of the Berkeley County Republican Party.
- b. Par. 121: The Berkeley County Republican Party made defamatory statements together about Plaintiff on its various websites such as she doesn't know whether to defecate or go blind and isn't it grand when a plan comes together.
- c. Par. 124: Some of these website comments were made by Whitley who also spoke out against Plaintiff in public.
- d. Par. 48: Whitley created a statement for a Board member (Scott Marino's mother) to read to the BCSD Board which misrepresented facts about a video Plaintiff had prepared.
- e. Par. 53: Whitley demanded an apology from the Superintendent in October of 2012 for the District's use of public funds to support the referendum.
- f. Par. 54-55: Whitley sent a FOIA to the BCSD requesting Plaintiff's emails regarding the referendum.
- g. Par. 56: Whitley chose some of the emails he received to create a power point harmful to the District and Plaintiff, which he then showed to the Republican Party and the Attorney General's office.
- h. Par. 58, 159: Thereafter, the Republican Party passed a resolution asking the Attorney General's office to prosecute any BCSD employees who violated the ethics laws.
- i. Par. 60: Plaintiff was assured by BCSD attorneys that Joshua Whitley was "family" and his actions were self-serving to further his career so Plaintiff did not require separate legal counsel.
- j. Par. 69: Whitley directed his complaints to a close friend of his in the Attorney General's office to receive special attention.
- k. Par. 124-125: When the BCSD refused to allow Terry Hardesty to disparage Plaintiff at Board meetings, Whitley sued the School District on behalf of Hardesty.

- i. Par. 159-160: Defendants Joshua S. Whitley, Terry Hardesty, Scott Marino, Karen Whitley, and The Berkeley County Republican Party, LLC conspired with each other to harm Plaintiff. Specifically, after they worked with each other to file a complaint with the Attorney General, they took actions to ensure a Resolution was passed by The Berkeley County Republican Party, LLC encouraging the Attorney General to prosecute Plaintiff. These Defendants played an active and inappropriate role in SLED's investigation and upon information and belief these Defendants provided false statements to SLED and the Attorney General.
- m. Par. 161: Whitley suggested stories and provided false information to the press.
- n. Par. 170: Whitley repeatedly commented publically on the SLED investigation to influence it.
- o. Par. 162: Whitley communicated directly with BCSD Board members in order to turn them against Plaintiff.
- p. Par. 163: Senator Larry Grooms stated publicly regarding Plaintiff, "Josh [Whitley] has got the goods on her."
- q. Par. 171: Whitley threatened to sue a referendum campaign volunteer if the volunteer continued to support Plaintiff.
- r. Par. 173: Whitley sent FOIAs for the emails of BCSD employees who publically expressed support for Plaintiff.
- s. Par. 178: Whitley's actions were taken with the intent of intimidating and harming Plaintiff.
- t. Par. 179: Plaintiff has suffered special damages (injury to her career).

19. Further, the following allegations support a claim of civil conspiracy against Karen Whitley:

- a. Par. 43: Shortly after Dr. Rodney Thompson was hired as Superintendent, Defendant Karen Whitley had been laterally transferred to a position with less authority and she had expressed dissatisfaction publicly with Dr. Thompson as a result of that move.

- b. Par. 44: Upon information and belief, Defendant Karen Whitley believed one of her direct reports, Gwen Scarborough, should have been assigned Plaintiff's job responsibilities and accordingly, Defendant Karen Whitley held a personal vendetta against Plaintiff.
 - c. Par. 45: Upon information and belief, one of Defendant Karen Whitley's objectives was to cause harm and embarrassment to her supervisors Mr. Franchini and Dr. Rodney Thompson so she would be able to rise in leadership at Defendant BCSD.
 - d. Par. 47: In October of 2012, Plaintiff showed a draft of the video she had been working on for the School District to Defendant Karen Whitley. Plaintiff showed no one else the draft video. Defendant Karen Whitley complimented Plaintiff on the video.
 - e. Par. 48: On information and belief, Defendant Karen Whitley then misrepresented this video to her son, Defendant Joshua S. Whitley, because at the next BCSD Board meeting Defendant Board Member Donna Marino, who is Scott Marino's mother read a prepared statement created by Defendant Joshua S. Whitley to the BCSD Board about a video and in the statement she asserted Plaintiff had created it for the bond referendum.
 - f. Par. 166: Defendant Karen Whitley advocated and spoke publicly in favor of the Referendum as an employee of the District, knowing that the speeches she gave had been written by Plaintiff.
 - g. Par. 167: As evidenced by multiple emails, Defendant Karen Whitley used public resources (employees and copying machines and computers) while negotiating a lease of her private property in Moncks Corner during work hours.
 - h. Par. 168: Defendant Joshua S. Whitley exchanged many emails with his mother about leasing her private property while she was at work; Defendant Karen Whitley was clearly repeatedly and often using BCSD resources to conduct her private business.
20. The Whitley Defendants do not offer any reason why I would harass them. I did not file this Complaint for the purpose of harassing the Whitleys. In fact, I had never met either of the Whitley Defendants at the time the lawsuit was filed. I only knew of Mr. Whitley and his actions through his internet posts, emails, and the documents I reviewed prior to filing the suit. I never met or spoke to Mr. Whitley prior to filing the Complaint and knew nothing about him other than he was a young attorney from Berkeley County who was active in local politics. In fact, I was not involved in Berkeley County politics at the time the Complaint was prepared and had no involvement in the criminal proceeding that preceded this civil case. I knew none of the parties involved in the previous criminal proceeding,

including Ms. Kovach. As previously stated, I was retained in September of 2015. Further, the case was referred to me by another attorney – I did not seek out Ms. Kovach or this case.

21. Josh Whitley's allegation (Ex. B to his Motion for Sanctions) that the Complaint contradicts the criminal transcript is wrong. I will explain each part of his Ex. B:

- a. In Paragraph 38, I allege the video Plaintiff was working on was not prepared in anticipation of the Referendum. This statement is true. The video was prepared prior to the District voting on to hold a Referendum, but it was not originally prepared for that purpose. The Attorney General states in the transcript there are two videos and that they are the same. The Attorney General states his opinion of what he saw in the video and it seems that Ms. Kovach agrees that is his opinion. Throughout the transcript it is very difficult to understand what facts Ms. Kovach admitted to and which statements are the Attorney General's opinion.
- b. In Paragraph 40, I allege Plaintiff never personally profited from her position with the Berkeley County School District. That is true. There has never been an allegation that she realized any monetary gain through her position which is what the Ethics Act is about. The fact that she wanted to do a good job and felt her work on the Referendum was important to her career has nothing to do with violating the Ethics Act.
- c. In Paragraph 57, I allege Plaintiff responded to questions about the Referendum and prepared Board members for presentations. This is true; that was an important part of her job.
- d. In Paragraph 83, I allege no public funds were used to create a Referendum video. This is true as the video at issue had been prepared for another purpose before the Referendum was an issue. Technically, everything Ms. Kovach and all other District employees did as part of their jobs is supported with public funds but that does not mean every public employee is always violating the Ethics Act while working. Had Mr. Whitley filed a Motion to Strike or Motion to Make More Definite and Certain, I may have clarified this Paragraph, but he did not.
- e. In Paragraph 106, I state that Plaintiff was retaliated against by the Attorney General's Office. I believe this to be true based on numerous conversations I had with her criminal lawyers, and this allegation had nothing to do with the charges Ms. Kovach pled guilty to. I read the transcript to communicate that even though there were only two charges against Ms. Kovach and three had been dropped, the Attorney General was arguing that the common law claim could incorporate the three charges that had been dropped. I interpreted this as error because three charges had clearly been dropped as per other parts of the transcript and

per my conversations with Ms. Kovach's criminal attorney. It was and is my good faith belief that the other attorneys I was consulting also reached this conclusion.

- f. In Paragraph 109, I state that a certain document's origin was disputed and refuted, both of which are true facts. Although the Attorney General discussed a forgery matter, that charge had been dropped. And, again it's confusing, but Ms. Kovach agrees with the Attorney General when he states he is talking about matters in the "original charges" that were not before the court.
- g. In Paragraphs 111-112, I state the indictments that were dropped were false and unfounded. This is true based on the emails and pleadings provided to me in addition to my conversations with Ms. Kovach's criminal counsel. The statement "For the Plaintiff's Counsel to now allege, without ever reading the transcript or attending the hearing, that the Attorney General knowingly submitted false evidence is the highest offense to our system and to the rule of law" at the end of Mr. Whitey's chart is argumentative and wrong; I have stated multiple times that I read the criminal transcript before filing the Complaint so I don't know why Mr. Whitley keeps making this false statement. I did not attend the Rule to Show Cause Hearing because Ms. Kovach had not retained me for that matter (she had retained Andy Savage.)
- h. In Paragraphs 113-117, I allege facts about the smurfing issue, all of these allegations show that Ms. Kovach's actions were done at the bequest and in accordance with her supervisor's instructions. Reading the rambling testimony by the Attorney General it is very difficult to determine what is fact and what is argument. Based on my multiple meetings with the client, her husband, her criminal counsel, and other attorneys consulting on the matter, I reasonably believed the facts proffered by Ms. Kovach regarding this smurfing issue were accurately stated in the Complaint to show that her actions were taken as an agent of the District.
- i. In Paragraph 123, I allege why Ms. Kovach pled guilty. The statement is a true statement of her personal health and has nothing to do with the fact that was competent stand trial.

ANDY SAVAGE'S APPEARANCE AND FALSE STATEMENT AT THE RULE TO SHOW CAUSE HEARING

22. Mr. Savage's assertions in the February 8, 2015 Rule To Show Cause hearing regarding my actions, due diligence, and the Complaint were false. In fact, I had met with and talked to Mr. Savage's law associate several times before the February 8th hearing and generally discussed what actions had been taken before the Rule to Show Cause had been filed. However, Mr. Savage's

law associate did not "investigate" or ask any questions about the precise actions taken by me such as what documents were reviewed, what due diligence was performed, what legal research performed, or how much time was spent preparing and revising the Complaint before it was filed. If he had, he would have been provided the information in this Affidavit, but he did not. Further, Mr. Savage did not have a single conversation with me about this case. Mr. Savage erred when he stated to the Court on February 8, 2015, "It was clear from our analysis that the time that a civil suit was filed, no due diligence, none, was performed." (Transcript, p. 8, Ex. 7.) Had Mr. Savage or his legal associate made any investigation at all to determine the facts, they would have known the following facts:

- My time records indicate I spent more than 37 hours researching, reviewing documents (including the criminal hearing transcript), speaking to other lawyers about the underlying criminal action, and preparing drafts over the course of four (4) weeks before filing the 31 page Complaint.
- As reflected in an email, I held off filing the Complaint, contrary to the written request of Ms. Kovach, until I had received and reviewed the criminal transcript and had allowed other attorneys to review the proposed Complaint.

VOLUNTARY DISMISSAL

23. Based on strategic decision between myself, the client, and her then-criminal counsel, all defendants (with the exception of Josh Whitley who had answered) including Defendant Karen Whitley had been dismissed without prejudice as a party on November 23, 2015. (See Karen Whitley Dismissal, Ex. 8). On that date, the Dismissal was filed by hand at the Berkeley County Clerk of Court's office. A copy of the same was placed in the United States Mail the next day, addressed to Howell Morrison. Contrary to Mr. Morrison's contention that he was not properly served with the Rule 41 (a) (1) Notice of Dismissal, service was complete at the time of mailing per S.C.R.C.P., Rule 5 (b) (1) since Mr. Morrison was the attorney of record and the filed Notice was placed in the US mail to his office. Even if there was no certificate of service, the cover letter had a date of November 24, 2015 and it was mailed on November 24, 2015, so it was clearly mailed before December 1, 2015. Under the Rules, Plaintiff's Dismissal was clearly served before an answer was filed and served on December 1, 2015.

24. Howell Morrison had actual authority to accept pleadings on behalf of his client and per S.C.R.C.P., Rule 5, and service is made by mailing a copy of the pleading to the attorney at his last known address. Therefore, as of November 24, 2015, Plaintiff's Voluntary Dismissal was filed and served on Defendant Karen Whitley and she was no longer a party to this action.

RULE 11

25. Attorney Josh Whitley did not inform me of the Motion for Sanctions or Amended Motion for Sanctions or attempt to discuss the merits of the Motion with me before filing it. Had he done so and had we been able to civilly discuss the aspects of the Complaint he takes issue with or the merits of his position or had I had the chance to communicate to him my due diligence and reasonable investigation behind Ms. Kovach's allegations, our consultation could have served a useful purpose.

26. Regarding my discussion with Howell Morrison set forth in his Rule 11 "certification," he did not inform me that he would be filing a Motion for Sanctions. This is based on my recollection. In addition, I retained minutes of my meeting with him. Mr. Morrison merely told me Karen Whitley was related to an attorney at Haynesworth Sinkler Boyd and she was a very nice person. He asked that I dismiss the Complaint against her. I told him I would talk to my client again, which I did. Ms. Kovach and her husband were adamant that they had a reliable witness who saw Ms. Whitley going in and out of Ms. Kovach's office while Ms. Kovach was on leave with papers when she had no right to be in Ms. Kovach's office and that shortly thereafter new charges were filed against Ms. Kovach that were later dropped. I told Mr. Morrison I may reconsider after a few depositions had been taken but that based on this witness' testimony and emails I had again reviewed, it appeared Ms. Whitley was involved. There was no discussion of the present Motion or of any substance contained in the present Motion.

27. The present Motions for Sanctions are the first Motions for Sanctions that have ever been filed against me in 33 years of practice.

FURTHER AFFIANT SAYETH NOT.

Nancy Bloodgood

NANCY BLOODGOOD

SWORN TO AND SUBSCRIBED

before me this 19 day of August, 2016.

Manda Kanner
Notary Public for the State of South Carolina
My Commission Expires: 4/23/23

CHILDS & HALLIGAN

A PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

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†Certified Specialist in Employment
and Labor Law
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**Also admitted to North Carolina
***Also admitted to Missouri
***Also admitted to Georgia

September 4, 2015

VIA E-MAIL AND U.S. MAIL

Nancy Bloodgood, Esq.
Foster Law Firm, LLC
895 Island Park Drive, Suite 202
Charleston, SC 29492

Re: Berkeley County School District/Amy Kovach

Dear Nancy:

I am writing to follow up our telephone conversation in which you advised me that you have been retained to represent Amy Kovach regarding her employment matter with Berkeley County School District. Attached is a copy of the Interim Superintendent's recommendation regarding Ms. Kovach's employment, which I just received. I would appreciate your ensuring Ms. Kovach receives a copy of this letter. As indicated in the letter, you can submit any information you would like for the Board to consider at its meeting on September 8, 2015, to me and I will get it to the District, or you can submit it directly to the District, whichever is easier for you.

With kind regards, I am

Sincerely yours,

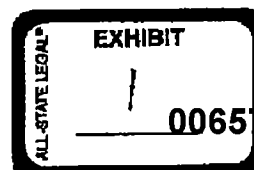


Kathryn Long Mahoney
kmahoney@childs-halligan.net

/slw

Enclosure

c: John M. Reagle, Esq. (w/o encls.)





Dr. Michael Turner, Interim Superintendent

September 4, 2015

Mrs. Amy Kovach
212 Clouter Creek Drive
Charleston, South Carolina 29492

Dear Mrs. Kovach:

This letter is a follow up to the September 2, 2015 conference I held with you at the Berkeley County School District office building. As I shared with you during the conference, your actions provide grounds for immediate dismissal as outlined in Policy GCN (Classified Personnel Separation). Therefore, it is my recommendation to the Board that you be terminated from your employment with Berkeley County School District as the Director of Communications and Community Relations.

The basis for my recommendation is that on August 28, 2015, you pled guilty to a charge of Misconduct in Office, and that you covered up your actions with dishonesty.

If you wish to oppose or contest my recommendation to the Berkeley County Board of Trustees, prior to Board action, please advise me in writing by noon on Tuesday, September 8, 2015, and include any information you want the Board to consider at its meeting that evening.

Sincerely,

Michael M. Turner, Ph.D.
Interim Superintendent

c: Personnel File

229 E. Main Street, P.O. Box 608 ~ Moncks Corner, South Carolina 29461 ~ 843-899-8600

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12580

Berkeley County Board of Education
229 E. Main Street, P.O. Box 608 - Moncks Corner, South Carolina 29461 -- 843-899-8600

September 16, 2015

Personal and Confidential

Mrs. Amy Kovach
c/o Nancy Bloodgood, Esq.
895 Island Park Drive, Suite 202
Charleston, SC 29492

Dear Mrs. Kovach:

This is to advise you that at its meeting on September 8, 2015, and after review of all information you submitted to the Berkeley County Board of Education ("Board"), the Board voted to terminate your employment with the Berkeley County School District ("District") for cause effective September 8, 2015. Additionally, the Board voted to deny your grievance. As authorized by the Board in its motion to terminate your employment, this letter sets forth the basis for the Board's decision.

On April 21, 2015, you entered into a contract with the Board for the 2015-2016 school year for the position of Director of Communications and Community Relations for the District. (Attachment 1) Critical to serving as Director of Communications and Community Relations are honesty and credibility- both internally with District staff and the Board as well as externally with the community and the District's stakeholders.

At that time, you were under indictment for forgery, among other accusations, to which you had entered a plea of not guilty. Subsequently, the Board took notice of your guilty plea entered in the Circuit Court of South Carolina on August 28, 2015 to indictment 2015-1073. In pleading guilty to this indictment, you admitted that you "continuously used public resources and time to influence the outcome of a bond referendum, and covered up [your] actions with dishonesty." Under Board policy GCN, dishonesty is stated as a ground for immediate dismissal. (Attachment 2)

After your guilty plea to misconduct in office involving dishonesty, the District's Interim Superintendent met with you on September 2, 2015 for at least an hour. During the conference, the Interim Superintendent discussed with you that dishonesty in connection with your employment with the District constitutes grounds for immediate dismissal, and he offered you the opportunity to explain your actions, which you did. Following the Interim Superintendent's meeting with you, he issued a written recommendation to the Board that you be terminated from your employment with the District. (Attachment 3)



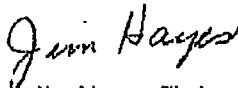
Thereafter, the matter of the termination of your employment came before the Board at its regular meeting on September 8, 2015. Additionally, you filed a grievance contesting the Interim Superintendent's recommendation on September 8, 2015. (Attachment 4) At its meeting on September 8, 2015, the Board considered the grievance materials submitted by your attorney, Nancy Bloodgood, Esq., the recommendation of termination letter submitted by the Interim Superintendent, and took notice of your guilty plea admitting misconduct in office and covering up your actions with dishonesty. Following the Board's consideration in executive session of whether termination of your employment was appropriate under the circumstances, the Board voted 8-0 in public session to terminate your employment for cause in light of your admitted dishonesty.

The Board understands that you now contend you did not act with dishonesty. However, a plea of guilty is a confession of guilt, and as long as a defendant has entered a plea freely and voluntarily, an admission of guilt (in this case to acting with dishonesty) fully and fairly litigates the matter. Accordingly, a defendant who enters a guilty plea may be collaterally estopped and precluded from re-trying the same issue in a subsequent civil proceeding. *Zurcher v. Bilton*, 666 S.E. 2d 224 (S.C. 2008).

You have also asserted that your employment contract does not provide for termination. The Board disagrees. First, your contract states: "[t]he employee also agrees to comply with all district policies, rules, and regulations." Policy GCN plainly provides for termination and dismissal from employment based on dishonesty, in addition to other acts of serious misconduct as determined by the administration. Moreover, state law provides that any employment contract for a definite term may be terminated for just cause. *Shivers v. Harland Co.*, 423 S.E. 2d 105 (S.C. 1992). Misconduct in office involving public funds and dishonesty can be a crime of moral turpitude constituting just cause for termination. *Matter of Lee*, 437 S.E. 2d 85 (S.C. 1993).

Accordingly, in terminating your employment for cause the Board concluded: you acted in connection with your job responsibilities with dishonesty; honesty is an important aspect of your position as Director of Communications and Community Relations; and your contract is immediately terminable for cause based on dishonesty. The Board regrets that its employment relationship with you has ended in this unfortunate manner, and wishes you success as you move forward.

Sincerely yours,



Jim Hayes, Chair
Berkeley County Board of Education

Encl.

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313 S.C. 142, *; 437 S.E.2d 85, **;
1993 S.C. LEXIS 198, ***

In the Matter of J. Archie Lee, former Magistrate for Horry County, Respondent.

Opinion No. 23940

SUPREME COURT OF SOUTH CAROLINA

313 S.C. 142; 437 S.E.2d 85; 1993 S.C. LEXIS 198

August 17, 1993, Submitted
October 4, 1993, Filed

DISPOSITION: [***1] PUBLIC REPRIMAND**CASE SUMMARY**

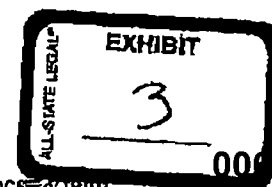
PROCEDURAL POSTURE: In a judicial disciplinary matter, respondent, a former magistrate, admitted that he committed acts constituting judicial misconduct. He consented to a public reprimand after using his office to obtain sexual favors and making improper sexual advances to females.

OVERVIEW: The magistrate pled nolo contendere or guilty to numerous counts of misconduct in office and assault and battery of a high and aggravated nature. He received a suspended sentence and probation. The court accepted the magistrate's admission and publicly reprimanded him, holding that he violated the Code of Judicial Conduct. He was guilty of judicial misconduct under S.C. App. Ct. R. 502(1)(b)(2) because public confidence in the judiciary was eroded by his irresponsible and improper conduct. The court also concluded that the fact that he used his public office in an attempt to obtain sexual favors demonstrated a vileness and baseness sufficient to make them crimes of moral turpitude in violation of S.C. App. Ct. R. 502(1)(b)(1). Thus magistrate no longer held public office; thus, the most severe sanction available was a public reprimand.

OUTCOME: The court accepted the magistrate's admission and publicly reprimanded him.

CORE TERMS: reprimand, aggravated, judicial misconduct, misconduct in office, assault, sexual, pled, assault and battery, crimes of moral turpitude, indictment, impropriety, probation, publicly

LEXISNEXIS® HEADNOTES



Legal Ethics > Judicial Conduct 

HN1 See S.C. App. Ct. R. 501, Canon 2, cmt.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Assault & Battery > Aggravated Offenses > General Overview 

Legal Ethics > Judicial Conduct 

HN2 While the crimes of misconduct in office, assault of a high and aggravated nature, and assault and battery of a high and aggravated nature are not always crimes of moral turpitude, they may be depending on the facts as particularized in the indictment. More Like This Headnote

Legal Ethics > Judicial Conduct 

HN3 When indictments to which a magistrate pled clearly indicate he used his public office in an attempt to obtain sexual favors, the facts demonstrate a villainess and baseness which are sufficient to make them crimes of moral turpitude. More Like This Headnote

COUNSEL: Attorney General T. Travis Medlock  and Assistant Attorney General James G. Bogle , both of Columbia, for Complainant.

L. Morgan Martin , of Conway, for Respondent.

JUDGES: Chandler, Finney, Jr., Toal, Moore

OPINION BY: PER CURIAM

OPINION

[*143] [85] PER CURIAM:** Respondent served as a Magistrate for Horry County from 1985 until his resignation on December 4, 1992. In this judicial disciplinary matter, respondent admits that while serving as a Magistrate he committed acts constituting judicial misconduct. He consents to a public reprimand. We accept respondent's **[**86]** admission and publicly reprimand him.

Respondent pled *nolo contendere* or guilty to six (6) counts of misconduct in office, two (2) counts of assault and battery of a high and aggravated nature, and one (1) count of assault of a high and aggravated nature. The charges of misconduct in office arose from his using his office to obtain sexual favors from at least twelve different women whose contact with respondent was initiated because he was a Magistrate. The assault charges, which were committed while respondent was acting in his capacity as a Magistrate, **[***2]** arose when he made improper sexual advances to females.

Respondent was sentenced to three years, suspended upon the payment of a fine of \$ 500 with one year probation. The terms of his probation include 400 hours of public service, mandatory counseling and written reports to the trial judge concerning completion of these conditions.

The crimes respondent pled to violate the basic tenets of Canons 1 and 2 of the Code of Judicial Conduct contained in Rule 501, SCACR. A portion of the commentary to Canon 2 is especially applicable here:

^{HN1}Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety.

Therefore, respondent has violated the Code of Judicial Conduct and is guilty of judicial misconduct under Rule 502(1)(b)(2), SCARC.

Further, ^{HN2}while the crimes of misconduct in office, assault of a high and aggravated nature, and assault and battery of a high and aggravated nature are not always crimes of moral turpitude, they may be depending on the facts [*144] s particularized in the indictment. Cf. *State v. Bailey*, 275 S.C. 444, 272 S.E.2d 439 (1980). [***3] Here, ^{HN3}the indictments to which respondent pled clearly indicate he used his public office in an attempt to obtain sexual favors. In our opinion, these facts demonstrate a villeness and baseness which are sufficient to make them crimes of moral turpitude. *State v. Harvey*, 275 S.C. 225, 268 S.E.2d 587 (1980). Therefore, respondent is also guilty of judicial misconduct under Rule 502(1)(b)(1), SCARC.

Since respondent no longer holds judicial office, the most severe sanction available is a public reprimand. Accordingly, we publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

A. Lee Chandler, A.C.J.

Ernest A. Finney, Jr., A.J.

Jean H. Toal, A.J.

James E. Moore, A.J.

Harwell, C.J., not participating

Source: Legal > Cases - U.S. > Federal & State Cases, Combined 

Terms: 437 SE2d 85 (Suggest Terms for My Search)

View: Full

Date/Time: Thursday, September 24, 2015 - 5:13 AM EDT

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FOSTER LAW FIRM, L.L.C.

Attorneys and Counselors at Law

PAUL J. FOSTER, JR., 1928-1999

NANCY BLOODGOOD
nbloodgood@fosterfoster.com
REPLY TO CHARLESTON

September 24, 2015

John M. Reagle, Esq.,
Childs & Halligan, P.A.
P.O. Box 11367
Columbia, SC 29211
jreagle@childs-halligan.net

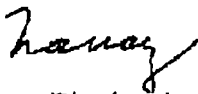
RE: FOIA request/ Amy Kovach

12588

Dear John:

Please accept this letter as a formal request under the South Carolina Freedom of Information Act, S.C. Code § 30-4-10 *et seq.* Please provide me a copy of the August 31, 2015 letter sent from the Attorney General's Office to the BCSD Board Chair and Board regarding Amy Kovach. Thank you in advance.

Sincerely,



Nancy Bloodgood

NB/alk

www.fosterfoster.com

GREENVILLE: 801 E. McRee Avenue, Suite 104 • Greenville, SC 29601 • 864-242-6200 • Fax: 864-242-6201
CHARLESTON: 808 Island Park Drive, Suite 202 • Charleston, SC 29492 • 843-072-0313 • Fax: 843-511-0313

Toll Free: 866-279-8772





ALAN WILSON
ATTORNEY GENERAL

August 31, 2015

Jim Hayes, Chairman and all Board Members
Berkeley County School Board
c/o Kathy Mahoney, Esquire
John Reagle, Esquire
Childs and Halligan, PA
PO Box 11367
Columbia, SC 29205
Via Email and US Mail

Re: State v. Amy Kovach

Dear Chairman Hayes and all Board Members,

Through letter of former Board chairman Kent Murray, as well as through written and oral requests of counsel Mahoney and Reagle, this Office has received requests from the School District for assistance in understanding the evidence in the criminal case against Ms. Kovach. Accordingly, I have prepared the following factual basis that was set forth at the plea of Ms. Kovach this past Friday, August 28, 2015. I would also suggest that you perhaps should order a transcript of the pleadings, as Judge Young was careful to ensure that Ms. Kovach admitted she was guilty of the charged crimes on multiple occasions during the plea.

In return for not pressing the two forgery indictments (2014-1403, 2015-1074) and one perjury (2015-1075) indictment, Kovach pled to two charges. First, she pled to the global common law misconduct in office indictment (2015-1079). It is important to note that this global charge covers and incorporates all the conduct at issue as originally charged, including the not pressed indictments. It reads that Defendant "continuously used public resources and time to influence the outcome of a bond referendum, and covered up her actions with dishonesty". Misconduct in office can be a crime of moral turpitude, particularly where it involves misuse of public funds or dishonesty. Matter of Lee, 313 S.C. 142, 437 S.E.2d 86, 86 (1993) ["while the crimes of misconduct in office

Page 1 of 7



... are not always crimes of moral turpitude, they may be depending on the facts as particularized in the indictment"; Ops. S.C. Atty. Gen., June 27, 2005; March 16, 2004.

Second, Ms. Kovach pled to the original ethics indictment for use of government funds to influence an election (2014-266).

As I related at the plea, we have developed over the years a three part test for assessing whether a criminal prosecution is warranted in cases like this one. First, we look to see if the individual had knowledge of the law, as we are typically not going to charge people with Ethics offenses if they did not know or should not have known of the rules. Second, we look for intentional violations of the law, and third we look for some additional evidence of criminal intent -- whether it be motive, or acts of lying, misrepresentation, and coverup. All of these are present in the instant case.

As to knowledge of the law, there was the "Referendum Do's and Don'ts" sheet prepared by the McNair firm. In an email dated 8/27/12, Kovach forwarded this very document and noted that there was a training on it with district staff in May of 2012. The sheet says employees are "strictly prohibited" from influencing an election, which it defines as "telling people how to vote -- yes or no -- or soliciting support or opposition". The sheet has a quick list of "don'ts" that says one cannot print things with government time, cannot send emails on county time, cannot use government computers or emails, cannot organize rallies, and generally cannot promote support for or against the referendum. As set forth at the plea, Ms. Kovach did those things.

Not only was Ms. Kovach familiar with the "Do's and Don'ts" sheet, but the emails discussed at the plea reflect statements such as wanting to avoid being called before the Ethics Commission in Columbia, and avoiding "crossing that very fickle line into advocacy". She also, as will be seen, told vendors on two occasions to remove references to the campaign on invoices because she could not pay them as written.

As to intentional violations of the law, there were first a number of miscellaneous matters detailed at the plea before getting to the meat of the case. There were multiple emails where Kovach was writing pro-referendum scripts for various community members. These occurred throughout August and September 2012. There were multiple emails showing where Kovach was having hundreds of yes 4 schools stickers and flyers printed on government printers and time (7/16/12, 8/22/12, 9/18/12, 9/18/12, 9/28/12). There was authorization for the storage of Yes 4 Schools yard signs at the district warehouse (9/17/12). There was an email where Kovach talked about putting a trailer or "portable" classroom on tour on Daniel Island because "fear of the dreaded trailer is the greatest motivator" (9/8/2012). And, she organized Yes 4 Schools rallies and used children as props (9/17/2012). Thus, the records reflect was not just an

isolated event here or there, but a continued and longstanding course of conduct over the months leading up to the referendum on Election Day in November 2012.

However, the meat of the case detailed at the plea addressed evidence of Ms. Kovach's conduct in arranging for a campaign video to be paid with district funds, as well as paying for campaign signs with district funds to be used in that video. First, though, was evidence of Ms. Kovach's motive that is present in her own emails. They reflect that she felt her own career and her Rodney's Thompson's career would be greatly advanced by winning the referendum. On 8/13/12, she wrote that Dr. Thompson was "very personally invested in this and knows the length of his term as superintendent very much depends on this referendum". And on 9/17/12 — right around the time of the video—she wrote that could not sleep, and that the referendum "is the ultimate test of my ability to succeed or fail".

Additionally, the emails detailed at the plea show Ms. Kovach was frustrated with the direction the campaign was going and the fact that she went from a level of control of the campaign to being marginalized by the campaign committee. On 7/20/12, she wrote that "campaign being run internally from my desk". On 8/9/12, she wrote that it was time for the committee to step up, and complains that everyone is willing to help but no one willing to lead the committee. On 8/27/12, she complained "finally the committee is taking a role". On 9/30/12, she complained about poor leadership from the chamber of commerce, and stated to Dr. Thompson "we can win this but must pull out every trick in the book, and I would walk through fire for you". Finally, on 10/8/12, she complained that campaign had marginalized her and Dr. Thompson, and had told them that it is not their campaign and they are to have no involvement. She further stated her opinion that the campaign's strategy is broken and was losing momentum fast. Finally, Ms. Kovach was aware the campaign was not exactly flush with cash.

It was in this vein that Ms. Kovach decided to make a campaign video with district funds consistent with her idea of how the campaign should be run. Ms. Kovach claimed in her statement to the press, and in her statement to SLED, that she was just making a district marketing video, that she was simply giving the campaign separate and unused excess "b-roll" footage to save time, and that the campaign asked for her to give them this excess footage. She also claimed in her statements that the signs from Nelson Printing were wanted by the campaign, and she prepared an invoice for reimbursement (as if that is somehow OK for the district to intentionally pay for campaign related items on the front end, reimbursement or not). However, the campaign workers denied they had anything to do with or knowledge of either, and Kovach's own emails and the investigation confirm this.

The evidence shows the whole process began on 9/12/12, when Kovach sends an email to Nelson Printing asking for foam core signs and a banner that are "going to

be held by students". That same day, she contacted Go To Team and videographer Jason Bennett about the project. Bennett then emailed a Go To Team staff member with his understanding of his discussion with Kovach, stating that "she is going to need two videos"; "one is a specific support the vote video and the other (using the same content) *will be a readit* used for general purposes" (emphasis added); and the "cost for project in total, which she has agreed to, will total \$4800, but split into two estimates of \$2400". Bennett explained that Kovach told him the reason the estimates needed to be split is for "budgetary permissions", as "[Kovach] is able to write checks up to \$2500 without going to committee".

Thus, the emails detailed at the plea show Kovach specifically and expressly asked Bennett to structure or "smurf" the transactions to avoid the oversight of the procurement code. Ms. Kovach told SLED and the public that she just gave the campaign extra unused and separate footage after the district video, but the email shows that the campaign video was the project, the district video was the extra, and the district video was going to be the same footage (as the district video was just a "readit" of the campaign video).

Emails show that on September 12, 2012, Kovach forwarded to Julie Hedrick a copy of the estimates from Jason Bennett, each for \$2400, and both which reflected that they were for a "support for the vote" video. Hedrick responded on 9/13/12, asking: "I thought as a school district we couldn't pay for anything towards the bond referendum?". Kovach then (by inference as interestingly it appears the original email has been deleted) got Bennett to resend the exact same estimates but with "support for the vote" removed from the description of the project. She emailed Hedrick "Julie, all fixed!". Indeed, the same thing happened on 10/3/12 with the invoice from Nelson Printing for the campaign signs paid for by the district - Kovach emailed them and asks them to change their invoice from "yes for schools" to "foam core signs", as she cannot pay it as written.

The emails and records discussed at the plea show Kovach then paid Go To Team \$2500 on 9/19/12, and then arranged to get school children to be used in the political advertisement she was producing. Indeed, the only difference between campaign and the subsequently created district video is the campaign video has an additional 44 seconds of Berkeley County school children told to yell "yes 4 schools", or holding a "yes 4 schools" banner. Other than that the videos are exactly the same, with the same footage and music. Stills from the campaign video were made and introduced as a court's exhibit at the plea hearing.

However, under the District's procurement code, three bids and written quotes are required for purchases over \$2500 from three qualified sources of supply, and the award must be made to the lowest qualified bidder. On 9/25/12, Kovach attempts to tell

the finance department that she does not need to comply because she had the estimates split, but Abrahamson responded that she cannot avoid the requirements of the code like that. Brantley Thomas tells Kovach to "hold off on any commitments" until she got three bids, and then pick the lowest. However, the records show that at this point Kovach has already paid for half of the project, and the video is already shot.

The records, evidence, and emails show Kovach then obtained sham estimates from vendors who had no idea they are wasting their time because the project has already occurred. On 9/26/12 she requests estimates from two vendors for the project. That same day she gets the campaign video from Bennett, telling him that it makes her "heart sing", but asking him to remove the district logo from the "yes 4 schools version", as she does want to be "accused of advocating". On 9/27/12 she requests an estimate from a third vendor. Also, even though she was told by finance that she could not "smurf" transactions, she asks Bennett to hold off running the second \$2500 until after October 1. On 10/1/12, the emails show she told Bennett she is ready to launch the campaign video "for the campaign internally and externally", and verified that he can run the \$2500 payment first, which is her maximum, and then \$300 after that one clears. On 10/8/12 payment of \$2500 clears, and the final \$300 runs on 10/9/12.

On 10/8/13 Kovach received an estimate from a vendor who again does not know its time is being wasted. On 10/9/12 there is a Board meeting where a board member, Donna Marko, first raises issues about a video. Two days later, Kovach is trying to get a final "sham" quote -- telling a vendor falsely that she needs an answer quickly because she has a meeting set up soon on the project. She receives a final quote that day.

Kovach had already completed the video and paid Go To Team in full at this point, but could not turn in the Go To Team estimates with the necessary paperwork as they were split into two bills of \$2400 as the records reflect she was told she cannot do. Plus, the records show the total cost ended up being \$5300, not \$4800 as reflected in the split estimates. Thus, Kovach manufactured a false and fictitious estimate to submit to finance for compliance with the procurement code. The estimate submitted for \$5300, found within the District's records on the project, apparently was made by typing in the text in the description in Word or Outlook, printing it, cutting it out and taping it over description in one of the real estimates, and then taping a blank sheet over the inconsistent \$2400 amount at the bottom to cover it up. The text has typos not found in the original two estimates, referring to the nonsensical "post production/editing" and "high definition camera audio gear" (as opposed to "post production/editing" and "high definition camera and audio gear"). It is also a different font from the rest of the document. The doctored document was then apparently "washed" through a copier, as evidenced by the degrading of the Go To Team logo. Regardless, Go To Team's accounting software used to create the real estimate could not have created the forged

one under any circumstances, and Go To Team staff specifically stated the estimate could not have come from them. The evidence reflects that Abrahamson stated the forged document would have to have come from Kovach or Hedrick, and Hedrick stated it came from Kovach. And of course, Kovach is the only one with the motive and need to turn it in, to cover up violations of the ethics act and the procurement code reflected in the record.

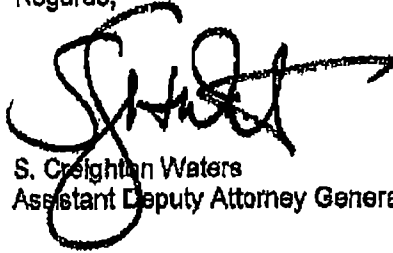
As to the invoice from Nelson Printing, Kovach was interviewed by SLED on November 22, 2015, during which she stated she had prepared a reimbursement invoice on October 2, 2012 for the campaign to pay for the campaign signs (which, as noted before, were used in the illicit campaign video). However, a review of the district's servers show the document does not show up on the system until November 25, 2013 – three days after SLED interview. Additionally, backups of Kovach's network area show that the document was not present in on October 17, 2012, but was present in February 2014. Additionally, no one else could ever recall seeing this document until its appearance after the SLED interview. This is the factual basis for the second false document created by Kovach to cover up her intentional violations of the ethics act.

Additionally, on November 22, 2013, Kovach gave SLED a detailed timeline she wrote about the video, in which she claimed that she started getting estimates before the shoot, that she picked the lowest of the estimates, that the campaign had asked for the video, that the campaign was just getting excess unused footage from a district shoot, that the videographer was instructed to use separate footage, and that she herself verified the two videos were entirely separate. None of these statements is true based on the emails, evidence, and records detailed at the plea.

This is some of the evidence set forth at the plea as the factual basis showing that the Kovach knew the law's requirements, but knowingly and intentionally broke the law. Her emails show she knew a successful referendum was good for her career and was frustrated with the campaign committee's direction, and she knowingly used government resources to advocate for Yes4Schools, and lied, misrepresented, and fabricated during and after to cover it up. After hearing the factual basis, the judge himself stated that Kovach's actions showed "lies, lies, lies", and that at every turn Ms. Kovach chose deceit over the truth. Moreover, as the case continued to be investigated, we uncovered evidence in other instances where it appears Ms. Kovach altered or created invoices or estimates outside of the bond referendum. Most of the evidence in the case comes from the District's own email and financial records.

Thank you for your attention to this matter, and please do not hesitate to contact me with any questions or concerns.

Regards,

A handwritten signature in black ink, appearing to read "S. Waters", with a long horizontal flourish extending to the right.

S. Creighton Waters
Assistant Deputy Attorney General

Amy Kovach
212 Clouter Creek Drive
Charleston SC 29492

Page: 1
February 08, 2016
Our File No. 12586-0000P
Statement No: 7

DRAFT STATEMENT-IN HOUSE USE!!!

		Code	Hours
09/03/2015	NB	Meeting with client; Review documents	1.80
	NB	Telephone conference with Kathy; Email to Amy and Jerry Theos; Review documents	0.70
08/04/2015	NB	Receive and review voluminous documents from Jerry Theos and documents from Amy; Receive and review emails from Kathy Mahoney	1.20
08/07/2015	NB	Review documents; Revise and supplement affidavit; Prepare memo; Assemble exhibits; Meet with Amy re revisions	8.80
09/08/2015	NB	Edit and finalize grievance affidavit and memo and scan to opposing counsel	1.80
09/09/2015	NB	Receive email from opposing counsel re decision by Board; Telephone conference with Amy; Lengthy Telephone conference with John Reagle	0.40
09/17/2015	LCS	Review, edit, and supplement draft complaint	0.70
	NB	Telephone conference with Amy; Telephone conferences with John Reagle; Research causes of action and start draft complaint	4.70
09/18/2015	NB	Revise and supplement complaint; Emails to Amy; Prepare informed consent	0.80
09/21/2015	NB	Supplement complaint with additional causes of action	1.40
	LCS	Review, edit and supplement draft complaint	0.60
09/22/2015	NB	Revise complaint; Meet with Amy	1.70
	NB	Receive and review emails and edit and supplement complaint	1.60
09/23/2015	NB	Supplement complaint; Meet with client; Lengthy telephone conference with Jerry Theos; Revise complaint	3.40
09/25/2015	NB	Supplement complaint; Receive and review emails from Rodney and media file from Jerry	1.30



Amy Kovach

Page: 2
February 08, 2016
Our File No. 12586-0000P
Statement No: 7

			Hours
09/28/2015	NB	Receive and review emails re facts from Rodney; Amend Complaint; Telephone conference with Amy	3.80
09/29/2015	NB	Telephone conference with Joe Griffith; Receive and review voluminous emails; Revise complaint	3.80
09/30/2015	NB	Receive and review emails from Amy and revise complaint	0.30
10/01/2015	NB	Edit and supplement complaint	1.10
	LCS	Edit and supplement draft complaint	1.40
10/02/2015	NB	Receive and review emails and supplement complaint	0.60
10/06/2015	NB	Telephone conference with Jerry; Receive and review FOIA's letter and forward to Jerry and Amy	0.30
10/07/2015	NB	Receive and reviews from Amy and reply re AG's letter	0.20
10/09/2015	NB	Supplement complaint; Voicemail to Jerry Theos; Telephone conference with Jerry	0.40
10/13/2015	LCS	Call client re discovery (L/M)	0.50
10/14/2015	NB	Finalize complaint; Prepare transmittal documents	0.60
10/27/2015	NB	Meeting with Howell Morrison; Email Amy re same	1.20
10/29/2015	NB	Meeting with client; Review Board minutes; Email to Howell Morrison re same	0.90
10/30/2015	NB	Prepare draft preservation of evidence letter	0.80
	NB	Receive and review correspondence from opposing counsel to Judge; Email Jerry Theos; Telephone conference with Chris; Correspondence to opposing counsel re letter; Receive and review correspondence from opposing counsel	1.80
11/04/2015	NB	Review and analysis voluminous pleadings; Telephone conference with Amy	0.60
11/06/2015	NB	Start to work on motion to dismiss	0.90
	NB	Receive and review Rule to Show Cause; Email to Jerry; Telephone conference with Jerry; Telephone conference with Chris; Lengthy telephone	

00673

Amy Kovach

Page: 3
February 08, 2016
Our File No. 12586-0000P
Statement No: 7

			Hours	
		conference with Vic Rawl	1.10	
11/12/2015	NB	Telephone conference with Joe Griffith, Michael O'Connell; Meeting with Michael; Telephone conference with Amy; Texts with Amy	4.60	
	NB	Meeting with Amy; Assemble documents for Michael	0.90	
	NB	Meeting with Amy; Assemble documents for Michael	0.90	
11/17/2015	NB	Receive and review emails with Michael O'Connell; Telephone conference with re same; Receive and review email from Joe and reply; Send Michael AG letter	0.60	
11/20/2015	NB	Receive and review multiple emails from Amy; Lengthy telephone conference with Joe and Michael	0.50	
11/24/2015	NB	Prepare answer and work on response	2.60	
11/25/2015	NB	Finalize response to motion to dismiss	1.80	
11/30/2015	NB	Meeting with Howell; Start to prepare motion to dismiss	1.80	
	LCS	Edit and supplement response to motion to dismiss	0.40	
12/01/2015	NB	Draft motion to dismiss; Lengthy telephone conference with Joe Griffith	1.80	
12/10/2015	NB	Email to Chris; Prepare answer to amended complaint	1.60	
12/30/2015	NB	Prepare for and attend status conference	2.20	
	LCS	Travel to and attend status conference	1.50	
		FOR PROFESSIONAL SERVICES RENDERED	70.20	0.00

FEE SUMMARY

Timekeeper	Hours	Rate	Total
Nancy Bloodgood	65.10	\$0.00 350	\$0.00
Lucy Clark Sanders	5.10	\$0.00 250	0.00

PREVIOUS BALANCE \$341.61

TOTAL BALANCE DUE \$341.61

00674

Amy Kovach
212 Clouter Creek Drive
Charleston SC 29492

Page: 1
November 24, 2016
Our File No. 12588-0000P
Statement No: 4

UPS Shipping - NB	22.38
Service Process Fee	<u>231.68</u>
TOTAL COSTS ADVANCED THROUGH 11/15/2015	254.06

TOTAL AMOUNT OF THIS BILL	254.06

PREVIOUS BALANCE	\$150.00

11/17/2015	Payment on Expenses - Thank you. Stmt #3	-150.00

TOTAL BALANCE DUE	<u>\$254.06</u>

00675

Amy Kovach
212 Clouter Creek Drive
Charleston SC 29492

Page: 1
December 21, 2015
Our File No. 12686-0000P
Statement No: 5

Postage Charges	37.55
Motion Fee	50.00
TOTAL COSTS ADVANCED THROUGH 12/15/2015	87.55
TOTAL AMOUNT OF THIS BILL	87.55
PREVIOUS BALANCE	\$254.06
TOTAL BALANCE DUE	<u>\$341.61</u>

00676

Amanda Kramer

From: Chris and Amy Kovach <call.kovach@yahoo.com>
Sent: Thursday, September 03, 2015 3:33 PM
To: Nancy Bloodgood
Subject: RE: update
Attachments: BCSD Grievance Policy and Administrative Rule.pdf; gae_e.pdf; Amy Kovach Narrative for Nancy Bloodgood.docx

Nancy: Attached are the following documents:

1. Berkeley County School District, Policy GAE, Staff Concerns, Complaints and Grievances and Berkeley County School District, Administrative Rule GE, Staff Concerns, Complaints and Grievances
2. Berkeley County School District, Grievance Form, GAE-E
3. Narrative to accompany timeline I provided this morning.

Please let me know if I can provide any additional information.

Amy

Amy, I finally have spoken to Kathy (I had to call every Childs & Halligan lawyer whose cell phone I have to reach her) The State grievance procedure does not apply to school employees; we have to use Berkeley County's. She said the Superintendent will make the decision and then a written appeal is made and the Board decides if they want a hearing. I told her that we may have two things going on -- a grievance and a breach of contract suit and then there was silence on the line. We'll see what happens- she said she'd call me and let me know. Who is the reporter you don't like? Nancy

Nancy Bloodgood,
Partner
Foster Law Firm, LLC
895 Island Park Drive
Charleston, S.C. 29492
office: 843-972-0313
fax: 1-888-519-0934
nbloodgood@fosterfoster.com

BERKELEY COUNTY SCHOOL DISTRICT

G - PERSONNEL

Policy GAE Staff Concerns, Complaints and Grievances

Policy GAE Staff Concerns, Complaints and Grievances

Issued 8/05

The board recognizes the need to provide an orderly means of resolving disputes concerning the application of federal or state laws and district policies and rules as they affect the work activities of employees.

Employees should secure an equitable solution of grievances at the most immediate administrative level. Employees are encouraged to seek resolution of disputes under the existing grievance regulation and will have the right to do so with complete freedom from reprisal.

The grievance procedures set forth in the following administrative rule are to be used to process employee complaints on alleged violations of Title VII of the Civil Rights Act of 1964; Title IX of the Education Amendment Act of 1972; Section 504 of the Rehabilitation Act of 1973; and Titles I and II of the Americans with Disabilities Act of 1990.

Adopted 10/27/92; Revised 8/23/05

BERKELEY COUNTY SCHOOL DISTRICT

BERKELEY COUNTY SCHOOL DISTRICT

G - PERSONNEL

Policy GAE Staff Concerns, Complaints and Grievances

AR GAE-R Staff Concerns, Complaints and Grievances

AR GAE-R Staff Concerns, Complaints and Grievances

Issued 8/05

Preliminary statement

Employees are encouraged to discuss their concerns or complaints informally with their supervisors. Often, the cause of a problem or concern is merely a misunderstanding among the individuals involved. If, however, an employee feels that a formal mechanism for raising his/her concern or problem is needed, the procedures in this administrative rule should be followed.

Purpose

The purpose of this procedure is to settle, at the lowest possible administrative level, employee complaints relating to working conditions. "Working conditions" refers to areas of class loads, planning time, adequate physical facilities, activities, salaries, etc. The district will keep all grievance proceedings as informal and confidential as may be appropriate at all levels of procedure.

Definition

A grievance is a claim by an employee of a violation, misinterpretation or misapplication of a provision of board policies and administrative rules or district practices as they may affect the employment or work of such employee and/or a violation, misinterpretation, or misapplication of federal or state law.

The board does not consider actions which are subject to the Teachers Employment and Dismissal Act, S.C. Code of Laws 1976, as amended, Section 59-24-410, et seq., Section 59-26-40, as revised, employment decisions implemented under the district's reduction-in-force policy, or classified employee terminations to be grievances under this procedure.

Joint grievances

Employees may present a joint grievance where each complainant alleges essentially the same facts or circumstances and requests the same relief. Joint grievances must bear the signature of each complainant. The district reserves the right to consolidate individual grievances and the right to hear joint grievances on a separate basis.

Definition of supervisor

The term "supervisor" means any person having the authority to recommend employment, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline an employee or any person having the responsibility for directing or reviewing the work of an employee.

Definition of day

A "day" is any day on which the district office is officially open.

Grievance procedure

An employee who wishes to file a grievance must complete the prescribed grievance form and present it to his/her direct supervisor within 10 days following either the event giving rise to the grievance or the time when the employee reasonably should have gained knowledge of its occurrence.

Should the employee believe that resolution of the grievance requires a decision beyond the supervisor's level or area of authority, the employee will so state such belief upon submitting the grievance form. If the supervisor is in agreement concerning authority to resolve the grievance, he/she will immediately pass the grievance on to the appropriate supervisor who will handle the matter as a first level grievance. The direct supervisor may, however, determine that resolution of the grievance is not outside his/her authority and hear the grievance.

The appropriate supervisor will arrange a meeting with the employee within 10 days of receipt of the grievance. The supervisor will provide the employee with a written response to the grievance within 10 days after the meeting. The response will include the name of the next level supervisor to whom the grievance may be appealed, provided such appeal is presented in writing within five days.

The grievance may be appealed through each supervisory or administrative level to the superintendent's level. At each level, the procedure above will be followed. The original grievance and the supervisor's response will serve as the basis of the meeting. The employee and the supervisor at the preceding level may summarize the facts previously presented.

On appeals to the superintendent, the superintendent or his/her designee will arrange a meeting within 10 days of receipt of the grievance and will respond in writing to the employee within 10 days of his/her hearing of the grievance. The superintendent or his/her designee may, at his/her discretion, hear witnesses and evidence directly. At a grievance hearing before the superintendent or his/her designee, the employee may be accompanied by a representative of his/her choosing, provided that notice of legal representation is given to the superintendent or his/her designee at least four days prior to the meeting.

Reasonable adjustments to the time frame set forth in the administrative rule may be made at the request of either party.

Appeal to the board of trustees

After following the above procedure, an employee may request a meeting with the board for the purpose of discussing the grievance which arose from his/her employment. The request must be made in writing to the superintendent within five days of the superintendent's or his/her designee's response to the grievance.

The superintendent will, at the next regularly scheduled board meeting, present to the board the request that the grievance be heard, together with copies of all correspondence and responses from the lower administrative levels.

The board will notify the employee of its decision (whether or not to meet with the complainant to discuss the grievance) within 15 days. Should the board decide to hear the grievance appeal, the format will be informal and non-adversarial pursuant to the expectations of the board.

Title VI, Title VII, Title IX, Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act

The grievance procedures set forth above are to be used to process employee complaints based on alleged violations of Titles VI and VII of the Civil Rights Act of 1964; Title IX of the Educational Amendment Act of 1972; Section 504 of the Rehabilitation Act of 1973; and Titles I and II of the Americans with Disabilities Act of 1990.

The above grievance procedure, however, will be modified for these grievances as follows. After the first two steps above, if the responses of successive supervisory or administrator levels below the superintendent do not resolve the grievance to the satisfaction of the employee or if no decision is made within a designated time, the complainant may appeal in writing to the district's civil rights coordinator if the complaint involves an alleged violation of the employee's civil rights or to the Section 504 Coordinator if the alleged violation pertains to Section 504. If the complainant fails to appeal within five days of receipt of the written response, the right to appeal is waived. If an appeal is made to the civil rights coordinator or the Section 504 Coordinator, an investigation, as may be appropriate, should be undertaken by that individual. Within 10 days following any investigation, the civil rights coordinator or Section 504 Coordinator will conduct a hearing and afford all interested persons and their representatives if any, an opportunity to submit evidence relevant to the complaint.

The civil rights coordinator or Section 504 Coordinator will render a decision on the matter within 10 days after receipt of the grievance or if a hearing is conducted, within 10 days after the conclusion of the hearing. The decision and any description of the resolution will be in writing, and a copy forwarded to the complainant. After appeal to the civil rights coordinator, the complainant may file an appeal directly to the board.

The right of an employee to a prompt and equitable resolution of any civil rights grievance will not be impaired by the employee's pursuit of other remedies such as the filing of a complaint with the responsible federal or state agency. Use of this grievance procedure is not a prerequisite to the pursuit of other remedies.

Issued 7/1/92; Revised 10/12/99, 8/23/05

BERKELEY COUNTY SCHOOL DISTRICT

GRIEVANCE FORM

This form is to be completed in the filing of a grievance under policy GAE: Staff Complaints and Grievances.

Full name: _____

Job assignment: _____

Location (school or department): _____

Supervisor's name and position: _____

If you feel your supervisor is not the person who should address your grievance, give the name and position of the person you feel should address your grievance: _____

State the action you feel was in error and what state or federal law or board policies, regulations and/or rules were violated, misinterpreted, or misapplied. Use the back of this form, if necessary. _____

Date the action occurred: _____

State why you feel the action was in error: _____

State what you are asking to be done in this matter -- identify the remedy you seek: _____

Signature: _____

Date: _____

Present this form to your direct supervisor, even if you feel he/she was not responsible for the error. He/She will be responsible for passing it to the appropriate person, as necessary.

Amy Kovach

Narrative

Originally prepared June 16, 2015 for Jerry Theos

Revised September 3, 2015 for Nancy Bloodgood

In May 2011, Amy was invited by Rodney Thompson, newly named as Superintendent of Berkeley County School District and Archie Franchini to lunch. They proposed an interim coordinator of community relations position at an annual salary of \$50,000, a \$100,000 pay decrease from her well-paying career in the private sector. Swallowing pride and ego in favor of not relocating, Amy took the interim role for a one year contract. What she did not know is that she would learn to love the people, the opportunity to contribute to something she cared deeply about, and thrive again professionally. She was considered a 35 hour a week employee (the least number of hours she ever worked!) with limited responsibilities to create partnerships between the business community and school community in the region. Her tasks were to link businesses with classrooms, find mentors for students, and manage the Stuff the Bus charitable school supply drive. She enjoyed family flexibility for the first time, learned about the public sector as an outsider looking in, and developed collaborative, transparent relationships with staff, citizens, business leaders and parents of students.

Amy was expecting to leave the district in June 2012, as her original contract had stipulated one year. However, in May 2012, the Public Information Officer, Kathleen Sizemore, announced she was leaving the district for another position at Pinewood Preparatory Academy in Summerville. The position for a Director of Communication was posted and Amy bid and interviewed for the position with other external candidates.

Amy was interviewed by Archie Franchini and Mr. Willis Sanders, Associate Superintendent of Human Resources. The interview process was primarily devoted to the development of a fully functional communications program. Mr. Sanders and Mr. Franchini stressed the need for advancing technology at the district and specially asked for multi-media video, web, social media, and electronic communications development. Specifically, the district needed to change the way it was perceived in the community and resources were to be identified to help teach a broader audience that was more technologically astute than previous generations. Additionally, the position stipulated that the person hired work directly with the Superintendent whose communication skills were lacking, to help him better prepare as a public speaker, and to provide his written communication as a ghost writer to improve communication with the board, with citizens and with businesses. The candidate would also serve as the voice of BCSD, conducting all media interviews and publicly speaking at events and community meetings.

In early June, Amy was notified at a Board of Education meeting that she had been selected for the position and she would be hired effective July 1, 2012, at a salary of \$75,000. It seemed like fate and luck and hard work had paid off.

The idea for a district video was a top priority, as was social media and communications planning. Amy had been assigned a student intern, Mr. Christopher (Chris) Piedmont, a sophomore at the College of Charleston, to provide administrative aid, write articles, and help with events. He worked in Amy's office with her as there was no space to put him elsewhere. Always generous with her time, Amy was glad to have Chris and they worked well together despite the small space. One of the first conversations they had upon Chris' arrival was of the district video. They brainstormed ideas, developed a story line, and visualized how it may unfold.

The demands of the role immediately increased Amy's work hours from 35 per week to 60 per week. Her typical day was to start at the Moncks Corner District Office, leave to go to two or three different schools to provide support, and then return to Moncks Corner before going home to Daniel Island. Her duties exponentially increased to include all communications for the district (the fourth largest in the state with 33,000 students), all media relations, all event planning, preparation and implementation, and at this time an increased responsibility to provide support to the upcoming Yes 4 Schools campaign. Amy was told she would have an administrative assistant for 30% of the time and the person would be located in another building and a public information officer would be hired later in the summer.

Chris and Amy worked through May, June and July as a team producing as much work as humanly possible to prepare for the Summer Reading Program, the Stuff the Bus school supply drive in August, the opening of Caney Bay Middle School in August, a rewriting of the Communications Plan and Strategy to be presented to the Board of Education and to the State of South Carolina Department of Education. Additionally, the day to day work of communicating with principals, teachers, parents, and business leaders persisted unabated. And, Amy was also elected and began serving as Chairman of the Board of Directors of The Education Foundation, a post she would hold for a record 18 months. Her day began before 6 a.m. and continued late into the evening. However, she loved the work and felt useful, creative, and energized to participate.

Susan Haire joined the district as Public Information Officer in July 2012. Her responsibilities were to manage media relationships, develop a social media program, and to increase the website attractiveness and usefulness. She became an invaluable friend and colleague. While she reported to Amy, Amy never treated her as anything less than an equal. Julie Hedrick served as Administrative Assistant and was finally resourced to Amy and Susan full time in January 2013, moved into the same part of the building and the team began to work effectively and smoothly.

Over the course of the summer, as the project list grew larger and the team's resources were stretched thin, Amy began to implement her own communications and leadership style. Whereas before she was an outsider to the district who happened to contribute, she now had a seat at the leadership table. This opportunity allowed her to experience the district from the inside-out. She was appalled at the lack of transparency, the lack of creativity, and the overall resignation of employees to behave as if they were there to collect a paycheck. She opened the door to her office, invited citizens and business leaders to the office, established herself with the media as the voice of the district, appeared on radio and local television, called back every person who had inquired to follow up on their questions, and developed meaningful relationships with principals and staff. Her open, collaborative and transparent style were different; her effervescent spirit was completely accepted or rejected. Her mantra became "Yes, we can...."

whenever asked. Her previous training and background in corporate America had taught her that the right customer answer is always "Yes, we can...." and then you work to research, figure out a way, and deliver the promise as expected. The word "No" was never part of her vocabulary; yet it was everywhere at the district. Amy earned trust from principals by delivering on commitments, by holding staff accountable, and for championing the cause of kids and schools as a community asset to be cherished.

Throughout the summer of 2012, community interest in the Yes 4 Schools campaign began to build. The Board of Education had voted in January 2012 to pursue a \$250 MM referendum to build and renovate schools. It was later reduced to \$198 MM. The media and community members were relentlessly in search of information, often at the micro-economic level.

Amy's work ethic and strong desire to change the district code of transparency opened up new vehicles for community dialogue. The all-volunteer campaign committee was responsible for the nuts and bolts of the campaign including community meetings, advertising, fundraising, and getting out the vote. They were officially formed in July 2012. They were well intentioned and a very nice group of people. However, they were hopelessly inept at communication with the public. A triangulation began to form where the committee would go out to the public in support of the Yes 4 Schools campaign and without malintent use information that was inaccurate. As the committee was needing more accurate information, the media and citizens were demanding a level of information that had never before been prepared by the district. Amy quickly realized that the volume of information needed to support the committee of volunteers, the accuracy of the information and the transparency she was committed to providing would dominate her working and non-working hours.

With all good intentions, the members of the campaign committee were eager to make promises on behalf of the district regarding the new construction and renovation of schools. They were particularly good at tailoring their promises to their audience, whether that be on Daniel Island, in Cross, or in Goose Creek. Additionally, Board of Education members began throwing their words into the mix to demonstrate to their constituents that they were looking out for their voting district. While all were well intentioned and none acted with malice, Amy was forced to correct the campaign members and Board of Education members in a way that allowed them to save face publicly and allowed the district to not have promises they could not keep made by people who didn't have authority to make them.

Community members, business leaders, and the media began emailing and calling daily. The phone rang constantly and each and every person was treated with the same respect and patience. The campaign committee would host a community meeting and the next day, Amy's desk was flooded with inquiries that required a great deal of time and resources to unravel. A citizen wanted to know how his/her property taxes would be impacted; a small business wanted to have their name on a stadium (because it was "promised"); teachers were coming back in August and needed school supplies asap; the campaign committee members needed fact sheets, frequently asked questions had to be developed, scripts were developed to keep community and schools on the same page to avoid the inaccurate statements. The more intense the campaign became, the more secretive some members of the campaign committee became which made it hard to get or receive accurate details of what was happening in the field. While Amy had worked closely with the campaign to provide information as quickly as possible, it was never fast

enough. If she failed to provide information, she was labeled as unhelpful. If she was slow to respond, a complaint was lodged to Rodney Thompson. The campaign committee was asking for information, access to schools, access to students and teachers, access to files, access to economic data, access to population reports, and access to every known demographic in Berkeley County. There simply was too much to do to keep up with the requests and do a full time Director of Communications job, while battling the public's perceptions and the campaign's inaccurate spread of information.

In September there was a lull in the storm and Amy began work in earnest on the district video to be used for teacher recruitment beginning in late November/early December. The story boards were created to center on the "Day in the Life of a BCSD student". The idea was to make the video light, focused on students, and to exemplify all of the great work and resources available in the district. Twelve schools were chosen to film B-Roll. All of the preparation work was finally put in place. Amy met with videographer Jason Bennett at the suggestion of her Chamber of Commerce colleague Patrick Bryant of Go To Team Media. Amy explained the project in detail; she also explained that she would like a second edition of the video to be provided to the Yes 4 Schools Campaign; however, she was firmly clear that it could not cost a penny more and if it was going to be too complex or difficult or create any additional expense, then the only video to be made was the district recruiting video. Jason agreed and understood; a quote was received from Go To Team Video for \$4800 (under the \$5000 threshold for three quotes), and a date for filming was set for September 21, 2012. An additional \$500 would only be billed as needed for editing, if needed (only \$300 was required).

Amy spent all day with Jason and his assistant where they filmed at 9 schools and three football games, starting at 6:30 a.m. at Cainhoy Elementary School for morning breakfast service and ending at 11 p.m. at the close of the Stratford High School football game. The footage was great and Jason felt the story would be easy to tell in about 3 to 3 and a half minutes.

About two weeks later, Jason called to say the draft was ready to review. Amy viewed both drafts, made two minor suggestions, and the video was ready to be shown to an internal meeting of principals on October 4, 2012. Amy paid for the district video and put aside the campaign video to be given to the committee later in the day for their use as they saw fit.

Amy showed the video to the Principals where it was warmly received as a good representation of the district and the full range of services offered. In keeping with an open and transparent communication approach, Amy shared the campaign video as well, not realizing at the time that Dr. Karen Whitley, associate superintendent was an ardent opponent to the campaign.

On October 4, 2012, the campaign team officially "kicked off" the campaign process on the lawn of Stratford High School. Members of the Board, the public, business leaders, and campaign committee were on hand. No one from the district spoke or played any role in the kick off except to observe and keep students from inadvertently wandering into the line of the camera. Later that day, a similar kick off was held inside the Rollings Middle School for the Arts in Dorchester District Two. Superintendent Joe Pye spoke passionately about the need to support the DD2 campaign, as did several other public figures in Summerville. Amy was greatly impressed with DD2's active PTA and their committees more laser focus on positive messaging.

By mid-October, the campaign committee received a fax from a business associate alerting them to a counter opposition campaign. The fax was shared with Amy, who was also asked to prepare a response of facts to dispute the inaccuracies. Such a response was provided back to the campaign to use at their discretion. It took nearly two days to track down all of the economic data and to correct the information.

At no time did the opposition ever present itself to the district, reach out for information or attempt to collaborate. Had they done so, they would have been treated with the same courtesy, respect and information to fulfill their position.

Signs were delivered, at the request of Laura Varn, to the district office for holding until a pick up could be made by Jane Pulling on or around October 10. The signs were inside the receiving building for less than 24 hours before being picked up for distribution. Board members contacted Amy continuously asking for updates and for more signs. She referred them to Jane for signs and provided updates as she had information.

In all, Amy presented to the Board of Education on five separate occasions in public about the campaign committee's work, providing details about their goals and expectations so that they would have full knowledge at their disposal. Never once did a board member question or cry foul. In fact, Phillip Obic asked Amy why she wasn't working faster and harder to support the effort. He and other board members were continuously calling about their voting district. Additionally, Amy fielded all criticism about the campaign by community members and district staff. If the campaign committee did or said anything that someone disagreed with, a call was made to the district office and referred to Amy. On numerous occasions Amy soothed citizens and tried to facilitate dialogue between the campaign team and the citizens to no avail. The campaign committee members were either unresponsive or inattentive to the need to be transparent at all times, a work value that Amy could not tolerate. She also attended community meetings where she was publicly attacked verbally for the perceived errors of the district on topics ranging from the referendum to past decisions by Board of Education members she had never met or known. Throughout it all, she maintained a strong conviction that she could take the assault of work, words and abuse as long as the mission to support the children of Berkeley County was carried out in accordance with the wishes of the Superintendent and the Board of Education.

Amy attended more than 200 public meetings and events between August 2012 and November 6, 2012. She logged more than 80 hours per week of work time; she worked from home at night, often late into the early morning hours to keep pace with the demands of the role and the demands of the community, the media, the campaign, and the district staff. She never received compensation for her mileage or her overtime.

Through all of this, she received very little guidance or input from legal or Rodney Thompson. While she was religious about sharing everything for approval, she often got very little feedback, was told she was doing a great job, and never once was told to stop what she was doing, change what she was doing, or alter her work in any way.

On November 6, 2012, Amy volunteered (officially district offices and schools were closed due to state law) to work at two polling places. She stood in the rain and 45 degree weather outside of Berkeley High School for 8 hours, from 7 a.m. to 3 p.m. While there she was approached and threatened by Mr. Terry Hardesty. Amy called for the polling worker in charge

who declared she was within her rights to be where she was and that she was not in violation of polling policy. Amy notified Rodney Thompson and her husband about the threats as she was shaken by the encounter.

Later that day, she volunteered at Daniel Island School with campaign committee chair Chad Vail. Together they waited until the polls closed at 7 p.m.

That night, the polls showed that the public had passed the referendum by 59%.

In November 2012, Amy was informed by Rodney Thompson that her work was under investigation by local community member Mr. Josh Whitley (son of Dr. Karen Whitley, associate superintendent). She was asked to review files of work in the law offices of Childs and Halligan. Together with Rodney, Amy went to Columbia. Amy specifically asked Kathy Mahoney if she had done something wrong, if she should be concerned or if this was a serious allegation, and if she should retain legal counsel. Kathy Mahoney replied, "Don't worry. Josh will get bored and this will blow over. He's family. You have nothing to worry about."

Throughout 2013, the investigation increased. Amy met with SLED in February (her husband was present, as was John Reagle from Childs and Halligan). In March 2013, Amy was advised to seek private legal counsel. Chris (Kovach) spoke with Rodney Thompson who referred him to Joe Griffith. Mr. Griffith recommended that Chris contact Jerry Theos and provided his cell phone number. Chris called immediately and spoke with Mr. Theos who met with the couple the next day. A joint defense agreement was entered into and Mr. Theos was retained on March 7, 2013. Childs and Halligan never directly informed Amy to seek legal counsel and has had no contact with them since March 7, 2013.

As the investigation unfolded and grew, very little information or concern was raised that this case would go anywhere throughout 2013. It was troubling, however, as Amy continued to work diligently on the work of the district.

On Friday, November 22, 2013, Amy met with SLED at the offices of Jerry Theos, under the assumed protection of a proffer agreement. Amy complied with every request made of her to forward information as requested, including invoices and information about the district and campaign video (which was never shown publicly or used in any way). All information was provided to Mr. Theos on Monday, November 25, 2013.

On February 10, 2014, Amy left the office completely unaware of the events to unfold over the next 24 hours.

On February 11, 2014 at 7:30 a.m. on her drive to work, Mr. Theos called Amy to tell her she had been indicted and to not report to work. She was driving during this call and had already reached Goose Creek. She went to the District Office of Technology, called her husband, and then contacted Mr. Brantley Thomas to make arrangements for Amy's daughters to be safely picked up and removed from school that afternoon. She contacted Mr. Ric Raycroft at the high school and Mrs. Marty French at the elementary school to alert them to a change in the girls' afternoon transportation.

Amy has been on administrative leave, having never returned to Moncks Corner with the exception of mandated court appearances with her attorney. She has not collected her personal items from her office, she has not been to any district related events or meetings. She has not

physically seen Rodney Thompson since February 10, 2014. She has had minor contact with a few colleagues who have reached out to her. She has been isolated from her career and her colleagues.

On April 11, 2014, Amy attended her arraignment at Berkeley County Courthouse with Jerry Theos.

On September 9, 2014, Amy was indicted a second time for a forgery related to the first indictment. Amy produced the original document to her attorney and they had it tested for forensic ink analysis in November 2014. Results proved that the document was produced on or before October 2012, thus it could not have been forged.

Amy appeared in court again with her attorney on October 29, 2014, for a hearing to dismiss the charges brought and to waive the second arraignment.

Throughout this period of time, due to isolation and fear, Amy developed a deepening depression, panic and anxiety attacks, and other physical manifestations of the stress induced. Beginning in November 2014, she began seeing Dr. Richard Phelps, psychiatrist, and Lisa Glavin, therapist, to deal with depression, insomnia, and anxiety. She also increased her daily physical yoga and ballet practice throughout 2014 to try to cope with the stress and depression.

In January 2015, Amy enrolled in the Charleston Power Yoga teacher training program at her own expense. From February through April, Amy studied and practiced to become a certified yoga instructor. She earned her certificate on April 26, 2015. She teaches yoga locally at Barefoot Yoga Studio, North Charleston, one time per week, and subs for other teachers as needed. She also has started her own business (Asana Family Yoga, LLC) and offers free classes in the community three times per week.

In January 2015, Mr. Theos submitted a motion to disqualify the Attorney General from the case and a motion to change venue from Berkeley County.

In April 2015, Amy was informed that the Attorney General wished to set a trial date of May 18, 2015. Mr. Theos' schedule would not permit that timeline and the motions submitted in January still had been heard.

In late June, Mr. Theos called Amy to inform her that SLED had new evidence and she should report to his office the next morning to review it. The document is and was not Amy's. She was asked to take a polygraph test and she passed it.

In July, the Attorney General indicted Amy on three additional charges, a second forgery (for the above mentioned document), a perjury charge, and a misconduct in office charge for violating the procurement code.

On July 31, 2015, a hearing was scheduled in front of Judge Jeff Young. On the record, he admitted to not having read or reviewed the motions or attached affidavits. He denied both motions.

With five indictments and a trial date scheduled for September 21, 2015, Amy and Mr. Theos began to discuss trial outcomes, risks of trial, pleading/negotiating, and other possibilities.

By mid August, it was decided that the safest route to Amy and her family was to accept the two misdemeanor charges in exchange for the Attorney General's office dropping the three aforementioned felony charges.

As expected, the Attorney General's office leaked the plea deal and the date of the hearing. On August 28, 2015, Amy appeared before Judge Jeff Young in Berkeley County and plead guilty to the two misdemeanors.

Amanda Kramer

From: Janet Smith <janet@uricchio.com>
Sent: Thursday, September 03, 2015 4:01 PM
To: Nancy Bloodgood
Cc: Janet Smith
Subject: FW: Amy Kovach
Attachments: Ltr from Judge Rawl to Kent Murray 05 02 14.pdf; Al Lyter report in color.pdf; Letter Freeman 4.22.14.pdf

Ms. Bloodgood:

Pursuant to Mr. Theos' instructions, attached are copies of the documents you requested below.

Please confirm receipt. Thank you,

Janet S. Smith
Legal Assistant to Jerry N. Theos
and Margaret E. Theos

URICCHIO, HOWE, KRELL, JACOBSON,
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From: Nancy Bloodgood [mailto:nbloodgood@fosterfoster.com]
Sent: Thursday, September 03, 2015 12:16 PM
To: Jerry Theos <jerry@uricchio.com>
Subject: Amy Kovach

Jerry, I met with Amy this morning and I am going to help her with her employment issues. Likely, she'll be fired today and I'll have to prepare quickly for a grievance. Can you send me a copy of John Freeman and Vic Rawl's reports? Amy said they prepared something for the Board. Also, do you have any forensic computer reports regarding the alleged backdated invoice or the other document that was not Amy's which they alleged was? Is it correct that SLED never prepared any report? Thanks, Nancy

Nancy Bloodgood, Partner
Foster Law Firm, LLC
895 Island Park Drive
Charleston, S.C. 29492
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nbloodgood@fosterfoster.com

A. Victor Rawl, Sr.
2835 Preakness Stakes, Charleston, SC 29414

(843) 766-7334
avrawl@aol.com

May 2, 2014

Dr. Kent Murray, Chairman
Berkeley County School District Board of Education
P.O. Box 608
Moncks Corner, SC 29461

Dear Dr. Murray:

I am writing you to comply with your request dated February 26, 2014. Please understand, my methodology is terse; therefore, I am attaching documents that I may refer to in this memorandum. You asked me the following:

- (1) Whether, based on the information available to the board at this time, the conduct of Ms. Kovach as outlined in the indictment constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110; and
- (2) If you conclude that Ms. Kovach was acting "in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110, in regard to the issues referenced in the indictment, whether the board is precluded from appearing and defending Ms. Kovach under the statute simply by virtue of the fact that she has now been indicted?

In answering question one, which I feel comfortable in so doing, I have reviewed some forty pounds of e-mails and documents submitted to me by Childs & Halligan, your attorneys. I have conducted lengthy conversations with Jerry Theos, attorney for Amy Kovach, and reviewed some of his materials. I have spoken with Jane Pulling. I have also tried to talk with Laura Varn, and was only able to speak to her attorney, Ben Hagood. I have intentionally not spoken to anyone else, as it would have entailed a very lengthy and continuous process. I note for the edification of yourself and the board that SLED and the Attorney General's office have purportedly reduced their investigation to a report that is unavailable to the school district or Ms. Kovach's defense attorney, Mr. Theos, at this time.

The standard for review to determine "acting within the course and scope of employment" is most clearly defined in the body of law surrounding the area of workers' compensation. The course and scope of employment is obviously controlled by the employment agreement the

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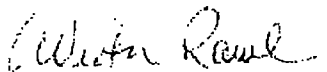
Board of Education entered into with Ms. Kovach. It is very clear to me in reviewing the material that her job description, a copy of which is attached, covers a very broad area of public information, coordination, outreach, education, and, of course, community involvement. You will see from the timeline attached that Ms. Kovach was very active in complying with her job description. It is clear to me that she has an outgoing, effervescent personality that compelled her to over-perform her responsibilities as outlined in her job description. It is also clear that she was extremely communicative, especially by e-mail, to everyone. The material clearly supports my decision that all of her actions were within the course and scope of her employment.

The next question, of course, is "good faith." In determining whether someone is acting in good faith, the standard is whether she was acting for her own benefit or for the benefit of her employer or someone else. In reviewing and discussing that standard, it is necessary to determine what, if any, personal benefit she derived from the activities outlined in the documentation. I can find absolutely no personal or financial benefit to her in the documentation. Questions have been raised concerning a video and payment for some banners and signs. These questions focus narrowly on a small number of selected documents without regard to the records or issues as a whole. The alleged video is clearly for the benefit of the school district, and not for her personal benefit. The alleged signs and banners may raise an issue of personnel matters or expenditure authority, but certainly in no way, shape, or form, are they an indication of personal benefit to her. Remember, it is her job to coordinate everything. She did her job.

The second question you asked me to provide a response to deals with a legal interpretation of South Carolina Code § 59-17-110. I did not feel comfortable for a myriad of reasons in responding to that question, and have taken the liberty of requesting that John Freeman, Esq., an expert in the field of statutory construction, as well as corporate governance, provide me with an opinion to give to you. I attach that opinion for the benefit of yourself and the board.

As you can see from the above-discussion, I clearly conclude as a matter of fact that Ms. Kovach's activities were clearly within the course and scope of her employment and clearly performed in good faith with her only concern being the benefit of and in the best interest of the Berkeley County School District. I will be more than happy to discuss, in person, my decisions, as well as give you and the board the ability to question me on the basis therefore.

Sincerely,



A. Victor Rawl
South Carolina Circuit Judge, Retired

Attachments (Kovach Job Description, Timeline, Letter from Freeman)

JOHN P. FREEMAN
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803-254-4667 t
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April 22, 2014

The Honorable A. Victor Rawl, Sr.
2835 Preakness Stakes
Charleston, SC 29414

Re: Berkeley County School District

Dear Judge Rawl:

Thank you for calling on me to assist in analyzing a legal issue that needs to be determined by the Berkeley County Board of Education. The issue concerns the Board's obligation to indemnify an employee, Mrs. Amy Kovach, who has been indicted for an alleged violation of S.C. Code § 8-13-1346. In this regard, S.C. Code § 59-17-110 requires that:

In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

You have advised me that you have diligently investigated the conduct of Mrs. Kovach as outlined in the indictment and have concluded based on your investigation that her conduct constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110. Based on that factual predicate, you have asked me to give you my legal opinion whether the Board is precluded from appearing and defending Mrs. Kovach under the statute simply by virtue of the fact that she has now been indicted.

As you know, I am a recognized expert in the field of entity governance, having taught Business Associations, Corporations, Agency and a host of related courses over a span of the 35 years during which I was a Professor of Law at USC Law School. I have lectured and testified as an expert many times about the duties, rights, and powers of entities and of their board members, officers, and agents. Among other professional activities, I served the South Carolina General Assembly as a reporter on the most recent South Carolina Corporate Code revision project. The

areas for which I was reporter included indemnification of corporate officers and directors. I have in the past advised entities and their board members about indemnification matters.

PROFESSIONAL OPINION

Based on my research and in light of your factual findings, it is my professional opinion that Mrs. Kovach's indictment does not preclude the board from appearing or defending the action in her behalf.

REASONS IN SUPPORT OF OPINION

A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of impropriety. A case in point is the Second Circuit's ruling in United States v. Stein, 541 F.3d 130, 157 (2d Cir. 2008). The government there sought to bar accounting firm KPMG from providing legal fees to former employees indicted for tax fraud. That action was held unconstitutional as a deprivation of Sixth Amendment rights. The court explained:

The government conceded at oral argument that it is in the government's interest that every defendant receive the best possible representation he or she can obtain. A company that advances legal fees to employees may stymie prosecutors by affording culpable employees with high-quality representation. But if it is in the government's interest that every defendant receives the best possible representation, it cannot also be in the government's interest to leave defendants naked to their enemies.¹

Furthermore, South Carolina's public policy strongly favors indemnity being extended to employees who have acted within the scope of their employment and in good faith. Thus, under South Carolina corporate law, S.C. Code Ann. § 33-31-851(a), indemnification is allowed in

¹ Here is additional background concerning Stein from Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: the Rise of Corporate White-collar Practices in Large U.S. Law Firms*, 53 Ariz. L. Rev. 1221, 1223 (2011):

On July 16, 2007, U.S. District Court Judge Lewis A. Kaplan entered a remarkable order. Federal prosecutors had investigated the giant accounting firm KPMG LLP ("KPMG") for allegedly marketing fraudulent tax shelters. The firm managed to avoid criminal charges, but 16 former partners and employees did not. In United States v. Stein, Judge Kaplan dismissed the indictment against 13 of the 16 individuals, finding that federal prosecutors had unconstitutionally induced KPMG to stop funding their individual defenses. As a result, although these defendants generally had substantial personal assets, they either lost their counsel of first choice (including lawyers from major law firms) or were financially unable to defend their cases as they would have had their legal expenses been entirely advanced or underwritten by KPMG. The court was incensed, calling this "intolerable in a society that holds itself out to the world as a paragon of justice." The Department of Justice . . . challenged the ruling. The defendants and their amici were represented in a closely watched appeal by some of the finest lawyers of the day, including counsel from the nation's largest law firms. On August 28, 2008, the U.S. Court of Appeals for the Second Circuit affirmed, finding that the government had violated the defendants' Sixth Amendment right to counsel.

some cases in favor even of criminally-convicted officers, trustees, employees, or agents. Indemnification is flatly prohibited only where there is an adjudication that the officer, trustee, employee, or agent is liable to the company or where an improper personal benefit was received by the person seeking indemnification. S.C. Code Ann. § 33-31-851(d). See S.C. Code § 33-31-851(c) ("The termination of a proceeding by . . . conviction . . . is not, of itself, determinative that the director did not meet the standard of conduct described in this section."). The corporate law "standard of conduct" set forth in Section 33-31-851(a) requires that the entity be able to conclude the officer, trustee, employee, or agent acted in good faith and reasonably believed his or her conduct was in the entity's best interest. That factual predicate for indemnification in the corporate setting is very similar to the one established by S.C. Code § 59-17-110.

I have reviewed the Attorney General's Opinion dated May 13, 1997, 1997 WL 323769 (S.C.A.G.). That Opinion holds:

[O]ur courts would conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings.

As you well know, an Attorney General's Opinion has no force of law. In this case it is wrong. Opinions rendered by the Attorney General do not trump statutory enactments. The 1997 Opinion relies on and reiterates the holding from a 1995 Opinion, that purported to find that "a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding." This opinion is obviously and egregiously wrong because it contradicts the plain language of, S.C. Code § 59-17-110. Again, the statute requires that:

In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

In this case, an employee is being prosecuted in a criminal proceeding. You have determined, after making a reasonable investigation, that the employee acted in good faith and in the course of her employment. Under these circumstances, it is "the duty" of the school district to provide a defense to the proceeding on her behalf.

I hold the foregoing opinion concerning the Berkeley County Board of Education's duty to provide a defense on behalf of Mrs. Amy Kovach to a reasonable degree of professional certainty as an expert in the field of entity governance and employee indemnification rights.

I am rendering this legal opinion as a public service. No compensation, direct or indirect, in any form or fashion, has been or will be furnished to me in connection with this work.

Sincerely yours,

A handwritten signature in cursive script that reads "John P. Freeman". The signature is written in dark ink and is positioned directly below the "Sincerely yours," text.

John P. Freeman

Berkeley County School District

Job Description

TITLE: Director of Communications and Community Relations

FLSA: Exempt

GENERAL SUMMARY

Under the direction of Deputy Superintendent is responsible in ensuring that the district Vision, Mission and Goals are achieved and oversees the planning for and implementation of a comprehensive community relations program in order to build trust of the district and support for its programs and services.

ESSENTIAL FUNCTIONS

Assist the superintendent and district administration with public presentations in line with district goals.

Assist the superintendent in the development of strategic planning, appropriate community engagement relationships, and implementation of objectives.

Facilitates community relationships throughout the county for all schools, including volunteer recruitment, new parent introductions, and works with other agencies and organizations (i.e., Chamber of Commerce), business, and government leaders to grow and sustain accountability, collaboration and trust with the district and its key stakeholders to have a positive impact on student achievement (i.e., increased graduation rates, decreased dropout rate, improved advocacy efforts);

Establishes a district process for partnerships and in-kind services to support CTE programs, relevant educational opportunities for students, and provides community partner recognition;

Establishes volunteer leadership contacts at each school (i.e. PTA president) and assists schools in recruiting volunteers, soliciting fundraising supplies, and provides assistance where feasible to strengthen relationships between school personnel and city, county, and business leaders to engage community partners in opportunities to support student learning, improve test scores, improve soft skills, etc. (mentors, literacy coaches, soft skills presentations by business leaders);

Audits volunteer tracking system and develops improved tracking methods for district wide usage to measure community engagement;

Collaborates with PIO to retrieve outreach needs by calling and/or emailing school principals (and/or PTA presidents) for consistent weekly updates regarding individual school accomplishments, school functions, and student honors;

Gains insight on community requests by contact and follow up with district principals, school counselors, department chiefs, deputy superintendent and the superintendent; and, may also solicit the community for support of school activities and programs;

Creates updates for superintendent to inform board members of system-wide incidents that may impact community relations and the future of the district; works with existing partner companies and engages new partners to create meaningful student touch points through mentoring, special projects and internships, awards and recognition;

Maintains strong knowledge of the way each community partner works with its neighborhood schools, their needs and responds to promotional opportunities which may impact the district;

Serve as a backup to the PIO for media requests and media relationships;

Creates and maintains a list of volunteers and volunteer needs (as determined by each school) in order to match wants/needs to support the academic and social development of district children;

Determines a need for social media outlets and applications that allow parents and children with access to district information using smart technology;

Will assist superintendent and/or deputy superintendent with research at his/her request;

Works with the technology specialist to improve communication and community relationships through the district's website with continuous highlights and updates;

Translates detailed information from superintendent and/or deputy superintendent (as directed) into layman's terms for the reading and listening audience within and beyond the district;

Outlines and conducts community and business-related tour of schools by coordinating efforts with individual principals, assistant principals, counselors, and superintendent as a way of providing more insight about the district to all citizens;

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00698

Must be available to community events as a representative of the district to further the mission and goals of the district (i.e. Chamber of Commerce meetings, Trident United Way, etc.); some events may be before or after normal business hours;

Facilitates the process of community focus groups in an effort to communicate with local citizens, who support the school district through tax payer dollars;

Plans and organizes detailed logistics for special events that represent the entire school system;

Oversees department budget;

Stays well informed about current issues and future trends in education and public relations and about local school programs and activities, as a basis for on-going communication needs assessment;

Attends board meetings (as required by published agenda), principals' meetings, superintendent's cabinet meetings (as requested) and district and community committee meetings;

Supervises the public information officer;

Supervises the communication specialist;

Assures compliance with FOIA and Family Right to Privacy Act; and

Perform other duties as assigned.

JOB SPECIFICATIONS

Education and Experience:

Master's degree or higher in Communications, Journalism or a related discipline with six to nine years of experience in Public Information/Community Relations or Education Administration; or any equivalent combination of education and experience that provides the required knowledge, skills and abilities.

Knowledge:

Extensive knowledge of Media/Community Relations management functions, programs, policies, procedures and systems. Knowledge in the development, planning, organization, implementation and management of Media/Community Relations programs and practices designed to meet the district educational and community needs; knowledge of the principles of management, and the standards, regulations, and laws relating to Community Relations activities; knowledge in the proper methods for development, implementation and control of financial resources and budgets; knowledge of general and specialized computer applications and their utilization as related to specific tasks and responsibilities; knowledge of effective survey and polling methods; knows how to keep abreast of changes in policy, standards, procedures, and regulations pertinent to personnel and community relations functions; and maintains affiliation with the National School Public Relations Association and its state chapter.

Skills/Effort:

Must have advanced management, organizational, human relations, communications and interpersonal skills; exceptional writing and photojournalism abilities; ability to oversee the development of communication tools for print, broadcast, radio and online mediums; ability to develop and maintain effective working relationships with district staff; ability to use independent judgment and discretion in directing and managing scope of authority; ability to instruct others through explanation, demonstration and supervised practice, and/or make recommendations on the basis of technical disciplines; ability to prepare and monitor the department budget; ability to complete, process, and maintain all required records, reports, and confidential information; ability to develop and maintain effective communications with district employees, immediate supervisor, media representatives, attorneys, and the general public. Skilled at representing the district and has exceptional platform skills and ability to operate general office equipment such as a computer, calculator, copier, etc.

Work Conditions:

Physical demands are restricted to general office activities requiring movement/lifting items weighing up to 35 lbs. Routine local travel required; occasional overnight travel required. Job requires ability to work under a degree of stress related to duties that require considerable attention and meeting deadlines. Duties of the job require frequent use of a computer monitor and related equipment. Berkeley County is a smoke free district.

Responsibility:

Responsibilities include overseeing the designated budget and supervision of support staff.

DISCLAIMER STATEMENT

This job description is not intended as a complete listing of job duties. The incumbent is responsible for the performance of other related duties as assigned/required.

SIGNATURES

Date: _____

Date: _____

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00700

BCSD School Improvement Referendum 2012
Chronological Order of Events

	A	B	C	D	E
57	Open House Sedgwick Intermediate	August 16, 2012	Kevin O'Gorman		
58	Open House Westview Primary	August 16, 2012	Kevin O'Gorman		
59	Open House Westview Elementary	August 16, 2012	Kevin O'Gorman		
60	Open House Whitesville Elementary	August 16, 2012	Glenda Levine		
61	Daniel Island News Editorial Review	August 16, 2012	Amy Kovach		
62	Open House Goose Creek Primary	August 17, 2012	Karen Whitley		
63	Open House Hanahan Elementary	August 17, 2012	Karen Whitley		
64	Open House HE Banner	August 17, 2012	Susan Gehlman		
65	Open House St. Stephen Elementary	August 17, 2012	Susan Gehlman		
66	Open House Westview Middle	August 17, 2012	Archie Franchini		
67	Open House Calhoun Elementary/Middle	August 21, 2012	Archie Franchini		
68	Open House Berkeley Middle College	August 23, 2012	Kim McLaren		
69	Open House Macedonia Middle School	August 23, 2012	Archie Franchini		
70	Charleston Metro Chamber Board of Directors	August 23, 2012	Amy Kovach		
71	Open House Hanahan High School	August 27, 2012	Rodney Thompson		
72	Open House Cross High School	August 27, 2012	Archie Franchini		
73	Board of Education Campaign Update	August 28, 2012	Amy Kovach, Archie Franchini	Board of Education	
74	Open House Berkeley High School	August 28, 2012	Susan Gehlman		
75	Open House Goose Creek High School	August 29, 2012	Rodney Thompson		
76	Open House Goose Creek Primary	August 30, 2012	Amy Kovach		
77	Open House Berkeley Elementary	August 30, 2012	Rodney Thompson		
78	Open House Cane Bay Middle	August 30, 2012	Archie Franchini		
79	Community Meeting Goose Creek	August 30, 2012	Rodney Thompson, Amy Kovach		
80	Community Meeting, Goose Creek, 6-7 pm	August 30, 2012	Rodney Thompson, Amy Kovach in attendance		
81	Open House Berkeley Middle School	September 4, 2012	Amy Kovach		
82	Open House Stratford High School	September 4, 2012	Archie Franchini		
83	Open House Westview Middle School	September 4, 2012	Kim McLaren		
84	Open House Berkeley Elementary	September 6, 2012	Danise Ling		
85	Open House Westview Elementary	September 6, 2012	Jerome Davis		
86	Open House St. Stephen Middle	September 6, 2012	Amy Kovach		
87	Open House Timberland High School	September 6, 2012	Archie Franchini		
88	Open House Whitesville Elementary	September 10, 2012	Karen Whitley		
89	Open House St. Stephen Elementary	September 10, 2012	Archie Franchini		
90	Open House Cane Bay High	September 10, 2012	Archie Franchini		
91	Open House Berkeley Intermediate	September 10, 2012	Kim McLaren		
92	Open House Berkeley High School	September 10, 2012	Susan Gehlman		
93	Open House College Park Elementary	September 11, 2012	Jerome Davis		
94	Open House Whitesville Elementary	September 11, 2012	Kim McLaren		
95	Daniel Island Community and Daniel Island News	September 11, 2012	Rodney Thompson, Amy Kovach	Matt Sloan, Jane Baker, Beth Bush	
96	Open House Whitesville Elementary	September 12, 2012	Kim McLaren		
97	Open House Gargano Middle	September 12, 2012	Rodney Thompson		
98	Video Taping	September 12, 2012	Amy Kovach	District Office Video	
99	Open House Whitesville Elementary	September 13, 2012	Amy Kovach		
100	Open House Berkeley Elementary	September 13, 2012	Rodney Thompson		
101	Open House Howe Hall AIMS	September 13, 2012	Rodney Thompson		
102	Direct Mail	September 18, 2012	Steering Committee		
103	Second Target Polling	September 18, 2012	Steering Committee		
104	Open House Cross Elementary	September 17, 2012	Glenda Levine		
105	Open House Whitesville Elementary	September 17, 2012	Kim McLaren		
106	Moncks Corner NAACP	September 17, 2012	Rodney Thompson		
107	Community Meeting, Hanahan City Hall	September 17, 2012	Amy Kovach		
108	Open House Whitesville Elementary	September 18, 2012	Amy Kovach		
109	Open House Devon Forest Elementary	September 18, 2012	Rodney Thompson		
110	Open House HE Banner	September 18, 2012	Archie Franchini		
111	Open House Goose Creek Primary	September 18, 2012	Rodney Thompson		
112	Open House Cane Bay Elementary	September 18, 2012	Kim McLaren		

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BCSD School Improvement Referendum 2012
Chronological Order of Events

	A	B	C	D	E
1	What?	When?	Who?	Special Notes	
2	First meeting with superintendent re: referendum	November 15, 2011	Rodney Thompson, Amy Kovach, Keith Sizamore		
3	Board of Education Meeting	January 10, 2012	Archie Franchini	Board votes 6-3 to pursue information for referendum	
4	Berkley Chamber Board of Directors	January 31, 2012	Rodney Thompson		
5	Charleston Two Party BMT Meeting	February 2, 2012	Amy Kovach, Archie Franchini		
6	First campaign research, Davis Public Relations (Columbia, Richmond Two)	February 22, 2012	Amy Kovach		
7	Title 1/Federal Programs Parent Meeting	February 23, 2012	Amy Kovach		
8	Committee Meeting Kick Off	March 23, 2012	Amy Kovach, Archie Franchini		
9	Endorsements Sought	April 1, 2012	Steering Committee		
10	Presentation to the Summerville/Dorchester Chamber of Commerce	April 3, 2012	Amy Kovach		
11	Assembly Oversight, Steering	April 5, 2012	Archie Franchini, Amy Kovach		
12	Meeting with RT and Laura Varn, Sam (Senias Cooper)	April 18, 2012	Rodney Thompson, Amy Kovach	Looked at Alken loss and reasons why	
13	Rotary Meeting	April 24, 2012	Amy Kovach		
14	Board of Education Campaign Update	April 24, 2012	Amy Kovach, Archie Franchini	Board of Education	
15	Present Building/Renovation Plan	April 24, 2012	Archie Franchini		
16	Present Campaign Plan	April 24, 2012	Amy Kovach		
17	Alcoa Retirees Presentation	April 25, 2012	Amy Kovach		
18	Berkley Chamber begins solicitation of funds	April 26, 2012	Berkley Chamber of Commerce	All Funds Donated to Berk Chamber and reported to SC Ethics Commission	
19	Principals Meeting Update	May 1, 2012	Archie Franchini, Amy Kovach		
20	Fundraising	May 1, 2012	Steering Committee		
21	Trident Association of Realtors Presentation	May 15, 2012	Amy Kovach, Rodney Thompson		
22	Hire PR Firm/VAD Agency	May 18, 2012	Communications Committee		
23	Organize Sub-committees	June 1, 2012	Steering Committee Leaders		
24	First round of Polling	June 1, 2012	Charleston Trident Association of Realtors		
25	Board of Education Summer Retreat, Campaign Update and Polling Review	June 29, 2012	Amy Kovach	Board of Education	
26	Campaign Communications Plan Drafted	July 13, 2012	Communications Committee		
27	Building/Growth Presentation and Campaign Update at Board Meeting	July 24, 2012	Amy Kovach, Archie Franchini	Board of Education	
28	Board of Education Campaign Update	July 24, 2012	Amy Kovach, Archie Franchini		
29	Ballot Question Voted on By Board	July 24, 2012	Archie Franchini	Board voted 7-0-1	
30	Campaign Plan Approval	August 1, 2012	Steering Committee		
31	Televised Press Conference	August 6, 2012	Amy Kovach		
32	Open House Hershman High School	August 9, 2012	Rodney Thompson	Cane Bay Middle School on location	
33	Cane Bay Middle School Opened	August 14, 2012	Board of Education	Board meeting held at CSM	
34	Open House Westview Middle	August 14, 2012	Kim McLaren		
35	Ballot Question Presented to Board of Elections	August 15, 2012	Bradley Thomas		
36	Open House Sangeres Elementary	August 15, 2012	Glenda Levine		
37	Open House Berkeley Intermediate	August 15, 2012	Susan Gehlman		
38	Open House Hanahan Middle School	August 15, 2012	Rodney Thompson		
39	Open House Sangeres Middle School	August 15, 2012	Kim McLaren		
40	Open House Berkeley Elementary	August 16, 2012	Glenda Levine		
41	Open House Berkeley Middle College	August 16, 2012	Jerome Davis		
42	Open House Boulder Bluff	August 16, 2012	Jerome Davis		
43	Open House Cane Bay Elementary	August 16, 2012	Willie Sanders		
44	Open House College Park Elementary	August 16, 2012	Karen Whitley		
45	Open House College Park Middle	August 16, 2012	Karen Whitley		
46	Open House Cross Elementary	August 16, 2012	Susan Gehlman		
47	Open House Daniel Island Elementary	August 16, 2012	Amy Kovach		
48	Open House Devon Forest Elementary	August 16, 2012	Jerome Davis		
49	Open House Hershman Elementary	August 16, 2012	Kevin O'Gorman		
50	Open House Hanahan Middle School	August 16, 2012	Rodney Thompson		
51	Open House Howe Hall JMS	August 16, 2012	Karen Whitley		
52	Open House JK Gordin	August 16, 2012	Archie Franchini		
53	Open House Martington Elementary	August 16, 2012	Rodney Thompson		
54	Open House Martington Middle	August 16, 2012	Kim McLaren		
55	Open House Sangeres Elementary	August 16, 2012	Willie Sanders		
56	Open House Sangeres Intermediate	August 16, 2012	Willie Sanders		

00702

**BCSD School Improvement Referendum 2012
Chronological Order of Events**

A	B	C	D	E
113 Charleston Home Builders Association Meeting	September 18, 2012	Rodney Thompson, Amy Kovach		
114 Post and Courier Editorial Review Board	September 19, 2012	Rodney Thompson, Amy Kovach		
115 Open House Sedgewick Middle	September 20, 2012	Amy Kovach		
116 Open House Boulder Bluff	September 20, 2012	Amy Kovach		
117 Open House Hanahan Elementary	September 20, 2012	Jerome Davis		
118 Open House Harrington Elementary	September 20, 2012	Archie Franchini		
119 Open House Sedgewick Intermediate	September 20, 2012	Rodney Thompson		
120 Open House Sangre de Cristo Elementary	September 20, 2012	Kim McLaren		
121 Community Meeting Moncks Corner AME	September 22, 2012	Jane Pulling		
122 Community Meeting, Hanahan First Baptist Church	September 24, 2012	Amy Kovach		
123 Board of Education Campaign Update	September 25, 2012	Amy Kovach, Archie Franchini	Board of Education	
124 Board of Education Meeting	September 25, 2012	Laura Vern	Presented campaign materials to Board of Education	
125 Kiwanis Club Meeting Moncks Corner	September 25, 2012	Laura Vern		
126 Department of Justice Approval	September 26, 2012	Brennly Thomas		
127 Community Meeting, Goose Creek, Berkeley Electric Cooperative	September 26, 2012	Amy Kovach	No attendees	
128 Open House Sangre de Cristo Intermediate	September 27, 2012	Amy Kovach		
129 Open House Harrington Middle	September 27, 2012	Rodney Thompson		
130 Community Meeting Moncks Corner AME	September 27, 2012			
131 Campaign Kick Off Press Conference	October 2, 2012	Campaign Steering Committee	Stratford HS	
132 B/H/Z Lowcountry Tea Party Meeting	October 2, 2012	Philip Obia, Shannon Lee, Amy Kovach		
133 Community Meeting St. Stephens	October 3, 2012	Jane Pulling		
134 Open House Goose Creek Primary	October 4, 2012	Archie Franchini		
135 Berkeley Middle College Beta Club Induction	October 4, 2012	Amy Kovach		
136 Hanahan Exchange Club	October 4, 2012	Rodney Thompson		
137 Daniel Island School SIC meeting	October 4, 2012	Pam Thompson		
138 Community Meeting Highland Park Baptist Church	October 8, 2012	Amy Kovach		
139 Community Meeting St. Stephen's American Legion Hall	October 9, 2012	Archie Franchini		
140 Open House Daniel Island Elementary	October 11, 2012	Rodney Thompson		
141 Foster Creek Home Owners' Association	October 11, 2012	Archie Franchini		
142 Daniel Island Club and Business Community	October 15, 2012	Steering Committee		
143 Community Meeting Highland Park Baptist Church	October 15, 2012	Amy Kovach		
144 Direct Mail	October 16, 2012	Steering Committee		
145 Calhoun Community Meeting	October 16, 2012	Amy Kovach, Rodney Thompson		
146 Community Meeting St. Stephen's American Legion Hall (180 Ravenel Drive)	October 16, 2012	Kim Glaze		
147 Daniel Island Rotary Club Meeting	October 17, 2012	Chad Vail		
148 Open House Hanahan Elementary	October 18, 2012	Rodney Thompson		
149 Lions Club Moncks Corner	October 18, 2012	Amy Kovach		
150 Community Meeting St. Stephen's American Legion Hall	October 23, 2012	Kim Glaze		
151 Community Meeting St. Stephen's American Legion Hall	October 30, 2012	Kim Glaze		
152 Direct Mail	November 1, 2012	Steering Committee		
153 Phone Bank Final Calls	November 4, 2012	Steering Committee		
154 Election Day	November 6, 2012			

Passage of Referendum 59.8%

00703

Alfred Victor Rawl (CV)

Born Norfolk, Va. Jan. 5, 1946 Resident Charleston, S.C. Married, one child.
Address: 2835 Preakness Stakes Charleston, S.C. 29141. Phone 843 766 7334. Fax 843 766 7334. E-mail AVRAWL@aol.com.

Education: The College of Charleston BS History 1968. Attended The University of Texas School of Law 1968. The University of South Carolina School of Law JD 1973.

Employment History: Private practice (general) Rawl and Runcy 1973-1986. Assistant Solicitor 9th Circuit 1976. S.C. Workers Compensation Commissioner 1986-1990. Staff Counsel S.C. Second Injury Fund 1990-1991. S.C. Circuit Court Judge 1991-2003.

Political History: S.C. General Assembly Member 1977-1978, 1981-1986. State Reorganization Commission 1979-1980. S.C. Housing Authority 1986. S.C. Prison Overcrowding Project 1984-1985. Chairman Special Laws Subcommittee of the S.C. House Judicial Committee 1983-1986.

Military Service: Retired Lt. S.C. Army National Guard 1968-1994. Basic and Advanced Infantry Training Ft. Jackson 1969. Officers Candidate School 1970. Officers Basic Course (JAG) (SIG) (INF) JAG Advanced Course 1980. Command General Staff Course 1985. JAG Military Judges Course 1993. Medals and Commendations ARCOM, USAR, Achievement, National Defense, Service.

Professional Associations: SC Bar Assn., Charleston Bar Assn., American Bar Assn., S.C. Trial Lawyers Assn., Admitted to practice in S.C. state and federal courts and the Fourth Circuit Court of Appeals.

Conference and CLEs: S.C. and American Bar Meetings, S.C. Trial Lawyers Meetings. S.C. Defense Trial Lawyers Meetings. S.C. Workers Compensation Educational Conferences. National Judicial College Courses and conferences. I have been on many panels, taught and lectured on the topics of rules, evidence, trial advocacy, ethics, civility, and alternative dispute resolution.

I have completed the S.C. Mediators Course.

Elected to Charleston County Council 2008.

JOHN P. FREEMAN
2329 Wilmot Avenue
Columbia, South Carolina 29205-3164

803-254-4667 t
753-9370 f
jpfreemanusc@gmail.com

April 22, 2014

The Honorable A. Victor Rawl, Sr.
2835 Preakness Stakes
Charleston, SC 29414

Re: Berkeley County School District

Dear Judge Rawl:

Thank you for calling on me to assist in analyzing a legal issue that needs to be determined by the Berkeley County Board of Education. The issue concerns the Board's obligation to indemnify an employee, Mrs. Amy Kovach, who has been indicted for an alleged violation of S.C. Code § 8-13-1346. In this regard, S.C. Code § 59-17-110 requires that:

In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

You have advised me that you have diligently investigated the conduct of Mrs. Kovach as outlined in the indictment and have concluded based on your investigation that her conduct constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110. Based on that factual predicate, you have asked me to give you my legal opinion whether the Board is precluded from appearing and defending Mrs. Kovach under the statute simply by virtue of the fact that she has now been indicted.

As you know, I am a recognized expert in the field of entity governance, having taught Business Associations, Corporations, Agency and a host of related courses over a span of the 35 years during which I was a Professor of Law at USC Law School. I have lectured and testified as an expert many times about the duties, rights, and powers of entities and of their board members, officers, and agents. Among other professional activities, I served the South Carolina General Assembly as a reporter on the most recent South Carolina Corporate Code revision project. The

areas for which I was reporter included indemnification of corporate officers and directors. I have in the past advised entities and their board members about indemnification matters.

PROFESSIONAL OPINION

Based on my research and in light of your factual findings, it is my professional opinion that Mrs. Kovach's indictment does not preclude the board from appearing or defending the action in her behalf.

REASONS IN SUPPORT OF OPINION

A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of impropriety. A case in point is the Second Circuit's ruling in United States v. Stein, 541 F.3d 130, 157 (2d Cir. 2008). The government there sought to bar accounting firm KPMG from providing legal fees to former employees indicted for tax fraud. That action was held unconstitutional as a deprivation of Sixth Amendment rights. The court explained:

The government conceded at oral argument that it is in the government's interest that every defendant receive the best possible representation he or she can obtain. A company that advances legal fees to employees may stymie prosecutors by affording culpable employees with high-quality representation. But if it is in the government's interest that every defendant receives the best possible representation, it cannot also be in the government's interest to leave defendants naked to their enemies.¹

Furthermore, South Carolina's public policy strongly favors indemnity being extended to employees who have acted within the scope of their employment and in good faith. Thus, under South Carolina corporate law, S.C. Code Ann. § 33-31-851(a), indemnification is allowed in

¹ Here is additional background concerning Stein from Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: the Rise of Corporate White-collar Practices in Large U.S. Law Firms*, 53 Ariz. L. Rev. 1221, 1223 (2011):

On July 16, 2007, U.S. District Court Judge Lewis A. Kaplan entered a remarkable order. Federal prosecutors had investigated the giant accounting firm KPMG LLP ("KPMG") for allegedly marketing fraudulent tax shelters. The firm managed to avoid criminal charges, but 16 former partners and employees did not. In United States v. Stein, Judge Kaplan dismissed the indictment against 13 of the 16 individuals, finding that federal prosecutors had unconstitutionally induced KPMG to stop funding their individual defenses. As a result, although these defendants generally had substantial personal assets, they either lost their counsel of first choice (including lawyers from major law firms) or were financially unable to defend their cases as they would have had their legal expenses been entirely advanced or underwritten by KPMG. The court was incensed, calling this "intolerable in a society that holds itself out to the world as a paragon of justice." The Department of Justice . . . challenged the ruling. The defendants and their amici were represented in a closely watched appeal by some of the finest lawyers of the day, including counsel from the nation's largest law firms. On August 28, 2008, the U.S. Court of Appeals for the Second Circuit affirmed, finding that the government had violated the defendants' Sixth Amendment right to counsel.

some cases in favor even of criminally-convicted officers, trustees, employees, or agents. Indemnification is flatly prohibited only where there is an adjudication that the officer, trustee, employee, or agent is liable to the company or where an improper personal benefit was received by the person seeking indemnification. S.C. Code Ann. § 33-31-851(d). See S.C. Code § 33-31-851(c) ("The termination of a proceeding by . . . conviction . . . is not, of itself, determinative that the director did not meet the standard of conduct described in this section."). The corporate law "standard of conduct" set forth in Section 33-31-851(a) requires that the entity be able to conclude the officer, trustee, employee, or agent acted in good faith and reasonably believed his or her conduct was in the entity's best interest. That factual predicate for indemnification in the corporate setting is very similar to the one established by S.C. Code § 59-17-110.

I have reviewed the Attorney General's Opinion dated May 13, 1997, 1997 WL 323769 (S.C.A.G.). That Opinion holds:

[O]ur courts would conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings.

As you well know, an Attorney General's Opinion has no force of law. In this case it is wrong. Opinions rendered by the Attorney General do not trump statutory enactments. The 1997 Opinion relies on and reiterates the holding from a 1995 Opinion, that purported to find that "a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding." This opinion is obviously and egregiously wrong because it contradicts the plain language of, S.C. Code § 59-17-110. Again, the statute requires that:

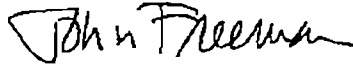
In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

In this case, an employee is being prosecuted in a criminal proceeding. You have determined, after making a reasonable investigation, that the employee acted in good faith and in the course of her employment. Under these circumstances, it is "the duty" of the school district to provide a defense to the proceeding on her behalf.

I hold the foregoing opinion concerning the Berkeley County Board of Education's duty to provide a defense on behalf of Mrs. Amy Kovach to a reasonable degree of professional certainty as an expert in the field of entity governance and employee indemnification rights.

I am rendering this legal opinion as a public service. No compensation, direct or indirect, in any form or fashion, has been or will be furnished to me in connection with this work.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "John P. Freeman". The signature is written in dark ink and is positioned below the typed name.

John P. Freeman

Southwestern Association of Forensic Document Examiners and the American Society of Questioned Document Examiners. A list of my publications is also contained within Exhibit A.

Attached to this report as Exhibit B is a list of the matters in which I have given sworn testimony in either deposition or trial for the last 4 years.

I am being compensated for time spent at the hourly rate of \$400.00. Receipt of compensation is in no way contingent upon our examination results or opinions espoused.

DOCUMENT TESTING METHODOLOGY

The document referenced earlier, "Invoice", was presented for examination in my offices on November 18, 2014.

PHYSICAL EXAMINATION

VISUAL AND MICROSCOPIC

The document was viewed with the unaided eye and was also examined with magnification ranging from 4X to 140X by means of handheld magnifiers and a digital microscope. The handheld magnifiers used room illumination and did not contain internal illumination. A digital microscope (MiScope) was also used that provided examination at either 40x or 140x with capabilities for digital image capture.

CHEMICAL EXAMINATION

This phase of examination is designed to analyze the components of the various materials found within the examined documents. These materials usually consist of paper, writing ink and printed text (which can be either toner based or ink based). The role of this examination phase is to characterize the materials for comparison with each other for purposes of the determination of common source or to determine the date or time period during which the materials were commercially available. Procedures also exist to allow for the determination of the date or time period of preparation of the document.

EXAMINATION OF XEROGRAPHIC TONER

1. It is often the case that documents that have been produced by the xerographic process are suspected of being recent productions, as opposed to documents that were prepared years in the past. As is the case with writing inks, xerographic toner has been found to change chemically with time. The methodology proposed is one that measures quantitatively the change in the chemical nature of toner.
2. The basis of this methodology has its foundation in previous studies related to the examination of writing inks. These studies date from the 1930's (Witte) through the

1950's (Kukuchi) and into the present day. (Cantu and Prough¹, Aginsky²). All of these studies indicated that writing inks when first applied to paper were different chemically and reacted differently to various stimuli than "aged" inks. By application of artificial aging conditions (heat or ultraviolet light), it was observed that the chemical measurements of "aged" or old writings yielded similar results to the measurements of artificially aged writings. A comparative examination of writings of known preparation date with writing whose date of preparation is unknown, resulted in a conclusion regarding the date of preparation of the unknown writing. Some of the more recent studies also proposed the application of threshold values for measurements as an indication of a more specific preparation time.³ All of these methodologies required the measurement of a parameter that could be quantified and treated by statistical measures.

3. In the early 1990's this author investigated the ability of an instrumental technique, X-ray Photoelectron Spectroscopy (XPS), to measure the chemical nature of xerographic toner. The XPS technique is a well researched and published analytical technique that measures the atomic and molecular structure and make up of both organic and inorganic materials. It has been in use for more than 50 years and has resulted in thousands of scientific articles. It is used routinely in the medical device field, particularly for the examination of polymers, and the semi-conductor field for both quality control and research regarding performance. Xerographic toner is a blend of polymer components and colorant, usually carbon black. In its raw form the measurement of toner will result in experimental data consistent with the chemical make-up of the toner and the specific polymer species. However, the electrostatic process used in the preparation of copies or laser print documents involves the use of a high voltage corona and the production of ozone (O₃), which becomes incorporated into the toner. This was evidenced by the change in XPS data from neat, or unprocessed toner, to the toner found on a document. It was also found that with time the toner reverted back to the chemical state of the toner before the xerographic process. By applying artificial aging methodologies to toner samples from documents of varying ages it was found that documents of less than 2 years of age resulted in significant and reproducible changes in several measured parameters. While documents that were greater than 2 years in age showed statistically insignificant variations in these parameters.
4. This work was introduced to the Forensic community at the International Association of Forensic Science meeting in Dusseldorf Germany in August of 1993 and published in the proceedings *Advances in Forensic Sciences*, B. Jacob, W. Bonje, *Forensic Criminalistics* 1, Volume 3, page 272. Additionally, work related to the specific analysis technique and the interpretation of the data was published in the authors dissertation entitled *Surface Characterization of Polymeric Materials by X-ray Photoelectron Spectroscopy and Time-of-Flight Secondary Ion Mass Spectrometry: Biomedical Materials and Forensic Applications*, University of North Carolina - Chapel Hill, 1999. Presentations were made at the annual meeting of the American Academy of Forensic Sciences (San

¹ Cantu, AA and Prough, RS, "On the Relative Aging of Ink-The Solvent Extraction Technique", *IFSCA*, Vol. 32, No. 5, Sept. 1987, pp. 1151-1174

² Aginsky, VN, "Dating and Characterizing Writing, Stamp Pad and Jet Printer Inks by Gas Chromatography/Mass Spectrometry", *International Journal of Questioned Document Examiners*, Vol. 2, No. 2, April/June 1996, pp 103-115.

³ Gaudreau, M. & Aginsky, V., "Essentials of the Solvent Loss Ratio Method", Annual Conference of the American Society of Questioned Document Examiners, Victoria, BC, August 28-Sept. 2, 2010

Francisco, CA, February 1998), the American Society of Questioned Document Examiners (San Diego, CA, August 2002) and the International Association of Forensic Sciences (Hong Kong, 2005) that further outlined the experimental methodology and the measured parameters.

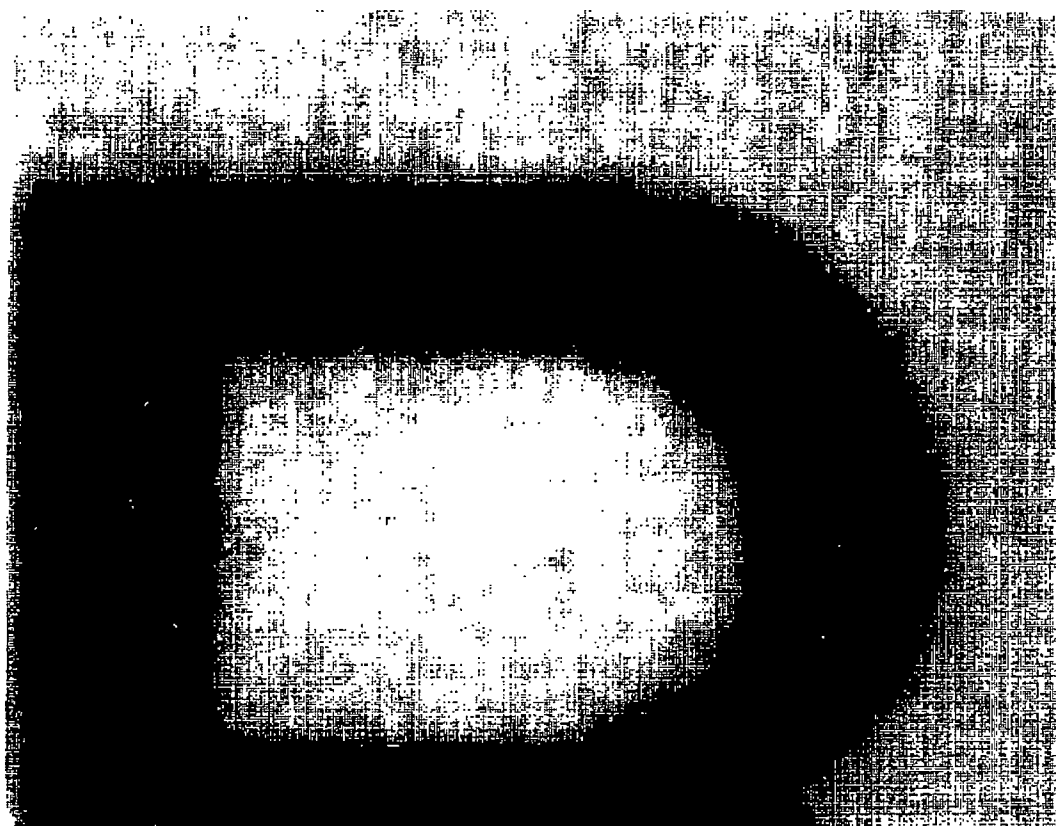
5. During this time period, 1993 to the present, this author has examined the toner of hundreds of documents for the purpose of measuring the various parameters identified as indicative of the age or relative age of the toner. Several instances of examination have resulted in the preparation of expert reports and proffering of expert testimony. One of these trial appearances was *Anderson v. Mardirossian*, which occurred in state court in Rockville, MD in January of 2002. At the time of our testimony there was a legal challenge to the admissibility of our opinion, which was denied by the trial judge.

EXAMINATION RESULTS

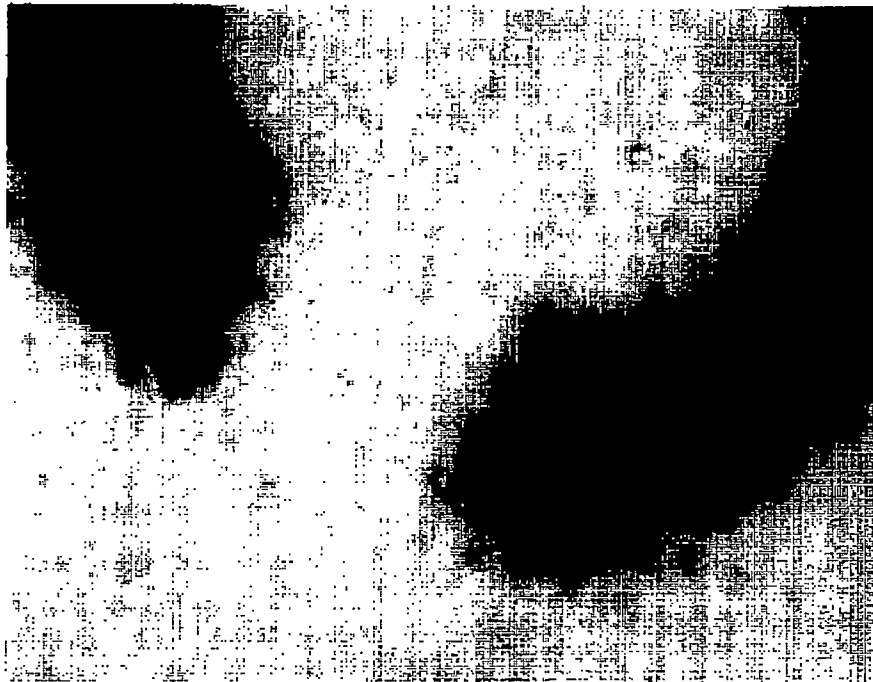
PHYSICAL EXAMINATION

Our visual examination of the referenced document, "Invoice", yielded a single page document of 8 ½ by 11 inch paper void of any watermark or individualistic markings. The document appeared to be a "letterhead" of the Berkeley County School District with a logo in the upper middle of the page and the address, phone and website along the lower edge. The document contained printed material that appeared to be both green and black in color, and the document contained no handwritten material.

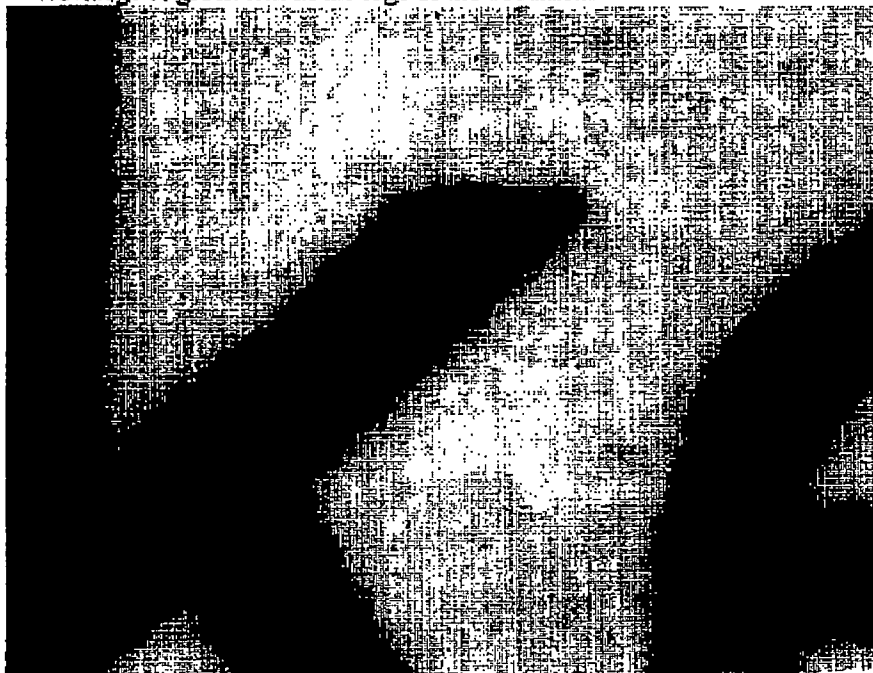
Our microscopic examination of the referenced document, "Invoice", yielded characteristics indicative of the presence of toner material. Toner is the material that is used to impart an image to paper via the xerographic process that is found in both laser printers and copiers. In this examination it was noted that the black text characters were consistent in their make-up, while the colored text and logo was composed of multiple components in the form of multi-colored "dots". Additionally, there was an underlining pattern of yellow colored "dots". The following 3 images illustrate these findings and were taken from the referenced document via the digital microscope.



140X image of black text on the document, note yellow "dot"



140X image of green text in the logo of the document

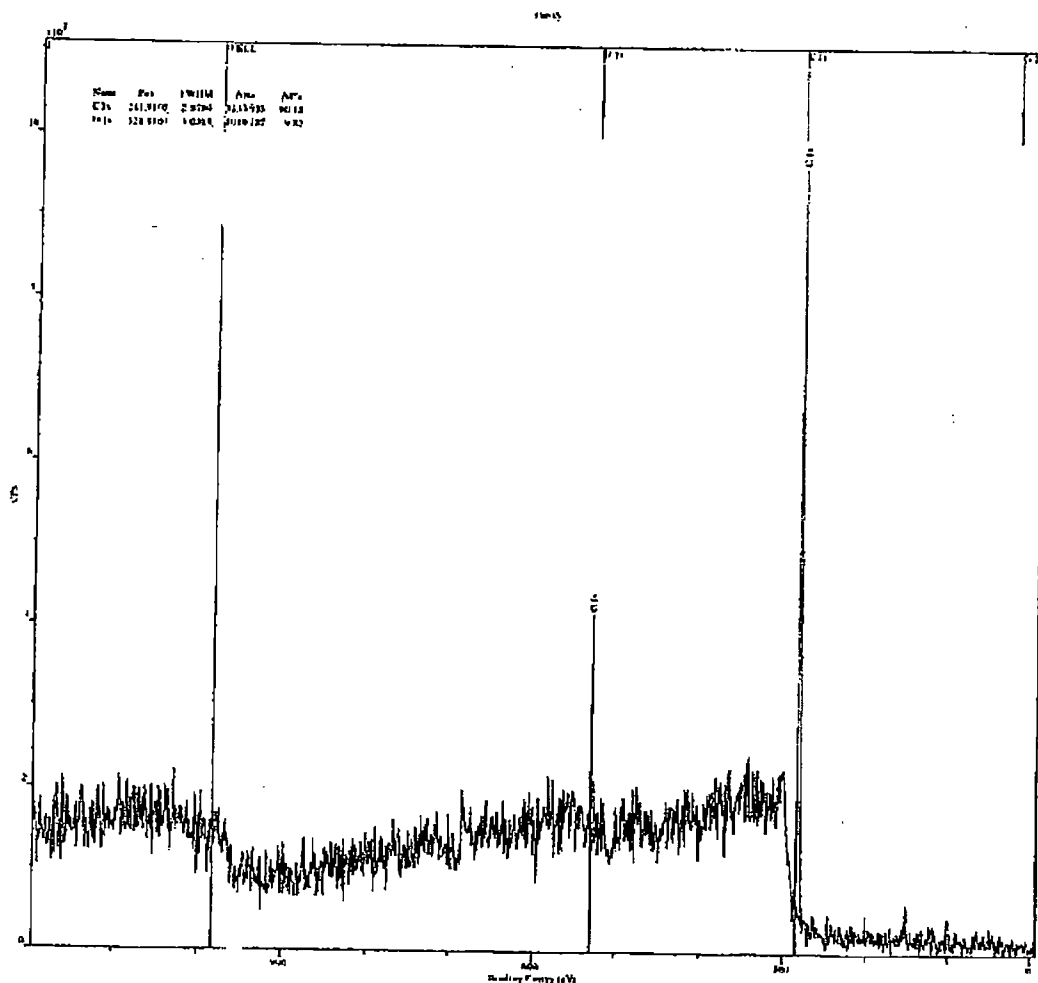


140X image of black text on the document, note yellow "dots".

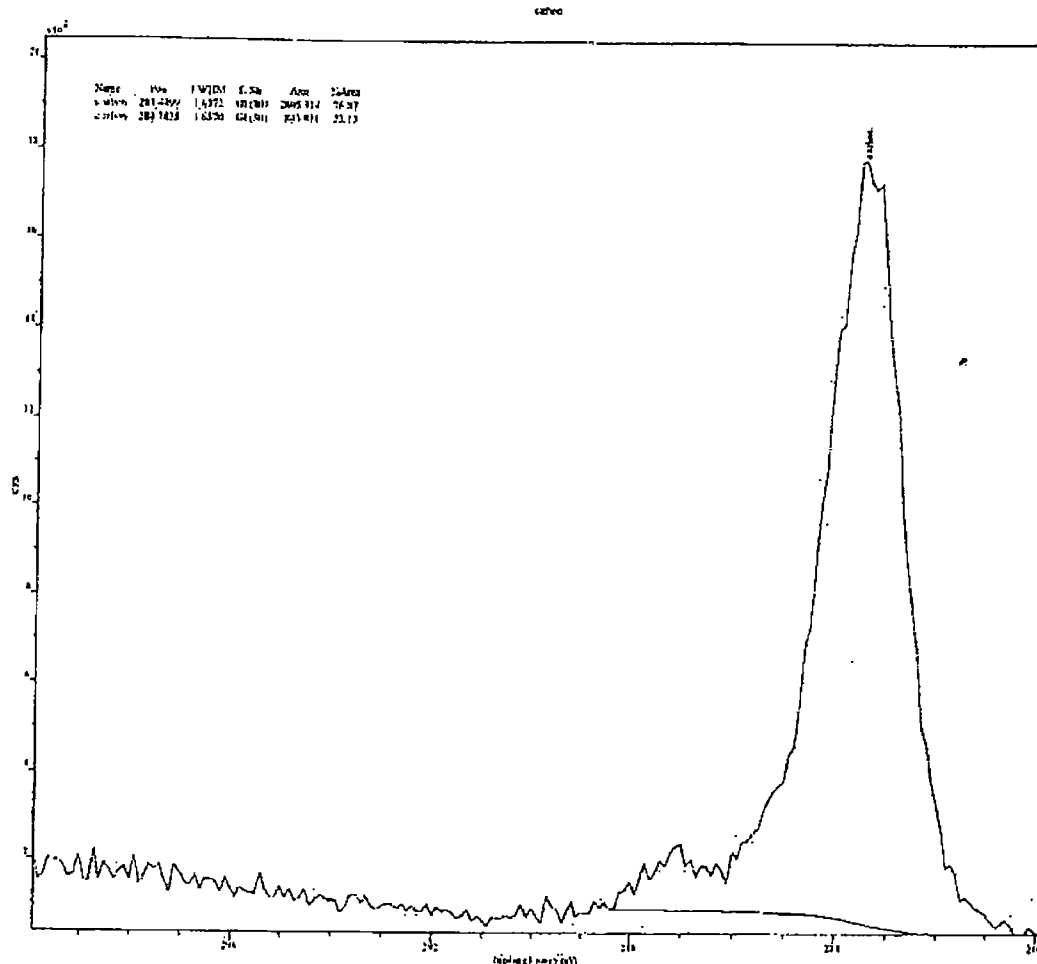
CHEMICAL EXAMINATION

Examination of Xerographic Toner

Examination of toner samples removed from the referenced document by X-ray Photoelectron Spectroscopy (XPS) yielded data regarding both the elemental and molecular make-up of the samples. The following images illustrate the elemental composition, survey spectra, and the molecular composition, C1s spectra, of a toner sample from the referenced document.



00714



The samples of toner were examined in triplicate and included not only samples of untreated toner, but also samples of toner that were exposed to either heat (70° C) or ultraviolet light (254nm and 365nm) for 12 hours. The parameters that were measured included the atomic percent of the various elements present and the number and quantity of carbon species present as a percent of the total. These measurements were evaluated in light of the reported association between the effect of artificial aging treatments on the Carbon/Oxygen Ratio and the percent of various Carbon species as they relate to the age of the toner material.

CONCLUSIONS

The consistency of materials and physical appearance of the referenced document did not indicate any alteration or substitution. The physical appearance of the document was unremarkable and the use of color laser technology to reproduce "letterhead" is quite common.

All of the measured parameters regarding the toner found on the examined page indicates that the toner was not applied to the paper within the most recent time period. Since the methodology detects differences in the measured parameters within the most recent 2 years since production of the document, the examination results indicate that the referenced document was produced (printed) at least 2 years prior to the date of the examination, i.e. before December 2012. Given the limitations of the examination methodology, it is not possible to provide a specific date or time period of production of the document.

A handwritten signature in black ink, appearing to read 'A. Lyter III', with a stylized flourish at the end.

Albert H. Lyter III, Ph.D., D-ABC
Forensic Chemist



FEDERAL FORENSIC ASSOCIATES, INC.

Post Office Box 31567 • Raleigh, North Carolina 27612
(919) 848-3686 • FAX (919) 848-9849

ALBERT H. LYTER III

EDUCATION:

B.S. Chemistry, Oklahoma City University, 1973
B.S. Biology, Oklahoma City University, 1973
M.S. Forensic Science, George Washington University, 1975
Ph.D. Analytical Chemistry, University of North Carolina-Chapel Hill, 1999

TRAINING:

Fiber Microscopy, Institute of Paper Chemistry, 1975
X-ray Spectrometry, State University of New York, 1976
Questioned Documents, United States Secret Service, 1977
High Pressure Liquid Chromatography, Waters Associates, 1978
High Pressure Liquid Chromatography, American Chemical Society, 1978
Forensic Microscopy, McCrone Research Institute, 1978
Surface Analysis Techniques, Physical Electronics, 1992
Identification of Photocopiers, New Mexico State Police, 1983
Canon Facsimile Workshop, American Society of Questioned Document Examiners, 1991
Microscopy for Pigment & Fiber Identification in Art & Artifacts, Campbell Center for Historic Preservation Studies, 2010

EXPERIENCE:

September 1981 to present

President and Chief Scientific Officer of Federal Forensic Associates, Inc.
Engaged in consultation, examination, training, research and testimony in Forensic Science, including ink and paper analysis, trace evidence and questioned document examination
Qualified trace evidence areas include fire debris, explosives, paint, hair, fibers, glass and wood.

January 1975 to September 1981

Forensic Chemist, U.S. Treasury Department, Bureau of Alcohol, Tobacco and Firearms, National Laboratory Center, Rockville, Maryland
Engaged in consultation, examination, training, research and testimony as service to federal and state law enforcement

Court qualified in federal, state and military courts in over 33 states, U.S. Virgin Islands, Australia, Canada, Mexico, Malaysia and Singapore
Instructor at the FBI Academy, Federal Law Enforcement Training Center, Naval Investigative Service, Air Force Office of Special Investigation, United States Secret Service, Florida Department of Law Enforcement, colleges and universities
Lecturer at numerous scientific and legal organization meetings to include the American Academy of Forensic Sciences, American Society of Questioned Document Examiners, California Association of Criminalists, International Association of Forensic Scientists

**PROFESSIONAL
ORGANIZATIONS:**

American Academy of Forensic Sciences - Fellow
Mid-Atlantic Association of Forensic Scientists
California Association of Criminalists
Southwestern Association of Forensic Document Examiners
International Association of Forensic Sciences
American Chemical Society
Society for Applied Spectroscopy
American Society for Testing and Materials

PUBLICATIONS:

Comparison of Paper Samples - IAI News, 1976
Comparison of Typewriter Ribbon Inks by Thin Layer Chromatography - Journal of Forensic Science, 1977
A Scientific Study of Pencil Lead - Journal of Forensic Science, 1978
Analysis of Water Soluble Paper - Journal of Forensic Science, 1980
Comparison of Typewritten Carbon Impressions - Journal of Forensic Science, 1982
Examination of Ball Pen Ink by High Pressure Liquid Chromatography - Journal of Forensic Science, 1982
Ink Analysis, A Key Element in Questioned Document Examination - Trial, 1983
A High Performance Liquid Chromatographic (HPLC) Study of Seven Common Explosive Materials - Journal of Forensic Science, 1983
Finding Fraudulent Documents - Family Advocate, 1989
Attempted Determination of Authorship by Ball Pen Line Characteristics - Forensic Science International, 1990
Analysis of Writing Ink - chapter in the book HPLC in Forensic Science, 1982
Contributions to the book Forensic Ink and Paper Examination by Brunelle and Reed, 1982
Examination of Gel Pen Ink by Microspectrometry - Journal of the American Society of Questioned Document Examiners, Dec. 2005
Examination of Gel Pen Ink by Physical and Thin Layer Chromatographic Examination - Journal of the American Society of Questioned Document Examiners, Dec. 2005
Ph.D Dissertation - Surface Characterization of Polymeric Materials by X-ray Photoelectron Spectroscopy and Time-of-Flight Secondary Ion Mass Spectrometry: Biomedical Materials and Forensic Applications

HONORS:

Honorary Assistant Attorney General, State of Alabama
Treasury Award for Outstanding Performance
Honorary Member - Southwestern Association of Forensic Document Examiners

CERTIFICATION:

Diplomate of the American Board of Criminalistics

CASES OF NOTE:

Mormon Will of the late Howard R. Hughes
Slander trial of CBS, Sixty Minutes and Dan Rather
Nazi war crimes case of Ivan Demjanjuk
Sam Shephard murder trial - 2000
Martha Stewart case

CASE NAME	LOCATION	DEPOSITION	TRIAL
Ball v. Ball	St. Petersburg, FL – State	12/3/14 – for trial	
Sassaman v. Gugliotta	Morris Plains, NJ – State	12/1/14	
Quality Home Health Care, Inc. v. Stollings	Milwaukee, WI – State	11/11/14	
COFISA v. BNP	Miami, FL – Federal	3/3-4/14	
Certain Opaque Polymers	International Trade Commission – Wash. DC	4/24/14	
Verona Equities v. Corsaro Corp.	Newark, NJ – State		4/15/14
Helvetia Asset Recovery v. Kahn	San Antonio, TX – State	4/2/14	
Imperial ED v. Pacquiao	McAllen, TX – Federal	3/7/13	
Ceglia v. Facebook	Buffalo, NY – Federal	8/9/12	
Horizon Health Corp. v. Acadia Healthcare Co.	Dallas, TX – State	7/20/12	12/14/12
Snider v. Fritz	Hudson County, NJ – State	5/10/12	
Gugliatto v. Cochise	Miami, FL – State	3/7/12 – for trial	
Estate of Karoly	Easton, PA – State		12/10/11
PacTool v. Kett Tool	Seattle, WA – Federal	10/13/11	
Quiborax v. Bolivia	International Arbitration – Paris, France		5/13/11
Abu-Shamah v. Yassen	Cleveland, OH – State		5/4/11
Wong v. Wong	Philadelphia, PA – State		7/14/10
Potter v. Synerlink	Tulsa, OK – Federal	2/22/10	
Peach v. Fallivena	Morristown, NJ – State	1/22/10	
US v. Paredes Cordova	New York, NY – Federal		10/28/09
Hostetter v. Hostetter	Gentysburg, PA – State		5/28/09
Devades v. Niksari MD	New York, NY – State		5/21/09
Lau King Ting Katie v. Cheng Miu Har Stella	Hong Kong – High Court		3/19/09
Bates Amusements v. Fayette County Agricultural Board	Columbus, OH – State	3/9/09 – for trial	
Gutliart v. Park Centre West Corp., et al	West Palm Beach, FL – Federal	3/2/09 – for trial	
Skilled Investors Inc. v. Bank Julius Baer	New York, NY – Arbitration		2/18/09
Hypoxico, Inc. v. Colorado Altitude Training LLC	New York, NY – Federal		1/23/09
DGCM v. Mexicana	Santa Monica, CA – State	11/24/08	
Campbell v. Campbell	Charlottesville, VA – State		11/19/08
Blau v. Shaeffer, M.D.	NJ – State	7/11/08	
Gong v. Gong	San Diego, CA – State	5/28/08	
Mattel v. MGA	Riverside, CA – Federal	4/17/08	
	Santa Ana, CA – Federal	12/6/10	3/10/11
27 West 84 th Street Tenants Assoc. v. Monsanto	New York, NY – State	2/12/08	

Amanda Kramer

From: Janet Smith <janet@uricchio.com>
Sent: Thursday, September 03, 2015 4:08 PM
To: Nancy Bloodgood
Cc: Janet Smith
Subject: Kovach
Attachments: Motion to Disqualify AG filed 01 20 15.pdf; Appendix of Exhibits to Motion to Disqualify Attorney General filed 01 20 15.pdf; File stamped copy of Motion To Dismiss 5.22.14.pdf

Ms. Bloodgood:

Pursuant to Mr. Theos' instructions, attached are copies of the following:

Motion to Disqualify AG
Motion to Dismiss

Thank you,

Janet S. Smith
Legal Assistant to Jerry N. Theos
and Margaret E. Theos

URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS & KEITH, P.A.
17 ½ Broad Street
Charleston, South Carolina 29401
(843) 723-7491
Fax: (843) 577-4179

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STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY) IN THE COURT OF GENERAL SESSIONS
NINTH JUDICIAL CIRCUIT
INDICTMENT #s: 2014-GS-08-0266
2014-GS-08-01403

STATE OF SOUTH CAROLINA,)
vs.) APPENDIX OF EXHIBITS TO
AMY KOVACH,) MOTION TO DISQUALIFY
Defendant.) ATTORNEY GENERAL

- Exhibit 1 – Excerpt of SLED Investigative Report, July 25, 2013
- Exhibit 2 – Santee Cooper Check for \$15,000
- Exhibit 3 – Excerpt of Memorandum of Interview with Laura Varn, May 9, 2013
- Exhibit 4 – Memorandum of Interview with Kris Mathews, May 29, 2013
- Exhibit 5 – Letter from John W. McIntosh, January 17, 2013
- Exhibit 6 – Letter from Amy Kovach to BCSD, March 7, 2013
- Exhibit 7 – Indictment dated February 11, 2014
- Exhibit 8 – Letter from A. Victor Rawl, Sr., May 2, 2014
- Exhibit 9 – Letter from John Freeman, April 22, 2014
- Exhibit 10 – Motion for Protective Order filed August 6, 2014
- Exhibit 11 – Case Management History
- Exhibit 12 – Excerpt of Motion Hearing Transcript, October 28, 2014
- Exhibit 13 – Indictment dated September 9, 2014
- Exhibit 14 – Letter from John W. McIntosh, October 14, 2014
- Exhibit 15 – Letter from Kathryn Long Mahoney, October 14, 2014
- Exhibit 16 – Post & Courier, “Berkeley schools halt payment of Amy Kovach’s legal fees on felony charge,” December 10, 2014

75 JAN 20 PM 4:20
FILED
Kym
CLERK OF COURT
BERKELEY COUNTY, S.C.

EXHIBIT 1

00722

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

NIKKI R. HALEY
Governor



MARK A. KEEL
Chief

July 25, 2013

INVESTIGATIVE REPORT

TO: File : 31130011

FROM: Special Agent Ryan Kelly

RE: Violation of South Carolina Ethics Act
Misconduct in Office

Thompson, Rodney (Subject)
Kovach, Amy (Subject)
Franchini, Archie (Subject)

COUNTY: Berkeley

Introduction

On January 18, 2013, the South Carolina Law Enforcement Division (SLED) received a written request (Attachment 1) from Chief Deputy Attorney General John McIntosh to investigate alleged incidents of Misconduct in Office and Violation of the South Carolina Ethics Act by employees of the Berkeley County School District (BCSD) during the 2012 Yes4Schools bond referendum. According to documents (Attachment 2) provided by the South Carolina Attorney General's Office (SCAGO), Attorney Josh Whitley contacted the SCAGO and provided documents, newspaper articles, and emails detailing the alleged violations. Whitley alleged BCSD employees, specifically Superintendent Doctor (Dr.) Rodney Thompson, Deputy



An Accredited Law Enforcement Agency



P.O. Box 21398 / Columbia, South Carolina 29221-1398 / (803) 737-9000 / Fax (803) 896-7588

00723

Superintendent Archie Franchini, and Director of Communications Amy Kovach, worked on the campaign during business hours and used district resources. SLED Captain (Capt.) Ryan Neill assigned Special Agent (S/A) Ryan Kelly to conduct an investigation. State Ethics Commission Investigator (Inv.) Jim Bagnall was also assigned to conduct an investigation on behalf of the State Ethics Commission in concert with S/A Kelly.

Summary

On February 13, 2013, S/A Kelly and Inv. Jim Bagnall interviewed Josh Whitley and obtained a voluntary prepared statement (Attachment 3). Whitley provided the following information: He received complaints from teacher's aides, teachers and administrators regarding improper and illegal activities by Dr. Thompson, Dr. Franchini, Ms. Kovach and several Berkeley County School Board (BCSB) members. A public records request was made related to their campaign activities. He reviewed the records provided by the BCSD and was of the opinion that BCSD and BCSB members violated state laws.

On May 21, 2013, S/A Kelly and Inv. Bagnall again interviewed Josh Whitley and obtained a voluntary written statement (Attachment 4). Whitley provided the following information: He was the Chairman of the Berkeley County Citizens for Sustainable Education Committee. The committee's purpose was to oppose the 2012 BCSD bond referendum. He was never afforded equal opportunity to speak or present at rallies, meetings or open houses held on school property. He met with Dr. Thompson on October 2, 2012. Dr. Thompson was aware that he opposed the campaign.

On February 19, 2013, S/A Kelly and Inv. Bagnall interviewed BCSD Director of Communications Amy Kovach. Based on the interview, S/A Kelly prepared a Memorandum of Interview (Attachment 5) documenting the following information as provided by Kovach: She reported directly to Dr. Franchini. She was asked by the BCSB and Dr. Thompson to facilitate communication between the BCSD and the community. She provided data and public

EXHIBIT 2

00725



santee cooper

PO Box 2946101
Moncks Corner, SC 29461-2901
(843) 761-8000

OPERATING

West Fargo Bank, N.A.

DATE
10-08-2012

88-128
331

CHECK NO
618792

VENDOR NUMBER
502724

Fifteen Thousand Dollars And Zero Cents

PAY TO THE
ORDER OF

BERKELEY CHAMBER OF COMMERCE
PO BOX 968
MONCK'S CORNER, SC 29461

PAY THIS AMOUNT

\$ 15,000.00

VOID AFTER SIX MONTHS

Suzanne H. Ritter

Jonnie A. Carter

THE FACE OF THIS DOCUMENT HAS A MULTI COLORED BACKGROUND ON WHITE PAPER WITH A VOID FEATURE & AN ENDORSEMENT BACKER.

santee cooper		VENDOR NUMBER	VENDOR TIN	CHECK DATE	CHECK NUMBER
		502724	57-0650070	10-09-2012	618792
INVOICE DATE	INVOICE/REF NUMBER	INVOICE DESCRIPTION	INVOICE AMOUNT	DISCOUNT AMOUNT	NET AMOUNT
09-17-2012	2012 Berkeley Chambe	2012 Economic Development Sponsorship	15,000.00	0.00	15,000.00
					15,000.00

Medica, Hazel L - M503

*** NOTICE TO VENDORS/CUSTOMERS ***
If You Have Any Questions
Concerning This Check
Please Call (843) 761-4032

00726

EXHIBIT 3

00727

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

NIKKI R. HALEY
Governor



MARK A. KEEL
Chief

MEMORANDUM OF INTERVIEW

TO: File # 31130011
FROM: Special Agent Ryan Kelly
RE: Interview with Laura Varn on May 9, 2013
COUNTY: Berkeley

Name: Laura Varn

Address: [REDACTED]

Phone: [REDACTED]

DOB: [REDACTED]

SSN: [REDACTED]

Employer: Santee Cooper

On May 09, 2013, Special Agent (S/A) Ryan Kelly and S/A Albayalde, SLED, interviewed Laura Varn beginning at approximately 8:45 am at the Honeycomb Café located at 162 Seven Farms Dr., Daniel Island, SC. She provided the following information: She was a Co-Chair of the Yes4Schools campaign. She spoke with Berkeley County School District (BCSD) Superintendent Doctor (Dr.) Rodney Thompson over the telephone approximately two to three times during the campaign. The purpose of the phone calls was to discuss BCSD Chief.



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P.O. Box 21398 / Columbia, South Carolina 29221-1398 / (803) 737-9000 / Fax (803) 896-7588

00728

EXHIBIT 4

00729

STATE ETHICS COMMISSION

MEMORANDUM OF INTERVIEW

NAME: MR. Kris Mathews, Yes4Schools Committee Videographer

REPORT BY: JAMES T. BAGNALL

ADDRESS:

PHONE: [REDACTED]

DATE OF INTERVIEW: 5/29/2013

IN ATTENDANCE: S/A RYAN KELLY

EDWARD LOVE ESQ.

On May 29, 2013 Special Agent Ryan Kelly and I conducted a telephone interview with Mr. Kris Mathews in regard to videos for the 2012 Berkeley County, Yes4School campaign.

During the telephone interview, Mr. Mathews provided the following information:

- Mr. Mathews said that he filmed and edited the videos for the Yes4schools campaign. He stated that he filmed a campaign co-chair, Mrs. Pulling in the studio. Mr. Mathews said that he did not record any videos at the schools or take any still photographs.
- Mr. Mathews stated that videographer, Mr. Les Stringer also provided footage for the campaign video.
- Mr. Mathews said that Santee Cooper staff, Mr. Phil Salls provided still photographs for the campaign video.

00730

EXHIBIT 5

00731

ALAN WILSON
ATTORNEY GENERAL



January 17, 2013

RECEIVED
2013 JAN 18 PM 2:48
STATE ETHICS
COMMISSION

Chief Mark Keel
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, SC 29221

Mr. Herbert R. Hayden, Jr.
Executive Director
State Ethics Commission
5000 Thorndike Mall, Suite 250
Columbia, SC 29210

RE: Berkeley County School District

Dear Chief Keel and Director Hayden:

We have received information that indicates potential numerous violations of the South Carolina Ethics Act, and other potential misconduct in office, regarding a \$350 million bond referendum in Berkeley County. We have been provided with a notebook, two CDs, and other information outlining these potential violations.

This is to request that each of you assign an agent to investigate the potential violations in your respective jurisdiction. Your assigned agent can contact Senior Assistant Deputy Attorney General Allen Myrick, and he will provide you with a copy of the notebook, the CDs and the other information that was provided to this office.

If you have any questions or concerns, please contact me.

Yours very truly,

John W. McIntosh
Chief Deputy Attorney General

CC: Allen Myrick, SADAG

JWM/ds

EXHIBIT 6

00733

March 7, 2013

Dr. Rodney Thompson
229 E. Main Street
Moncks Corner, SC 29461

Dear Dr. Thompson:

Pursuant to South Carolina Code of Law, Title 59, Chapter 17, Section 110, titled *Duty of school districts to defend actions or proceedings against their employees*; and, pursuant to Berkeley County School District Policy GAEA, August 2005, titled *Staff Protection*, I hereby submit in writing on this, the seventh day of March, 2013, my request for legal protection and indemnification in the matter of inquiries and investigation referencing the school improvement referendum.

By state law and district policy, the district is obligated to defend its employees in legal actions resulting from acts done or omitted in good faith in the course of employment.

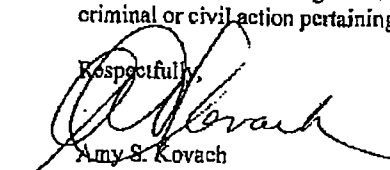
As a good faith employee, I have served to the best of my ability at the direction of the district administration and the Board of Education in the matter of the school improvement referendum, November 6, 2012. With full transparency, I presented to the Board and to the administration in public session on five (5) separate occasions detailed planning documents, information and updates regarding the activities of the volunteer campaign committee as the liaison of that committee back to the school district.

At no time was I informed, publicly or privately, not to continue to pursue working on behalf of the district in this matter, nor was I given direction indicating that my efforts were not supported by the Board of Education or the administration. The dates of public session presentation are as follows and available online for public viewing at www.berkeley.k12.sc.us.

1. Board of Education Meeting, April 24, 2012, Campaign Update and Overview;
2. Board of Education Meeting, June 29, 2012, Campaign Update and Review of Polling Data;
3. Board of Education Meeting, July 24, 2012, Campaign Review of Committee Status;
4. Board of Education Meeting, August 28, 2012, Campaign Update and Review of Committee Plans and Timing; and,
5. Board of Education Meeting, September 25, 2012, Introduction of Campaign Committee Presentation given by a representative of the Campaign Committee.

Thus, given that the Board of Education and the district administration was fully appraised and aware of all activity related to the school improvement referendum in a timely manner; and, that I provided all information publicly and in good faith with complete transparency; and, that at no time was I instructed or directed to cease or change the work as presented, I seek full protection and indemnification in any criminal or civil action pertaining to this issue.

Respectfully,



Amy S. Kovach

Director, Communications and Community Relations

00734

EXHIBIT 7

00735

WITNESSES

Charles Ghent, SLED

ARREST WARRANT NUMBER

Direct Presentment

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: 2-11-14

VERDICT

Foreperson of Petit Jury
Date:

Docket Number 2014-GS-08-00264

The State of South Carolina
County of Berkeley

COURT OF GENERAL SESSIONS

Term: February
2014

THE STATE

vs.

Amy Kovach,
DEFENDANT

Indictment for
Violation of Ethics Act:
Use of Public Funds to Influence
Election

SC Code: § 8-13-1346
CDR Code: 2985

After being fully advised as to my legal
rights, I hereby waive presentment to the
Grand Jury.

Defendant

I, _____
hereby appear in my own proper person
and plead guilty to the within indictment or
to _____

Defendant

Witness:

C.C.C. Pls. And G.S.C.

CLERK OF COURT
BERKELEY COUNTY, S.C.

14 FEB 11 PM 1:00

FILED

00736

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

INDICTMENT

At a Court of General Sessions, convened on February 11, 2014, the Grand Jurors
of Berkeley County present upon their Oath:

USE OF PUBLIC FUNDS TO INFLUENCE ELECTION

That Amy Kovach did, in Berkeley County, on or about the period
between August 1, 2012 and November 6, 2012, use and authorize the use
of public funds, property, or time to influence the outcome of an election,
to wit:

While employed as Communications Director by the Berkeley County
School District, Amy Kovach did use public funds to pay for the creation of
a campaign video and the production of other campaign material, did draft
and disseminate speeches during her public employment intended to
persuade the voting public, and did perform various other acts using
public resources and time, all of which promoted and supported a yes vote
as to the school bond referendum held on November 6, 2012, and all of
which was in violation of 8-13-1346 of the S.C. Code of Laws as amended.

Against the peace and dignity of the State, and contrary to the statute
in such case made and provided.

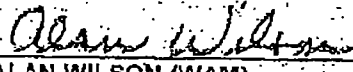

ALAN WILSON (WAM)
ATTORNEY GENERAL

EXHIBIT 8

00738

A. Victor Rawl, Sr.
2835 Preakness Stakes, Charleston, SC 29414

(843) 766-7334
avrawl@aol.com

May 2, 2014

Dr. Kent Murray, Chairman
Berkeley County School District Board of Education
P.O. Box 608
Moncks Corner, SC 29461

Dear Dr. Murray:

I am writing you to comply with your request dated February 26, 2014. Please understand, my methodology is terse; therefore, I am attaching documents that I may refer to in this memorandum. You asked me the following:

- (1) Whether, based on the information available to the board at this time, the conduct of Ms. Kovach as outlined in the indictment constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110; and
- (2) If you conclude that Ms. Kovach was acting "in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110, in regard to the issues referenced in the indictment, whether the board is precluded from appearing and defending Ms. Kovach under the statute simply by virtue of the fact that she has now been indicted?

In answering question one, which I feel comfortable in so doing, I have reviewed some forty pounds of e-mails and documents submitted to me by Childs & Halligan, your attorneys. I have conducted lengthy conversations with Jerry Theob, attorney for Amy Kovach, and reviewed some of his materials. I have spoken with Jane Pulling. I have also tried to talk with Laura Varn, and was only able to speak to her attorney, Ben Hagood. I have intentionally not spoken to anyone else, as it would have entailed a very lengthy and continuous process. I note for the edification of yourself and the board that SLED and the Attorney General's office have purportedly reduced their investigation to a report that is unavailable to the school district or Ms. Kovach's defense attorney, Mr. Theob, at this time.

The standard for review to determine "acting within the course and scope of employment" is most clearly defined in the body of law surrounding the area of workers' compensation. The course and scope of employment is obviously controlled by the employment agreement the

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Board of Education entered into with Ms. Kovach. It is very clear to me in reviewing the material that her job description, a copy of which is attached, covers a very broad area of public information, coordination, outreach, education, and, of course, community involvement. You will see from the timeline attached that Ms. Kovach was very active in complying with her job description. It is clear to me that she has an outgoing, effervescent personality that compelled her to over-perform her responsibilities as outlined in her job description. It is also clear that she was extremely communicative, especially by e-mail, to everyone. The material clearly supports my decision that all of her actions were within the course and scope of her employment.

The next question, of course, is "good faith." In determining whether someone is acting in good faith, the standard is whether she was acting for her own benefit or for the benefit of her employer or someone else. In reviewing and discussing that standard, it is necessary to determine what, if any, personal benefit she derived from the activities outlined in the documentation. I can find absolutely no personal or financial benefit to her in the documentation. Questions have been raised concerning a video and payment for some banners and signs. These questions focus narrowly on a small number of selected documents without regard to the records or issues as a whole. The alleged video is clearly for the benefit of the school district, and not for her personal benefit. The alleged signs and banners may raise an issue of personnel matters or expenditure authority, but certainly in no way, shape, or form, are they an indication of personal benefit to her. Remember, it is her job to coordinate everything. She did her job.

The second question you asked me to provide a response to deals with a legal interpretation of South Carolina Code § 59-17-110. I did not feel comfortable for a myriad of reasons in responding to that question, and have taken the liberty of requesting that John Freeman, Esq., an expert in the field of statutory construction, as well as corporate governance, provide me with an opinion to give to you. I attach that opinion for the benefit of yourself and the board.

As you can see from the above-discussion, I clearly conclude as a matter of fact that Ms. Kovach's activities were clearly within the course and scope of her employment and clearly performed in good faith with her only concern being the benefit of and in the best interest of the Berkeley County School District. I will be more than happy to discuss, in person, my decisions, as well as give you and the board the ability to question me on the basis therefore.

Sincerely,

A. Victor Rawl
South Carolina Circuit Judge, Retired

Attachments (Kovach Job Description, Timeline, Letter from Freeman)

EXHIBIT 9

00741

JOHN P. FREEMAN
2329 Wilmo Avenue
Columbia, South Carolina 29205-3164

803-254-4667
733-9870
jfreeman@comcast.net

April 22, 2014

The Honorable A. Victor Rawl, Sr.
2835 Preakness Stakes
Charleston, SC 29414

Re: Berkeley County School District

Dear Judge Rawl:

Thank you for calling on me to assist in analyzing a legal issue that needs to be determined by the Berkeley County Board of Education. The issue concerns the Board's obligation to indemnify an employee, Mrs. Amy Kovach, who has been indicted for an alleged violation of S.C. Code § 8-13-1346. In this regard, S.C. Code § 59-17-110 requires that:

In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

You have advised me that you have diligently investigated the conduct of Mrs. Kovach as outlined in the indictment and have concluded based on your investigation that her conduct constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110. Based on that factual predicate, you have asked me to give you my legal opinion whether the Board is precluded from appearing and defending Mrs. Kovach under the statute simply by virtue of the fact that she has now been indicted.

As you know, I am a recognized expert in the field of entity governance, having taught Business Associations, Corporations, Agency and a host of related courses over a span of the 35 years during which I was a Professor of Law at USC Law School. I have lectured and testified as an expert many times about the duties, rights, and powers of entities and of their board members, officers, and agents. Among other professional activities, I served the South Carolina General Assembly as a reporter on the most recent South Carolina Corporate Code revision project. The

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areas for which I was reporter included indemnification of corporate officers and directors. I have in the past advised entities and their board members about indemnification matters.

PROFESSIONAL OPINION

Based on my research and in light of your factual findings, it is my professional opinion that Mrs. Kovach's indictment does not preclude the board from appearing or defending the action in her behalf.

REASONS IN SUPPORT OF OPINION

A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of impropriety. A case in point is the Second Circuit's ruling in United States v. Stein, 541 F.3d 130, 157 (2d Cir. 2008). The government there sought to bar accounting firm KPMG from providing legal fees to former employees indicted for tax fraud. That action was held unconstitutional as a deprivation of Sixth Amendment rights. The court explained:

The government conceded at oral argument that it is in the government's interest that every defendant receive the best possible representation he or she can obtain. A company that advances legal fees to employees may stymie prosecutors by affording culpable employees with high-quality representation. But if it is in the government's interest that every defendant receives the best possible representation, it cannot also be in the government's interest to leave defendants naked to their enemies.¹

Furthermore, South Carolina's public policy strongly favors indemnity being extended to employees who have acted within the scope of their employment and in good faith. Thus, under South Carolina corporate law, S.C. Code Ann. § 33-31-851(a), indemnification is allowed in

¹ Here is additional background concerning Stein from Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: the Rise of Corporate White-collar Practices in Large U.S. Law Firms*, 53 *Ariz. L. Rev.* 1221, 1223 (2011):

On July 16, 2007, U.S. District Court Judge Lewis A. Kaplan entered a remarkable order. Federal prosecutors had investigated the giant accounting firm KPMG LLP ("KPMG") for allegedly marketing fraudulent tax shelters. The firm managed to avoid criminal charges, but 16 former partners and employees did not. In United States v. Stein, Judge Kaplan dismissed the indictment against 13 of the 16 individuals, finding that federal prosecutors had unconstitutionally induced KPMG to stop funding their individual defenses. As a result, although these defendants generally had substantial personal assets, they either lost their counsel of first choice (including lawyers from major law firms) or were financially unable to defend their cases as they would have had their legal expenses been entirely advanced or underwritten by KPMG. The court was incensed, calling this "intolerable in a society that holds itself out to the world as a paragon of justice." The Department of Justice . . . challenged the ruling. The defendants and their amici were represented in a closely watched appeal by some of the finest lawyers of the day, including counsel from the nation's largest law firms. On August 28, 2008, the U.S. Court of Appeals for the Second Circuit affirmed, finding that the government had violated the defendants' Sixth Amendment right to counsel.

some cases in favor even of criminally-convicted officers, trustees, employees, or agents. Indemnification is flatly prohibited only where there is an adjudication that the officer, trustee, employee, or agent is liable to the company or where an improper personal benefit was received by the person seeking indemnification. S.C. Code Ann. § 33-31-851(d). See S.C. Code § 33-31-851(c) ("The termination of a proceeding by . . . conviction . . . is not, of itself, determinative that the director did not meet the standard of conduct described in this section."). The corporate law "standard of conduct" set forth in Section 33-31-851(a) requires that the entity be able to conclude the officer, trustee, employee, or agent acted in good faith and reasonably believed his or her conduct was in the entity's best interest. That factual predicate for indemnification in the corporate setting is very similar to the one established by S.C. Code § 59-17-110.

I have reviewed the Attorney General's Opinion dated May 13, 1997, 1997 WL 323769 (S.C.A.G.). That Opinion holds:

[O]ur courts would conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings.

As you well know, an Attorney General's Opinion has no force of law. In this case it is wrong. Opinions rendered by the Attorney General do not trump statutory enactments. The 1997 Opinion relies on and reiterates the holding from a 1995 Opinion, that purported to find that "a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding." This opinion is obviously and egregiously wrong because it contradicts the plain language of, S.C. Code § 59-17-110. Again, the statute requires that:

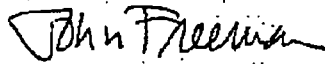
In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

In this case, an employee is being prosecuted in a criminal proceeding. You have determined, after making a reasonable investigation, that the employee acted in good faith and in the course of her employment. Under these circumstances, it is "the duty" of the school district to provide a defense to the proceeding on her behalf.

I hold the foregoing opinion concerning the Berkeley County Board of Education's duty to provide a defense on behalf of Mrs. Amy Kovach to a reasonable degree of professional certainty as an expert in the field of entity governance and employee indemnification rights.

I am rendering this legal opinion as a public service. No compensation, direct or indirect, in any form or fashion, has been or will be furnished to me in connection with this work.

Sincerely yours,

A handwritten signature in cursive script that reads "John P. Freeman". The signature is written in dark ink and is positioned above the printed name.

John P. Freeman

EXHIBIT 10

00746

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT
INDICTMENT NUMBER: 14-GS-08-0266

STATE OF SOUTH CAROLINA,)

versus)

AMY KOVACH,)

Defendant.)

MOTION FOR
PROTECTIVE ORDER

FILED
14 AUG -6 PM 3:28
CLERK OF COURT
BERKELEY COUNTY, S.C.

The Defendant, Amy Kovach (hereinafter "Mrs. Kovach"), by and through her undersigned counsel, hereby moves this Court for an order protecting from disclosure materials covered by the attorney-client privilege and work product protections seized by the State. For the reasons stated below, a procedure involving a third-party review of the electronically stored evidence ("ESI") is necessary before the State conducts a review that will invade the privilege and work product protections.

On August 4, 2014, a search warrant was issued seeking "[a]ny and all computers, iPads, hard drives, external hard drives, and electronic storage devices used by Amy Kovach, Rodney Thompson and Archie Franchini during their employment with the Berkeley County School District." Attached as Exhibit A is a copy of the Search Warrant. Also on August 4, the Search Warrant was executed at the designated premises, the office of the Berkeley County School District, 0 Pulaski Street, Goose Creek, SC 29445. Various materials were seized. See Exhibit A. Additionally, the State has requested that Mrs. Kovach voluntarily provide the iPad which she has in her possession.

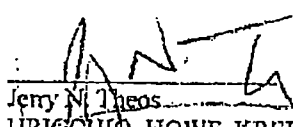
The materials seized and Mrs. Kovach's iPad contain privileged communications with Mrs. Kovach and her counsel, as well as work product. These materials are neither discoverable

nor reviewable by the State. See, e.g., Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 292-95, 692 S.E.2d 526, 529-30 (2010) (explaining the attorney-client privilege and work product protection); State v. Quattlebaum, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000) (reversing a conviction and disqualifying the Eleventh Circuit Solicitor's Office from re-prosecuting the defendant because a deputy solicitor eavesdropped on a privileged conversation between the defendant and his attorney).

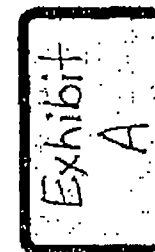
As the State now possesses non-discoverable, non-reviewable materials, and will possess more (Mrs. Kovach's iPad), a protective order is immediately necessary to halt the State's review of these materials. Mrs. Kovach proposes a procedure whereby the seized materials are provided to a third-party expert, capable of extracting the ESI from the seized devices for a privilege review prior to the State reviewing the materials.

Based upon the foregoing, Mrs. Kovach respectfully requests immediate issuance of a protective order prohibiting the State from reviewing the seized materials unless and until there is an appropriate order setting forth an extraction-and-review procedure that protects privileged and work product materials. Mrs. Kovach's counsel is willing to negotiate such an order with the State, or if the parties cannot agree, Mrs. Kovach respectfully requests that the Court issue such an order after hearing from all parties.

Respectfully submitted,


Jerry N. Theos
URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS & KEITH, P.A.
17 1/2 Broad Street
Charleston, South Carolina 29401

Charleston, South Carolina
August 6th 2014



00749

STATE OF SOUTH CAROLINA

County of BERKELEY

SEARCH WARRANT

SLED Case # 31130011

Date August 4, 2014

Officer: Special Agent Ryan Kelly

E. MAIN

SLED Case # 31130011

RETURN

I received the attached Search Warrant _____, 2014, and
have executed it as follows:

On _____, 2014, at _____ o'clock _____ M, I searched
(the person) described in the warrant and
(the premises)

I left a copy of the warrant with _____
(Name of person searched or "at the place of search") with. Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

This inventory was made in the presence of _____

AND _____

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this the _____

day of _____, 2014

(Signature of Officer Executing Warrant)

(I.S.)

SLED Case # 31130011 ³

STATE OF SOUTH CAROLINA

SEARCH WARRANT

COUNTY OF BERKELEY

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE
MUNICIPALITY OF Berkeley County.

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

Berkeley County School District, 229 East Main Street, Moncks Corner, SC 29461

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

Any and all computers, iPad, hard drives, external hard drives, and electronic storage devices used by Amy Kovach, Rodney Thompson and Archie Franchini during their employment with the Berkeley County School District.

This Search Warrant shall not be valid for more than ten days from date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to _____ within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of premises searched at the time of such search if practicable, and if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to prominent place on such premises.

Monck's Corner S. C.
August 4 2014.

[Signature] (L.S.)
Signature of Judge

00751

SLED Case # 31130011

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF BERKELEY

Personally appeared before me, one S/A Ryan Kelly, SLED
 who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions of
 Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Any and all computers, iPad, hard drives, external hard drives, and electronic storage devices used by Amy Kovach,
 Rodney Thompson and Archie Franchini during their employment with the Berkeley County School District.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

Berkeley County School District, 0 Pulaski Street, Goose Creek, SC 29445

REASON FOR AFFIANTS BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

On January 21, 2013 the South Carolina Law Enforcement Division (SLED) received a written request from Chief Deputy Attorney General John McIntosh of the Office of the South Carolina Attorney General for an investigation into alleged misconduct in office and misuse of public funds by employees of the Berkeley County School District (BCSD) during the "Yes4Schools" Bond Referendum. On November 11, 2013 Amy Kovach stated during an interview she informed BCSD Superintendent Dr. Rodney Thompson in a November 2012 meeting she purchased election signs and banners with BCSD fund, wrote and dispersed election related material on BCSD computers, and financed the production of two videos with BCSD funds. One of the videos was a campaign video advocating for the Yes4Schools Bond Referendum. In that Deputy Superintendent Archie Franchini was Kovach's supervisor and Franchini refused to be interviewed by S/A Kelly. In that Franchini and Thompson communicated via electronic communication with Kovach during and after the election. It is believed, based on the training and experience of the affiant that the computer may contain data related to financial records, transactions, and expenditures; as well as email, lists, documents, other records, and or photographs which will pertain to this investigation.

Sworn to and Subscribed before me

this 4 day of August, 2014.
[Signature] (L.S.)
 Signature of Judge

[Signature]
 Affiant

Address SLED Low Country Regional Office.

108 Simmons Street, Walterboro, SC 29489

Phone (843) 782-3822

00752

SLED Case # 31130011

RETURN

I received the attached Search Warrant Aug 4, 2014, and have executed it as follows:

On Aug. 4, 2014, at 10:00 o'clock A M, I searched (the person) described in the warrant and (the premises)

I left a copy of the warrant with Ms. RIDDLE.
(Name of person searched or "at the place of search") with. Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

SAAN DISK CRUZER SLIDE 8 GB EXTERNAL MEMORY DEVICE
WHITE BLUETOOTH EXTERNAL MEMORY DEVICE W/ LANYARD
HODAR EXTERNAL MEMORY DEVICE 4GB
GREEN BLUETOOTH EXTERNAL MEMORY DEVICE
DELL COMPUTER (THOMPSON)
DELL COMPUTER BLUETOOTH ASSET # 88038 (FLANCHU) SANDISK CRUZER 2GB
DELL EX. MEMORY DEVICE BLUETOOTH REGUS EXTERNAL MEMORY DEVICE
GREEN EX. MEMORY DEVICE SONY MICRO UDRIVE EXTERNAL MEMORY DEVICE
DT101 GT 4GB BLUE EX. MEMORY DEVICE SANDISK CRUZER EX. MEM. DEVICE
SANDISK 2GB FAMILY SERVICES REPORT

This inventory was made in the presence of SP4 KELLY LT CARTER

AND _____

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this the _____

day of _____, 2014

(Signature of Officer Executing Warrant)

(L.S.)



Ryan Kelly

Special Agent
Law Center Region
(843) 762-5532 (Office)
(803) 457-0788 (Mobile)
Email: rkelly@sled.sc.gov

South Carolina Law Enforcement Division
P.O. Box 21398
Columbia, South Carolina 29221-1398



Accredited Agency



00754

EXHIBIT 11

00755



CASE MANAGEMENT HISTORY

Page 1 of 1

AGENT:	Cave
SUPERVISOR:	Lewis
COUNTY:	Berkeley

CASE NUMBER:	7014-0112
VICTIM:	
SUBJECT:	Kovach

[illegible]

EXHIBIT 12

00757

STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY 2014-GS-08-0266

STATE OF SOUTH CAROLINA)
-vs-)
AMY KOVACH,)
Defendant.)
TRANSCRIPT OF RECORD
October 28, 2014
Moncks Corner, South Carolina

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

A P P E A R A N C E S:

Creighton Waters, Assistant Deputy Attorney General
Wayne Allen Myrick, Jr., Assistant Deputy Attorney
General
Attorneys for the State

Jerry N. Theos, Esquire
Chris Paton, Esquire
Attorneys for the Defendant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1 (October 28, 2014.)

2 THE COURT: All right. We're here on State
3 versus Amy Kovach, and this is 14-GS-08-0266.
4 Defendant's filed a motion to dismiss and some discovery
5 motions, but let's go ahead and deal with the motions to
6 dismiss first, so they're your motions, Mr. Theos.

7 MR. THEOS: Thank you, Judge. In addition,
8 we did file a motion for protective order, and if you
9 don't mind, I think that may be the quickest matter to
10 deal with.

11 THE COURT: All right.

12 MR. THEOS: I spoke with Mr. Myrick.
13 Previously I spoke to Mr. Adam Whitsett who is in-house
14 counsel for SLED. We thought we had an agreement related
15 to how -- related to the process that was going to be
16 followed pertaining to the iPads and electronic equipment
17 that was seized pursuant to the search warrant. I
18 believe that Mr. Myrick and I can now enter into an
19 agreement, and we had proposed a third party review the
20 e-mails and then determine what e-mail addresses related
21 to attorney-client privileged and protected information.

22 What Mr. Myrick tells me is that SLED will --
23 we've already provided the list, both on behalf of Ms.
24 Kovach as well as two other lawyers related to two other
25 individuals that were under investigation. We've all

1 provided a list. This is my motion, not theirs, though,
2 so what Mr. Myrick tells me is that SLED -- he is
3 agreeable that SLED will review -- will review our
4 listing of e-mail addresses, which are all attorneys or
5 paralegals within attorneys's offices, and that those
6 e-mails that pertain to those specific addresses, whether
7 they be e-mails to or from those addresses, that those
8 will be segregated. They will not be reviewed. They
9 will be accessed to the limited extent that is needed in
10 order to identify.

11 THE COURT: All right.

12 MR. THEOS: But they will not be reviewed,
13 and none of that will be shared with the Attorney
14 General's office. Have I accurately stated that?

15 MR. MYRICK: No, sir.

16 THE COURT: What's the problem with it?

17 MR. MYRICK: Only this, Your Honor: First of
18 all, I gave a filing to the Court's clerk this morning.
19 One: The Attorney General did not believe a privilege
20 exists with respect to the counsel for the school
21 district and communications with Ms. Kovach.

22 Second: The Attorney General's office does
23 not believe, the State of South Carolina does not
24 believe, that she has an expectation of privacy in
25 e-mails generated from a Berkeley County e-mail address

1 using a Berkeley County computer while sitting at a desk
2 paid for by Berkeley County.

3 THE COURT: Expectation of privacy isn't a
4 basis for attorney-client privilege. You either have it
5 or you don't. You have published it or you haven't.

6 MR. MYRICK: She has, in fact, published it.

7 THE COURT: If she called her attorney on the
8 telephone while she was at work, would that be considered
9 a publication or waiver by the State? Is that your
10 position?

11 MR. MYRICK: We're not talking about
12 telephones.

13 THE COURT: It's the same principle. Answer
14 the question. If she picked up the telephone while she
15 was at work, which is a publicly owned telephone, paid
16 for, provided for by the State, is it your position, if
17 she called her attorney, that that would be a waiver?

18 MR. MYRICK: I think it would depend on --

19 THE COURT: What?

20 MR. MYRICK: Whether or not there was written
21 policy as there is here, saying there is no privacy in
22 communications on Berkeley County equipment. It would
23 depend upon that. It would depend upon the existence of
24 extension maybe in a nearby office that could be picked
25 up by a third party unawares.

1 THE COURT: That's not the basis for waivers.
2 If somebody surreptitiously listens in on your
3 conversation, you still have a privilege. If you state
4 it in front of somebody else, then you have waived it,
5 but when somebody surreptitiously overhears your
6 conversation, that's not a basis for a waiver.

7 MR. MYRICK: Your Honor, moving past that
8 point, in the event that the defendant in this case
9 included third parties in those e-mail communications, I
10 think that would constitute publication, which would
11 destroy --

12 THE COURT: That's a different issue.

13 MR. MYRICK: So Your Honor's first point is
14 well made, but we don't know yet, Your Honor, who she
15 published these e-mails to, and we don't think that she
16 can claim the privilege with respect to people she
17 communicates with that aren't her lawyer.

18 Now, having said all that, the State has no
19 burning interest to read Mr. Theos's e-mails with his
20 client.

21 THE COURT: Okay.

22 MR. MYRICK: But after the execution of the
23 search warrant, Mr. Theos filed this motion for
24 protective order. While this motion is -- has been
25 waiting to be ruled on, SLED has not moved forward on

1 conducting this examination.

2 What I did propose, and the part Mr. Theos
3 got correct, was I believe -- I've been informed by SLED
4 that they can conduct this search. They can conduct this
5 search without going into the substance of the e-mails.

6 THE COURT: Okay.

7 MR. MYRICK: Further, they will not
8 communicate to the Attorney General's office the
9 substance of any e-mails that they happen to
10 inadvertently see when conducting the search, and they
11 won't discuss it with us, and what Adam Whitsett, general
12 counsel of SLED, has offered is he can present the
13 results of this search to this Court and the Court can
14 rule whether or not the privilege exists and excise, in
15 camera, any e-mails that the Court regards as privileged.

16 Of course we'd like the opportunity to be
17 heard again, if necessary.

18 THE COURT: All right. Is that satisfactory?

19 MR. THEOS: I thought that's what I said to
20 begin with, Your Honor, but with a slight twist.

21 THE COURT: I think the way he stated it,
22 maybe he implied that they agreed it was privileged, and
23 he is suggesting that they don't necessarily -- I gather
24 even communication between you and them, they might want
25 to take another swing as to whether or not it matters if

1 it's on a government owned computer, as to whether or not
2 that is a waiver, but they're suggesting that whatever
3 comes up as a result it be presented to the Court for in
4 camera review.

5 MR. THEOS: That it will be segregated. It
6 will be accessed in order to identify which e-mails those
7 are. Those would be segregated. They would not be
8 reviewed, but even if they are inadvertently reviewed, no
9 information will be passed along related to the Attorney
10 General's office, and then those e-mails will be
11 presented to the Court in camera, and if the AG wants to
12 pursue a claim that there has been a waiver of some sort
13 or the privilege doesn't apply, then we would be before
14 you or another judge.

15 Is that accurate?

16 THE COURT: Are we on the same page now?

17 MR. MYRICK: Yes, we are.

18 THE COURT: Okay. Good. So ordered. All
19 right.

20 What's next?

21 MR. THEOS: Your Honor, related to the motion
22 to dismiss -- and we handed up and filed and then
23 presented to you, and I copied Mr. Myrick a month or so
24 ago, both our motion and supplemental motion to dismiss.

25 Your Honor, the essence of our position and

EXHIBIT 13

00765

WITNESSES

S/A RYAN KELLY, SLED

ARREST WARRANT NUMBER

Direct presentment

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: 9-9-14

VERDICT

Foreperson of Petit Jury

Date:

Docket Number 2014-GS-08-01403

THE STATE OF SOUTH CAROLINA

County of Berkeley

COURT OF GENERAL SESSIONS

Term: 20__

THE STATE

vs.

Amy Kovach
DEFENDANT

Indictment for

FORGERY

SC Code: § 16-13-10

CDR Code: 3436

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I, _____
hereby appear in my own proper person
and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. Pls. And G.S.

14 SEP -9 AM 11:21
CLERK OF COURT
BERKELEY COUNTY, S.C.

FILED

00766

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
INDICTMENT
FORGERY

At a Court of General Sessions, convened on 9/9/14 the Grand Jurors of Berkeley County present upon their oath:

That Amy Kovach did, in Berkeley County, on or about November 2013, commit the crime of Forgery, in that she did falsely make, forge, or counterfeit, cause or procure to be falsely made, forged or counterfeited of a writing or instrument, and did utter or publish as true a false, forged, or counterfeited writing or instrument of writing. To Wit: During November 2013, Amy Kovach created a false, backdated invoice, purporting to be from the Berkeley County School District to the "Yes for Schools" campaign, in an attempt to establish that she had intended to have public funds repaid to the County which had been spent on materials in support of a bond referendum election campaign, this in an amount less than \$10,000 (\$259.20), and in violation of §16-13-10(A) and (B)(2) of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ALAN WILSON (WAM)
SOUTH CAROLINA ATTORNEY GENERAL

00767

EXHIBIT 14

00768



ALAN WILSON
ATTORNEY GENERAL

October 14, 2014

Kathryn Long Mahoney, Esq.
Childs & Halligan, P. A.
P. O. Box 11367
Columbia, SC 29211

RE: Attorneys' Fees in Criminal Matter

Dear Ms. Mahoney:

It is our understanding that on March 12, 2013 and May 13, 2014, the Berkeley County School Board authorized the use of public funds to pay the attorney fees for one or more Board officials who are the subject of a criminal investigation. This criminal investigation remains ongoing. One of these officials has been indicted on two separate occasions. Furthermore, we understand that public funds may be used to pay the attorney's fees for a non-employee witness in the pending criminal investigation.

Enclosed are prior opinions of this Office which conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings. These opinions (enclosed) conclude that such expenditures represent the use of public funds for a private purpose in violation of the South Carolina Constitution.

We would suggest that you carefully review these opinions and the legal authorities referenced therein. This Office is reviewing the possibility of legal action to recover the public funds expended for this purpose. Please advise as to the legal basis for such expenditures. It is difficult to understand how the Board concluded that these officials acted in good faith when the criminal investigation remains ongoing.

Yours very truly,

John W. McIntosh
Chief Deputy Attorney General

CC: Berkeley County School Board Members, via email to:
Dr. Kent Murray, MurrayKe@bcstdschools.net
Mr. Phillip Obie, II, ObieP@bcstdschools.net
Ms. Shannon Lee, LeeShannon@bcstdschools.net
Ms. Kathy Schwalbe, SchwalbeKa@bcstdschools.net
Ms. Wilhelmina Moore, MooreW@bcstdschools.net
Mr. Frank Wright, WrightFr@bcstdschools.net
Mr. Jim Hayes, HayesJ@bcstdschools.net

RC/JWM/ds

Westlaw.

Page 1

1995 WL 606050 (S.C.A.G.)

Office of the Attorney General
State of South Carolina

*1 September 14, 1995

The Honorable Harold Gene Worley
Member, House of Representatives
P. O. Box 296
North Myrtle Beach, South Carolina 29582

Dear Representative Worley:

You have asked whether a county school superintendent can continue to serve upon indictment for common law misconduct in office. As I understand the situation, the underlying facts of the indictment allege that the superintendent unlawfully "rigged" or "fixed" bids in contravention of state law. The indictment specifically charges the following facts:

[t]hat Gary Smith and Richard Heath, while public officers and public officials holding positions of public trust and having a duty of accountability to the people of Horry County and the State of South Carolina imposed by the common law and statutory laws upon public officers and assumed by them as a matter of law upon their entering public office, did in Horry County between September, 1993 and January, 1995 breach that duty in that Gary Smith and Richard Heath did knowingly, willfully, dishonestly and corruptly violate the procurement laws of the State of South Carolina and of the Horry County School District by "fixing bids" in the purchase of computers, thereby, damaging the integrity of the School District and the bidding process. Further, Gary Smith and Richard Heath did receive and accept gratuities of travel and lodging from favored vendors in violation of Section 8-13-720 of the State Ethics Act, all being against the peace and dignity of the State of South Carolina and the Common Law in such cases made and provided.

Article VI, Section 8 of the South Carolina Constitution (1895 as amended) provides in pertinent part:

[a]ny officer of the State or its political subdivisions, except members and officers of the Legislative and Judicial Branches, who has been indicted by a grand jury for a crime involving moral turpitude or who has waived such indictment if permitted by law may be suspended by the Governor, until he shall have been acquitted. In case of conviction the office shall be declared vacant and the vacancy filled as may be provided by law. (emphasis added)

This Office has often concluded that a county school superintendent is an officer. Op. Atty. Gen. August 9, 1991, affirming Op. Atty. Gen. April 5, 1991; Op. Atty. Gen. February 27, 1991. It makes no difference whether the superintendent is appointed or elected; he is still an officer. Thus, the question is whether the indictment charges a crime of moral turpitude. It is my conclusion that it does.

Here, the indictment alleges the dishonest and corrupt "fixing of bids" in the purchase of computers for the school district. Moreover, the indictment contends that there occurred a violation of S.C. Code Ann. Sec. 8-13-720, as part of the alleged misconduct in office. Section 8-13-720 proscribes any public official, public

member or public employee from soliciting or receiving "money in addition to that received by the public official, public member or public employee in his official capacity for advice or assistance given in the course of his employment as a public official, public member or public employee." In this instance, the Indictment charges that the superintendent received and accepted certain gratuities from favored computer vendors.

*2 As our Supreme Court has previously held, "moral turpitude" is defined as an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man Moral turpitude implies something immoral in itself, regardless of whether it is punishable by law as a crime....

State v. Horton, 271 S.C. 413, 414, 248 S.E.2d 263 (1978); Op. Atty. Gen., February 9, 1995. It does not appear that this Office has ever considered the issue of whether offenses involving the fixing of bids are crimes or moral turpitude.

However, in O'Halloran v. DeCarlo, 162 N.J.Super. 174, 392 A.2d 615 (1978), the Court held that a count in an indictment for "willfully and knowingly" conspiring "to pervert the due administration of the laws of the State of New Jersey pertaining to the requirements for public advertisement for bids and public bidding in public contracts" and "to violate the criminal laws of the State of New Jersey pertaining to the misconduct in office of public officials" constituted moral turpitude. The lower court, which the referenced decision affirmed, stated the public policy considerations underlying this conclusion as follows:

[t]his "partnership in criminal purposes" to violate the public bidding laws is in itself a fraud upon the State. The public's right to the benefits of public advertising and bidding were defeated, other contractors were cheated of their right to equal bidding opportunity, and the public was cheated of its right to have public officials conduct its affairs with propriety and in accordance with law.

156 N.J.Super. 249, 383 A.2d 769, 771 (1978). While the actual charge in these cases was a conspiracy to commit the offense, the result would undoubtedly be the same as to the substantive crime.

Moreover, the Indictment alleges a violation of the State Ethics Act wherein it is contended that the Superintendent accepted certain gratuities from vendors. Violation of a statute which proscribes the retention of fees or compensation in addition to those allowed by law has been held to constitute a crime of moral turpitude. In State ex rel. Griffin v. Anderson, 230 P. 315, 317 (Kan. 1924), for example, the Supreme Court of Kansas stated:

[w]e hold that the law forbidding a public officer to retain any reward other than that allowed by law for doing anything appertaining to his duties as such, both in its general scope and as applied to the situation here presented, involves turpitude, within the meaning of the phrase as used in the statute quoted.

In view of the foregoing, it is my opinion that the Indictment charges a crime of moral turpitude and thus the Governor is empowered to suspend the individual in question pursuant to his constitutional authority.

You have also asked whether the school board is authorized to retain an attorney to represent the superintendent in the foregoing prosecution, or to pay the costs of the superintendent's legal defense in those criminal proceedings. I am enclosing a copy of an opinion of this Office, dated February 15, 1985 which discusses at length the authority of a political subdivision to employ independent counsel to represent a particular member of the body. There, we specifically noted that a public body may not employ counsel or pay counsel with public funds as to matters in which the body is not directly interested or which involved a private purpose. Op. at p. 4. Express statutory authority is necessary for expenditure of public funds in criminal proceedings (e.g. public defender).

*3 By analogy, S.C. Code Ann. Sec. 1-7-50 only permits the State to pay for the defense of government employees in criminal actions if they acted in "good faith". Where, however, a grand jury has returned an indictment against a public official, this Office has concluded that Section 1-7-50 does not apply. We have previously stated:

... our Office has often taken the position that no defense will be provided where a judicial forum has made a finding of probable cause [which an indictment is] since this runs counter to the "good faith" finding specified in the statute. Under those circumstances, the employee is primarily responsible for selecting an attorney to provide a defense and for payment of any attorney fees and costs.

Letter from Nathan Kaminski, Executive Assistant for Administration, to Sally M. Walker, dated September 2, 1993. While Section 59-17-110 permits school districts to employ counsel in criminal proceedings for acts done in good faith in the course of employment, the grand jury here has found probable cause of "fixing bids", which would be clearly beyond the scope of a superintendent's duties. *People v. Mehlic*, 504 N.E.2d 1310.

Moreover, case law supports the idea that the payment of public funds for the defense of a public official in a criminal action is not an expenditure for a public purpose, but a private one. *Holtzendorff v. Housing Authority of Los Angeles*, 250 Cal.App.2d 596, 58 Cal.Repr. 886 (1967); *Bowling v. Brown*, 57 Md.App.248, 469 A.2d 896 (1984). See also, *Anderson v. Baehr*, 265 S.C. 153, 217 S.E.2d 43 (1975) [legislative findings of public purpose usually necessary]. In *Bowling v. Brown*, supra, the Court found that reimbursement of the town manager and town engineer for attorney expenses in defense against charges of official misconduct was not for a public purpose. The Court cited numerous authorities in support of this position:

[I]t is generally agreed that a municipality has no power to reimburse a town official for his expenses incurred in defending himself from charges of official misconduct. *Board of Chosen Freeholders v. Conda*, 164 N.J.Super. 386, 396 A.2d 613 (1978); see 3 McQuillen, *Municipal Corporations* (3d ed. 1973 rev.), § 12.137. The rationale behind the rule is that such an indebtedness against a city would constitute the application of money to an individual and not to a city purpose. See, e.g., *Chapman v. New York*, 168 N.Y. 80, 61 N.E. 108 (1901). The general rule in Maryland is that public funds of municipalities cannot properly be devoted to private uses, even when expressly authorized by the legislature. *City of Frostburg v. Jenkins*, 215 Md. 9, 136 A.2d 852 (1957); *Wilson v. Board of County Commissioners*, 273 Md. 30, 327 A.2d 488 (1974).

Continuing, the Court of *Bowling* recognized:

[a] New Jersey case presented a fact situation similar to that in the instant case. See *Township of Manalapan v. Loeb*, 126 N.J.Super. 277, 314 A.2d 81, aff'd per curiam 131 N.J.Super. 469, 330 A.2d 593 (1974). The case involved a complaint by a township for a declaratory judgment as to whether it was authorized to pay for legal expenses incurred by certain of its officers defending against an indictment handed down by a grand jury. A town committeeman had been charged with using a telephone credit card for personal calls and incurring expenses in excess of \$200.00 which was paid from township funds. The town mayor and town business administrator were charged with having knowledge of the improper use of the credit card and failing to take the necessary steps to see that the township was reimbursed for the amount of the calls. The indictment was dismissed against the mayor and administrator, and a jury found the committeeman not guilty. In spite of the favorable termination of the legal proceedings, the court in the declaratory judgment action held that the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment charging them with what amounted to official misconduct. 314 A.2d at 83 citing 56 Am.Jur.2d, *Municipal Corporations, Etc.*, § 208, at 266, and 64 C.J.S., *Municipal Corporations*, § 183, at 341. In reference to Defendants' "public purpose" argument in the present case, this Court adopts the words of the Manalapan court: "Here, under no circumstances can it be said that

the acts charged against ... [the town employees] in the indictment were for the benefit of the municipality."
314 A.2d at 82.
*4 469 A.2d at 902.

In conclusion, it is our opinion that the Indictment charges an officer with a crime of moral turpitude and, thus the Governor may suspend in this instance. Secondly, it is also our opinion that a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding. The foregoing authorities clearly hold that such expenditures are not for a public purpose. It is for the protection of the public that our Constitution requires that public funds be spent for public purposes. Just as the Court recognized in the Manalapan case, referenced above, "under no circumstances can it be said that the acts charged ... in the Indictment were for the benefit of" the public. Accordingly, there may not be an expenditure of public funds for the legal expenses or costs in the referenced criminal proceedings.

Sincerely,
Charles Molony Condon
Attorney General

1995 WL 606050 (S.C.A.G.)

END OF DOCUMENT

Westlaw.

Page 1

1997 WL 323769 (S.C.A.G.)

Office of the Attorney General
State of South Carolina

*1 May 13, 1997

The Honorable Tracy R. Edge
Member
House of Representatives
326A Blatt Building
Columbia, South Carolina 29211

Dear Representative Edge:

You note that in an opinion dated September 14, 1995, this Office concluded that a school district is without authority to pay a school board member's or an employee's expenses of representation in a criminal proceedings. You inquire as to "[w]hat legal remedies would be available when public funds continue to be expended for this unlawful purpose?"

Law / Analysis

In the September 14, 1995 opinion, we addressed the issue of "whether the school board is authorized to retain an attorney to represent [the school board officials or employees] ... in the foregoing prosecution, or to pay ... [their] legal defense in those criminal proceedings." We referenced therein an earlier opinion, dated February 15, 1985, wherein we opined that a public body may not employ counsel or pay counsel with public funds as to matters in which the body is not directly interested or which involved a private purpose. We also stated in the September 14, 1995 opinion that "[e]xpress statutory authority is necessary for expenditure of public funds in criminal proceedings (e.g. public defender)."

Referencing by analogy a state statute -- Section 1-7-50 -- which permits the State to pay for the defense of government employees if they acted in "good faith", we recognized that an indictment constituted a probable cause finding of criminal conduct and thus it represented the policy of this Office that "the employee is primarily responsible for selecting an attorney to provide a defense and for payment of any attorney fees and costs." Further, we noted that while Section 59-17-110 permits school districts to employ counsel in criminal proceedings for acts done in good faith in the course of employment, where a grand jury has found probable cause of "fixing bids," however, such "would be clearly beyond the scope of a superintendent's duties."

Furthermore, we concluded that there exists a body of case law which "supports the idea that the payment of public funds for the defense of a public official in a criminal action is not an expenditure for a public purpose but a private one." We particularly referenced the case of Bowling v. Brown, 57 Md.App. 248, 469 A.2d 896 (1984) wherein the Court found that reimbursement of the town manager and town engineer for attorney expenses in defense against charges for official misconduct was not for a public purpose. We quoted from this case at length as follows because the Court had cited numerous authorities in support of this position:

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[I]t is generally agreed that a municipality has no power to reimburse a town official for his expenses incurred in defending himself from charges of official misconduct. Board of Chosen Freeholders v. Conda, 164 N.J.Super. 386, 396 A.2d 613 (1978); see 3 McQuillin, Municipal Corporations (3d ed. 1973 rev.), § 12.137. The rationale behind the rule is that such an indebtedness against a city would constitute the application of money to an individual and not to a city purpose. See e.g. Chapman v. New York, 168 N.Y. 80, 61 N.E. 108 (1901). The general rule in Maryland is that public funds of municipalities cannot properly be devoted to private uses, even when expressly authorized by the legislature. City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957); Wilson v. Board of County Commissioners, 273 Md. 30, 327 A.2d 488 (1974) ...

*2 New Jersey [case law] presented a fact situation similar to that in the instant case. See Township of Manalapan v. Loeb, 126 N.J.Super. 277, 314 A.2d 81, aff'd, per curiam 131 N.J.Super. 469, 330 A.2d 593 (1974). The case involved a complaint by a township for a declaratory judgment as to whether it was authorized to pay for legal expenses incurred by certain of its officers defending against an indictment handed down by a grand jury. A town committeeman had been charged with using a telephone credit card for personal calls and incurring expenses in excess of \$200.00 which was paid from township funds. The town mayor and town business administrator were charged with having knowledge of the improper use of the credit card and failing to take the necessary steps to see that the township was reimbursed for the amount of the calls. The indictment was dismissed against the mayor and administrator, and a jury found the committeeman not guilty. In spite of the favorable termination of the legal proceedings, the court in the declaratory judgment action held that the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment charging them with what amounted to official misconduct. 314 A.2d at 83, citing 56 Am.Jur.2d, Municipal Corporations, Etc., § 208, at 266, and 64 C.J.S., Municipal Corporations, § 183, at 341. In reference to Defendant's 'public purpose' argument in the present case, this Court adopts the words of the Manalapan court: 'Here, under no circumstances can it be said that the acts charged against ... [the town employees] in the indictment were for the benefit of the municipality.' 314 A.2d at 82.

469 A.2d at 902.

Thus, our September 14, 1995 opinion concluded that "a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding."

The Supreme Court of Illinois recently concurred with the body of case law which has concluded that it does not constitute a public purpose to indemnify public officials for expenses incurred in the defense of a criminal prosecution. In Wright v. Danville, 174 Ill.2d 391, 675 N.E.2d 110 (1996), the Court held that a city ordinance was invalid to the extent it attempted to indemnify officials convicted of crimes for their attorneys fees and costs incurred in their unsuccessful criminal defense. The Court's view of the ordinance consisted of the following analysis:

[a]lthough plaintiffs are correct in their assertion that courts in some jurisdictions have determined that defending a public official from criminal charges may be a proper public purpose, it is generally held in these jurisdictions that a valid public purpose exists only when the authority of the municipality is limited to the reimbursement of legal expenses incurred in a successful defense. See Lomelo v. City of Sunrise, 423 So.2d 974, 976-77 (Fla. App. 1983) (costs of defending public official for misconduct charges served public purpose only because official was acquitted of charges); Ellison v. Reid, 397 So.2d 352, 354 (Fla. App. 1981); Snowden v. Anne Arundel County, 295 Md. 429, 439, 456 A.2d 380, 385 (1983) (Indemnity ordinance served public purpose primarily because it limited reimbursement to only those public officials who had successfully defended themselves against criminal charges); Bowens v. City of Pontiac, 165 Mich.App. 416,

420, 419 N.W.2d 24, 26 (1988) (Shepherd, J., concurring); Sonnenberg v. Farmington Township, 39 Mich. App. 446, 449, 197 N.W.2d 853, 854 (1972); Korschei v. City of Afton, 512 N.W.2d 351, 355 (Minn. App. 1994); Valerius v. City of Newark, 84 N.J. 591, 596, 423 A.2d 988, 991-92 (1980); Beckett v. Board of Supervisors, 234 Va. 614, 619 n. 7, 363 S.E.2d 918; 921 n. 7 (1988). Still, other states have held that the cost of defending a public official from criminal or official misconduct charges is never a proper public purpose. See Hall v. Thompson, 283 Ark. 26, 28-29, 669 S.W.2d 905, 906-07 (1984); Bowling v. Brown, 57 Md.App. 248, 260, 469 A.2d 896, 902 (1984); Corning v. Village of Laurel Hollow, 48 N.Y.2d 348, 353-54, 398 N.E.2d 537, 540-41, 422 N.Y.S.2d 932, 935-36 (1979); Township of Mangalapan v. Loeb, 126 N.J.Super. 277, 278-79, 314 A.2d 81, 81-82 (1974) (no authority for indemnification of municipal officer for costs of defending criminal charges which amount to official misconduct); Silver v. Downs, 493 Pa. 50, 55-57, 425 A.2d 359, 362-64 (1981); see also 56 Am.Jur.2d Municipal Corporations § 208 (1971) (municipality has no power to reimburse an official for expenses incurred in defense of official misconduct charges); 63A Am.Jur. Public Officers and Employees § 406 (1984) (members of governing body may not expend public funds to shield themselves from consequences of own unlawful and corrupt acts); 3 McQuillin on Municipal Corporations § 12.137.10 (3d rev. ed. 1990) (municipality cannot expend money to reimburse its officer for expenses incurred in defending official misconduct charges). Under the principles of all these cases, plaintiffs would not be able to recover the expenses of the unsuccessful criminal defense of the commissioners and corporation counsel from the city.

*3 Further, the purpose of indemnification, so as not to inhibit capable individuals from seeking public office, has no relevance in the context of the criminal conduct involved in this case. No official of public government should be encouraged to engage in criminal acts by the assurance that he will be able to pass defense costs on to the taxpayers of the community he was elected to serve. See Powers v. Union City Board of Education, 124 N.J.Super. 590, 596, 308 A.2d 71, 75 (1973). To the contrary, holding public officials personally liable for the expenses incurred in unsuccessfully defending charges of their criminal misconduct in office tends to protect the public and to secure honest and faithful service by such servants. Indeed, allowing expenditure of public funds for such use would encourage a disregard of duty and place a premium upon neglect or refusal of public officials to perform the duties imposed upon them by law. Bowling v. Brown, 57 Md.App. 248, 258, 469 A.2d 896, 901 (1984) ("[T]o reimburse [convicted public officials] for their legal expenses would not encourage the 'faithful and courageous discharge of duty on the part of public officials.' [Citation.] On the contrary, it would encourage the reverse"). The types of individuals who are drawn to these corrupt practices should not be given any incentive to seek public office.

675 N.E.2d at 115-116 (emphasis added).

A number of Attorneys General in other jurisdictions have reached the same conclusion as these courts. For example, in Minn. Op. Att. Gen. 125-A-25, 1980 WL 119580 (Minn. A.G.), (July 28, 1980), the Minnesota Attorney General concluded that a county was "without authority to reimburse" a deputy for the cost of his legal defense arising out of a criminal charge against him. While acknowledging that there might be instances where public policy considerations "might be advanced in favor of permitting payment of criminal defense costs ..., the authority to do so should derive from proper statutory or charter authorization with respect to such reimbursement." Likewise, in La. Att. Gen. Op. No. 89-401, 1989 WL 454326 (La. A.G.) (August 14, 1989), the Louisiana Attorney General found that a coroner performing medical experimentation upon infants "is not within the course and scope of his duty to investigate cause and manner of death is not entitled to attorneys fees for successful legal defense of criminal and civil proceedings against him." And in N.M. A.G. Op. No. 85-23, 1985 WL 190691 (N.M. A.G.) (September 16, 1985), it was concluded by the New Mexico Attorney General that "no authority exists which would empower the Risk Management Division to spend money from the Workmen's Com-

pensation Retention Fund, the Public Liability Fund or any of the other statutorily created funds which the Division administers to either employ attorneys to provide a criminal defense for public employees or to purchase insurance for that purpose."

*4 The thrust of your question is what remedies are available where a school board continues to ignore this body of case law and indemnifies a fellow school board member or other school officials for the costs and expenses of a criminal prosecution. A number of remedies are available, of course, the most obvious one—including the ballot box. However, I gather that your question is focused more upon a remedy which would halt this practice and possibly allow for recovery to the public the monies expended by the Board for this purpose.

A leading South Carolina case in this is Brown v. Wingard, 285 S.C. 478, 330 S.E.2d 301 (1985). There, the town of Greenwood reimbursed spouses of the City Council for attendance of the 1982 National League of Cities Convention in Los Angeles, California. A taxpayer of the Town brought a declaratory judgment action challenging such expenditures.

The initial question before the Supreme Court was whether a taxpayer possessed sufficient legal standing to contest these payments. The Court held that he did. Concluding that "taxpayers ... have an interest in seeing that city officials disburse funds in a lawful manner ...," the Court found legal standing to be present. Further the Court found that there existed "no public purpose in this case because the factual circumstances are too remote ..."

Likewise, in Tucker v. S.C. Dept. of Highways and Pub. Transp., 309 S.C. 395, 424 S.E.2d 468 (1992), the Supreme Court allowed a taxpayer action to challenge a statute requiring approval of county legislative delegation for expenditure of construction funds and allowing the delegation to contract for improvements. The Court subsequently held that the statute violated the constitutional separation of powers provision.

Courts have also permitted taxpayers to bring an action for a declaratory judgment that a town council had acted beyond its powers in approving reimbursement for expenses incurred in the defense of a criminal prosecution. Bowling v. Brown, *supra* provides considerable guidance in this area.

The Bowling decision first concluded that the municipality possessed no authority to authorize reimbursement for criminal defense expenditures. Said the Court:

[i]t is generally agreed that a municipality has no power to reimburse a town official for his expenses incurred in defending himself from charges of official misconduct. Board of Chosen Freeholders v. Conde, 164 N.J.Super. 386, 396 A.2d 613 (1978); see 3 McQuillen, Municipal Corporations, (3d ed. 1973 rev.) § 12.137. The rationale behind the rule is that such an indebtedness against a city would constitute the application of money to an individual and not to a city purpose. See e.g., Chapman v. New York, 168 N.Y. 30, 61 N.E. 108 (1901). The general rule in Maryland is that public funds of municipalities cannot properly be devoted to private uses, even when expressly authorized by the legislature. City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957); Wilson v. Board of County Commissioners, 273 Md. 30, 327 A.2d 488 (1974).

*5 A New Jersey case presented a fact situation similar to that in the instant case. See Township of Manalapan v. Loeb, 126 N.J.Super. 277, 314 A.2d 81, *affd.* per curiam 131 N.J.Super. 469, 330 A.2d 593 (1974). The case involved a complaint by a township for a declaratory judgment as to whether it was authorized to pay for legal expenses incurred by certain of its officers defending against an indictment handed down by a grand jury. A town committeeman had been charged with using a telephone credit card for personal calls and incurring expenses in excess of 200.00 which was paid from township funds. The town mayor and town business administrator were charged with having knowledge of the improper use of the credit card and fail-

ing to take the necessary steps to see that the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment charging them with what amounted to official misconduct. 314 A.2d at 82, citing 56 Am.Jur.2d, Municipal Corporations, Etc., § 208, at 266, at 64 C.J.S., Municipal Corporations, § 183, at 341. In reference to Defendants' 'public purpose' argument in the present case, this Court adopts the words of the Manalapan court: 'Here, under no circumstances can it be said that the acts charged against ... [the town employees] in the indictment were for the benefit of the municipality.' 314 A.2d at 82.

Id. at 901.

The Court then noted that "[o]nce the Plaintiff has established that the expenditures were not for a public purpose, the burden shifts to Defendants to justify relieving them of personal liability for the amounts expended." Defendants argued, however, that they were performing a "discretionary function" and were thus immune from suit under Maryland law. The Court rejected this argument, concluding that

[a]s the Plaintiff correctly argues, if the funds expended by the Town Council ... were not for a public purpose, the expenditure was an ultra vires act outside the scope of Defendant's employment and [the immunity statute] ... does not apply.

Id. at 903. Likewise, the Court found that the doctrine of qualified immunity "applies to actions for tort and has no application to acts which are ultra vires." Id. Moreover, the Court refused to hold that the defendants should not "be personally liable for the funds expended because they exercised good faith in authorizing the expenditures." Unsure, however, that the appropriate standard to qualify for immunity was one of "due diligence" in authorizing the expenditures or one of strict liability the Court noted that there was clearly law favoring both standards:

[t]his Court is not sure whether the Maryland Court of Appeals will follow the lead of the California Court and adopt the due care standard. In a similar case, the Court of Appeals declined to consider the question of good faith, because it found that the defendants had acted within the scope of their authority. See, Smith v. Edwards, 292 Md. 60, 437 A.2d 221, 228 n. 5 (1981). This Court does not reach the question of whether the due care standard should apply in Maryland, because the Defendants have failed to present sufficient evidence of due care to bring the question into play. The Court does note that ... Defendants should show evidence of both good faith and due care to present a serious challenge to the continued utility in Maryland of the strict liability standard set forth in Gloyd v. Talbott [221 Md. 179, 156 A.2d 665 (1955)]. ... The Court holds that the Defendants did exceed their authority as Town Commissioners as the Plaintiff has established that the expenditure of town funds by Defendants to reimburse town employees for legal expenses incurred defending themselves from criminal charges of misconduct in office was not an expenditure for a public purpose. Even if the Court assumes that the Court of Appeals would adopt the reasonable care doctrine as previously discussed in this Opinion, the Defendants have failed to establish that they used reasonable care in consulting their attorney about the expenditures subjudice and therefore are personally liable for the funds expended....

*6 469 A.2d at 904-905.

The law in South Carolina is supportive of liability for public officers who perform ultravires acts. Our Supreme Court has held, for example, that

[t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law. Sligh v. Bowers, 62 S.C. 409, 40 S.E. 885; Mauldin v. City Council of Greenville, 33 S.C. 1, 11 S.E. 434, 8 L.R.A.; 291; McCullough v. Brown, 41 S.E. 220, 19 S.E. 458, 23 L.R.A. 410, Pom. Eq. Jur.

277, Sec. 260, 2 Dill. Mun. Corp. Sec. 736.

Kirk v. Clark, 191 S.C. 205, 210, 4 S.E.2d 13 (1939). In Chandler v. Britton, 197 S.C. 303, 310, 15 S.E.2d 344 (1941), the Court stated that "in the absence of any statutory law to the contrary a public official is not liable for the loss of funds deposited with him if he has exercised that degree of care and prudence in the management of funds which a person of ordinary care and prudence would exercise in his own business." The Court, in Long v. Seabrook, 260 S.C. 562, 568, 197 S.E.2d 659 (1973) concluded that "[t]he failure of a public official to comply with the laws governing and regulating his powers and duties may give rise to liability." And in Sumter Co. v. Hurst, 189 S.C. 316, 1 S.E.2d 242 (1939), the Court said that "[w]e think that there can be no dispute of the proposition that when a public officer receives money for the public use, he is a trustee to receive such monies and to pay them to the public official or function for whom or which they were intended." *Id.* at 319.

Moreover, in Haesloot v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596 (1923), our Supreme Court recognized the following general principle:

... In the sense that all powers of municipal corporations are held in trust for public use, all property held by such corporations is held in a fiduciary capacity. ... Property held by such corporations for strictly governmental purposes or which has been devoted to a special public use may be sold or disposed of only under express legislative authority; but property acquired and held for general municipal purposes is subject to the corporation's discretionary power of use and disposal. ... It is universally conceded, however, that such discretionary power of use and disposal does not include the authority to donate municipal property to a strictly private use, for the obvious reason that a transfer or release of such property by a municipality to a private ownership without receiving in return some consideration of reasonably equivalent value would amount to a palpable breach of the trust upon which it is held.

115 S.E. at 600.

Thus, it would appear to me that the most feasible remedy available with respect to your situation is a taxpayer action concerning the expenditure of public funds for a private purpose. The question of the use of public funds to indemnify a public official for defense of a criminal action has never been addressed by our courts, to my knowledge. Nonetheless, as indicated above, a number of courts in other jurisdictions have concluded that such expenditures do not constitute a public purpose—even where the defense of the criminal action is ultimately successful. Here, the issue of the validity of § 59-17-110 would also have to be addressed in any such action. See Wright v. Danville, *supra*. An action for declaratory judgment would be the type of action typically brought by a taxpayer. In addition, the remedy of injunction against future expenditures of such funds for such purpose as well as reimbursement for past expenditures would be possible as well. It is thus my opinion, consistent with the opinion of Attorney General Condon, dated September 14, 1995 that our courts would conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings. It is also my opinion that a taxpayer action of the type described above would be the most effective remedy.

*7 With kind regards, I am

Very truly yours,
Robert D. Cook
Assistant Deputy Attorney General

Reviewed and Approved by:

Zeb C. Williams, III
Deputy Attorney General

1997 WL 323769 (S.C.A.G.)

END OF DOCUMENT

EXHIBIT 15

00781

CHILDS & HALLIGAN

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October 14, 2014

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**Also admitted in Georgia

VIA E-MAIL AND U.S. MAIL

John W. McIntosh, Esq.
Chief Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211

Re: Berkeley County School District

Dear Mr. McIntosh:

We received your letter dated October 14, 2014.

Initially, the District is not expending public funds to pay legal expenses for any non-employee witnesses in the criminal investigation. Rather, attorney Jonathan Milling has been retained by the District as independent legal counsel to advise only District employee witnesses subpoenaed to appear before the State Grand Jury tomorrow, to the extent they wish to utilize his legal services.

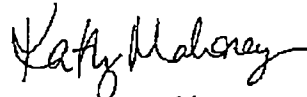
You have asked for the legal basis for the expenditure of public funds to pay the attorneys' fees for District employees under S.C. Code § 59-17-110, who are under investigation and/or indictment. Please see the enclosed opinions of retired Circuit Court Judge, A. Victor Rawl, and University of South Carolina Distinguished Law Professor Emeritus, John P. Freeman, copies of which were released publicly at the School Board's meeting on May 13, 2014. The Board relied on these expert legal opinions in determining the appropriateness of paying the legal fees on behalf of these employees. Further, please note that Professor Freeman's expert opinion specifically addresses both of the opinions you enclosed with your letter. Additionally, we have twice requested from the Attorney General's office information from SLED's investigative report and other investigative information so the Board can consider evidence your office may have that is not available to the Board. To date, the Board has not been provided with any such information from your office.

00782

John W. McIntosh, Esq.
October 14, 2014
Page 2

With kind regards, I am

Sincerely yours,



Kathryn Long Mahoney
kmahoney@childs-halligan.net

/slw

Enclosures

C: Dr. Kent Murray, Board Chairman
All Board Members
Kenneth L. Childs, Esq.
John M. Reagle, Esq.

00783

EXHIBIT 16

00784

Berkeley schools halt payment of Amy Kovach's legal fees on felony charge



[Brenda Rindge](#) ✉ [Email](#) 🐦 [@brindge](#)

Dec 10 2014 8:13 am 🕒 Dec 10 3:38 pm

The Berkeley County School Board will no longer spend taxpayers' dollars to defend indicted Communications Director Amy Kovach on a felony charge.

After a five-hour meeting, half of which was in closed session, the board voted Tuesday to suspend reimbursement to Kovach for fees for lawyer Jerry Theos in connection with a forgery charge.

Kovach was indicted by a Berkeley County grand jury on a misdemeanor ethics charge in February and a felony forgery charge in September in connection with 2012's Yes 4 Schools campaign. The ethics charge carries a fine of up to \$5,000 and a year in jail and the forgery charge is punishable by a fine and up to five years in jail.

According to Tuesday's motion, the board is suspending its decision to pay the fees until after the issue is resolved. Additionally, Chairman Kent Murray "is not to authorize payment of attorney's fees incurred in connection with the forgery indictment for Ms. Kovach unless and until the board takes further action."



Amy Kovach Provided

The action only pertains to the forgery charge and "in no way impacts upon the school district's continued payment of legal fees and costs associated with the original indictment," Theos said Wednesday.

As of Oct. 31, the district has reimbursed her \$130,912, according to a district response to The Post and Courier's Freedom of Information Act request, and some within the district say that figure has swelled closer to \$200,000. It is unclear what portion of that is for work on the forgery charge.

Kovach has been on paid administrative leave from her \$79,995-a-year job since she was indicted on Feb. 11.

For nearly two years, the board has maintained that Kovach and other district employees were acting in good faith and in the scope of their employment during the \$198 million bond referendum campaign to build and renovate schools, and state law requires that the district defend employees under those circumstances.

But residents have repeatedly questioned the move during public comments at board meetings and asked if the district will try to recover the payments if Kovach is found guilty.

In September, the Attorney General's office put the district on notice that it is considering taking legal action to recover the money spent for private defense attorneys for Kovach, Superintendent Rodney Thompson and Deputy Superintendent Archie Franchini. Franchini has been reimbursed \$30,000 for his lawyer, but Thompson has not received any reimbursements so far.

"It is difficult to understand how the board concluded that these officials acted in good faith when the criminal investigation remains ongoing," Chief Deputy Attorney General John McIntosh wrote in the letter.

The charges against Kovach stem from a State Law Enforcement Division investigation that began in January 2013 in response to complaints that she and other district employees illegally campaigned for the referendum during work hours and used district resources.

Although only Kovach has been charged in connection with the investigation, Thompson, who has acknowledged publicly he is under investigation, asked in September to be released from his contract two years early. He plans to step down on July 31.

In all, the district has paid more than \$300,000 to Kovach, Franchini and the law firm of Childs & Halligan in connection with the investigation.

Reach Brenda Rindge at 937-5713 or @brindge on Twitter.

Keywords [Amy Kovach \(/section/search&facet.filter=Keywords:Amy%20%20Kovach\)](#)

[Berkeley County School Board \(/section/search&facet.filter=Keywords:Berkeley%20County%20School%20Board\)](#)

[Rodney Thompson \(/section/search&facet.filter=Keywords:Rodney%20Thompson\)](#)

[Yes 4 Schools \(/section/search&facet.filter=Keywords:Yes%204%20Schools\)](#)

[Amy Kovach \(/section/search&facet.filter=Keywords:Amy%20%20Kovach\)](#)

[Berkeley County School Board \(/section/search&facet.filter=Keywords:Berkeley%20County%20School%20Board\)](#)

[Rodney Thompson \(/section/search&facet.filter=Keywords:Rodney%20Thompson\)](#)

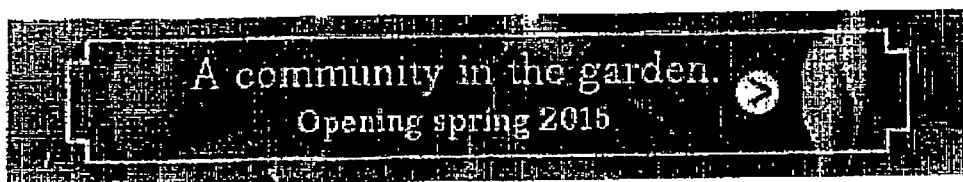
[Yes 4 Schools \(/section/search&facet.filter=Keywords:Yes%204%20Schools\)](#)

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) INDICTMENT #s: 2014-GS-08-0266
 2014-GS-08-01403

STATE OF SOUTH CAROLINA,)

vs.)

AMY KOVACH,)

Defendant.)

MOTION TO DISQUALIFY
ATTORNEY GENERAL

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

15 JAN 20 PM 4: 20

FILED

KM

Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.¹

The Defendant, Amy Kovach (hereinafter "Mrs. Kovach"), by and through her undersigned counsel, submits the following as and for her Motion to Disqualify the Attorney General Alan M. Wilson and his office (collectively, the "Attorney General") from prosecuting the above-listed indictments arising from the 2012 Berkeley County School District bond referendum. The Attorney General should be disqualified because he (1) is engaged in a campaign to both prosecute Mrs. Kovach and undermine her statutory right to have the Berkeley County School Board (the "BCSD") indemnify her for attorney fees and costs arising from the prosecution, thereby violating the Rules of Professional Responsibility that govern the legal profession and Mrs. Kovach's constitutional rights; (2) is on the advisory board of Santee Cooper, a governmental entity that supported the Bond Referendum, and therefore he has a conflict of interest in this matter; and (3) had SLED conduct an examination of Mrs. Kovach's

¹ Young v. United States ex rel. Vuitton Et Fils S.A., 481 U.S. 787, 814 (1987).

computer in the face of a filed motion for protective order claiming attorney-client privilege, and then misstated to the Court that SLED had not done so. Mrs. Kovach submits that a local solicitor should take over the prosecution from the Attorney General.

BACKGROUND

This case arises from a complaint made by the leadership of the Berkeley County Republican Party to the Attorney General, himself a Republican. See SLED Investigative Report dated July 25, 2013 (excerpted and without attachments at **Exhibit 1**²), at page 1 ("Attorney Josh Whitley contacted the SCAGO and provided documents, newspaper articles, and emails detailing the alleged violations."). "Whitley alleged BCSD employees, specifically Superintendent Doctor (Dr.) Rodney Thompson, Deputy Superintendent Archie Franchini, and Director of Communications Amy Kovach, worked on the [2012 Yes4Schools bond referendum] campaign during business hours and used district resources." Id. at 1-2. The purpose of the referendum was to raise funds to renovate and build public school facilities in Berkeley County. Voters approved the ballot measure in November 2012.

Santee Cooper was a strong supporter of the referendum campaign, contributing \$15,000 on October 9, 2012 (**Exhibit 2**), as well as an employee, Laura Varn, to serve as Co-Chair of the campaign, see Memorandum of Interview with Laura Varn on May 9, 2013 (excerpted at **Exhibit 3**). Santee Cooper staff member Phil Sails also worked as a photographer for the Campaign. See Memorandum of Interview with Kris Mathews on May 29, 2013 (**Exhibit 4**). Santee Cooper is a publicly owned entity established by statute. See S.C. Code Ann. §§ 58-31-

² The Exhibits are contained in the Appendix of Exhibits to Motion to Disqualify Attorney General, filed along with this Motion.

10 et seq. The Attorney General is a member of the advisory board of Santee Cooper. See S.C. Code Ann. § 58-31-20(D).

Upon receiving Whitley's complaint, the Attorney General immediately directed SLED to investigate his allegations. See Letter from John W. McIntosh dated January 17, 2013 (Exhibit 5). Thereafter SLED began interviewing people involved in the Yes4Schools Campaign, including Mrs. Kovach and Ms. Varn. Of course, elected officials and school district employees support school bond referendums all the time in South Carolina. See Appendix of Media Reports of Bond Referenda Support, filed January 20, 2015. It is unknown whether the Attorney General has investigated any of these other individuals, but there is no indication that he has.

On March 7, 2013, Mrs. Kovach wrote to the BCSD asking it to pay her attorney fees and costs related to the investigation, as it is required to do by statute (S.C. Code Ann. § 59-17-110) and the BCSD policy manual. See Letter from Amy Kovach dated March 7, 2013 (Exhibit 6). The BCSD began paying Mrs. Kovach's fees.

On February 11, 2014, the Attorney General presented a Berkeley County Grand Jury with an indictment charging Mrs. Kovach with violating S.C. Code Ann. § 8-13-1346 through her involvement in the Yes4Schools campaign (the "Election Indictment"). The Election Indictment states:

That Amy Kovach did, in Berkeley County, on or about the period between August 1, 2012 and November 6, 2012, use and authorize the use of public funds, property, or time to influence the outcome of an election to wit:

While employed as Communications Director by the Berkeley County School District, Amy Kovach did use public funds to pay for the creation of a campaign video and the production of other campaign material, did draft and disseminate speeches during her public employment intended to persuade the voting public, and did perform various other acts using public resources and time, all of which promoted and supported a yes vote as to the school board referendum

held on November 6, 2012, and all of which was in violation of 8-13-1346 of the S.C. Code of Laws as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Exhibit 7. The Grand Jury true billed the Election Indictment. Mrs. Kovach immediately was put on administrative leave with pay from her position with BCSD. Laura Varn, herself an employee of a public entity, was not indicted, despite having been paid by Santee Cooper to serve as co-chair of the Yes4Schools Campaign.

The BCSD asked A. Victor Rawl, Sr., a retired South Carolina Circuit Judge, to investigate and provide a legal opinion as to:

- (1) Whether, based on the information available to the board at this time, the conduct of Ms. Kovach as outlined in the indictment constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110; and
- (2) If you conclude that Ms. Kovach was acting "in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110, in regard to the issues referenced in the indictment, whether the board is precluded from appearing and defending Ms. Kovach under the statute simply by virtue of the fact that she has now been indicted?

Letter from A. Victor Rawl, Sr., dated May 2, 2014 (without attachments at Exhibit 8). As to the first question, Judge Rawl responded that Mrs. Kovach was acting in good faith and within the scope and course of her employment. Specifically, he found "absolutely no personal or financial benefit" to Mrs. Kovach in the "some forty pounds of emails and documents" he had reviewed. Id. at 2.

Judge Rawl referred the second question to Professor John Freeman, Esquire, a recognized expert in the field of statutory construction and corporate governance. Professor Freeman began explaining his opinion by noting that "A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of impropriety," citing United States v. Stein, 541

F.3d 130, (2d Cir. 2008), wherein the Second Circuit held that the government's attempts to bar KPMG from paying the legal fees of former employees indicted for tax fraud violated their Sixth Amendment rights. Letter from John Freeman dated April 22, 2014, at 2 (Exhibit 9). Professor Freeman also noted that

South Carolina's public policy strongly favors indemnity being extended to employees who have acted within the scope of their employment and in good faith. Thus, under South Carolina corporate law, S.C. Code Ann. § 33-31-851 (a), indemnification is allowed in some cases in favor even of criminally-convicted officers, trustees, employees, or agents. Indemnification is flatly prohibited only where there is an adjudication that the officer, trustee, employee, or agent is liable to the company or where an improper personal benefit was received by the person seeking indemnification. S.C. Code Ann. § 33-31-851(d). See S.C. Code § 33-31-851(c) ("The termination of a proceeding by ... conviction . . . is not, of itself, determinative that the director did not meet the standard of conduct described in this section."). The corporate law "standard of conduct" set forth in Section 33-31-851(a) requires that the entity be able to conclude the officer, trustee, employee, or agent acted in good faith and reasonably believed his or her conduct was in the entity's best interest. That factual predicate for indemnification in the corporate setting is very similar to the one established by S.C. Code § 59-17-110.

Id. at 2-3 (emphasis in original).

Professor Freeman concluded that the BCSD is not precluded from providing a defense for Mrs. Kovach because she was indicted, and that the BCSD has a duty to provide a defense for her under Section 59-17-110. Id. at 2. Professor Freeman addressed two Attorney General's Opinions, one from 1995 and one from 1997, which state that a school board may not pay for the defense of an employee in a criminal proceeding. Professor Freeman stated first that an Attorney General's Opinion "has no force of law." Id. at 3. Professor Freeman also stated that the Attorney General's Opinions are "obviously and egregiously wrong because [they] contradict[] the plain language" of Section 59-17-110. Id.

The BCSD made Judge Rawl's and Professor Freeman's opinions public at a board meeting, and has paid legal bills it has received from counsel for Mrs. Kovach and Mr. Franchini.

On or about August 4, 2014, SLED seized various materials from the offices of the BCSD, including Mrs. Kovach's computer. Mrs. Kovach's counsel immediately objected to any review of the computer, and moved for a protective order "prohibiting the State from reviewing the seized materials unless and until there is an appropriate order setting forth an extraction-and-review procedure that protects privileged and work product materials." Motion for Protective Order filed August 6, 2014 (Exhibit 10). While the Motion was pending, in total disregard of Mrs. Kovach's privilege claim, SLED conducted an examination of her computer. See Case Management History (Exhibit 11) (showing that the computer was searched beginning August 29, 2014). At a hearing on October 28, 2014, Assistant Deputy Attorney General Allen Myrick stated "While this motion is -- has been waiting to be ruled on, SLED has not moved forward on conducting this examination." October 28 Transcript pp. 5-6 (Exhibit 12). Of course, SLED had begun its examination two months earlier.

On September 9, 2014, the Attorney General obtained a second indictment of Mrs. Kovach, this time based on allegations of forgery:

That Amy Kovach did, in Berkeley County, on or about November 2013, commit the crime of Forgery, in that she did falsely make, forge, or counterfeit, cause or procure to be falsely made, forged or counterfeited of a writing or instrument, and did utter or publish as true a false, forged, or counterfeited writing or instrument of writing. To Wit: During November 2013, Amy Kovach created a false, backdated invoice, purporting to be from the Berkeley County School District to the "Yes for Schools" campaign, in an attempt to establish that she had intended to have public funds repaid to the County which had been spent on materials in support of a bond referendum election campaign, this in an amount less than \$10,000 (\$259.20), and in violation of §16-13-10(A) and (B)(2) of the Code of Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Exhibit 13 (the "Forgery Indictment"). In obtaining the Forgery Indictment, the Attorney General generated new ammunition for its attack on Mrs. Kovach's statutory right to indemnification.

On October 14, 2014, the Attorney General wrote to BCSD's counsel, copying the board members directly, urging the BCSD to stop paying legal fees based on the Attorney General Opinions Professor Freeman had already addressed and discredited, and threatening to sue to recover the fees already paid. See Letter from John W. McIntosh dated October 14, 2014 (**Exhibit 14**). BCSD counsel immediately responded, correcting factual errors in the Attorney General's letter, and providing Judge Rawl's and Professor Freeman's written opinions. See Letter from Kathryn Long Mahoney dated October 14, 2014 (**Exhibit 15**).

Mrs. Kovach consulted legal experts to provide opinions about the Attorney General's conduct with regard to her statutory right to fees. Professor Nathan Crystal, a recognized expert in the field of Attorney Professional Responsibility, agrees with Professor Freeman that the Attorney General's interpretation of § 59-17-110 is wrong. See Affidavit of Nathan M. Crystal dated December 15, 2014, ¶¶ 13-18. With regard to the Attorney General's letter to BCSD board members and its counsel, Professor Crystal concludes:

In my opinion the Attorney General of South Carolina is interfering with Ms. Kovach's Right to Counsel under the Sixth and Fourteenth Amendments and with her statutory right to indemnification under S.C. Code §59-17-110. In my opinion such conduct violates Carolina Rule of Professional Conduct (SCRPC) 3.8 and its comments and amounts to conduct prejudicial to the administration of justice under SCRPC 8.4(e). In addition, the Attorney General has engaged in other improper conduct in this proceeding, including representation that involves a conflict of interest. In my opinion such conduct warrants disqualification of the Attorney General's office from prosecution of Ms. Kovach.

Id. at ¶ 4. Professor Crystal notes also that the October 14 letter from John McIntosh, in which he copied BCSD board members on a letter to BCSD counsel, "raises a question of possible violation of SCRCP 4.2." Id. ¶21.

Dr. Gregory B. Adams, another recognized expert in the field of Attorney Professional Responsibility, opines "that the persistent, ongoing professional misconduct by [the Attorney General] in connection with the prosecution of these criminal charges, violates the constitutional rights of the defendant, Amy Kovach, especially her rights to counsel and due process, and warrants the disqualification of the Attorney General as prosecutor." Affidavit of Expert Opinion of Dr. Gregory B. Adams, dated January 19, 2015, ¶ I.

The Attorney General continues to undermine Mrs. Kovach's statutory right to indemnification. On December 9, 2014, the BCSD bowed to pressure from the Attorney General and voted to suspend payment of Mrs. Kovach's attorney fees related to the Forgery Indictment. See Post & Courier, Berkeley schools halt payment of Amy Kovach's legal fees on felony charge, Dec. 10, 2014 (Exhibit 16).

DISCUSSION

1. **The Attorney General Should be Disqualified Because he Violated the Rules of Professional Responsibility and Mrs. Kovach's Sixth Amendment Right to Counsel.**

In Berger v. United States, the United States Supreme Court explained the duties of a prosecutor, in that case the United States Attorney:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he

may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88 (1935). The same principals apply to a state attorney general serving as a prosecutor: he also "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* "Prosecutors who overreach undermine 'confidence, not only in [their] profession, but in government and the very ideal of justice itself.'" Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand. L. Rev. 45, 59-60 (1991).

Comment [1] to Rule 3.8 of the South Carolina Rules of Procedural Conduct ("SCRPC") makes the same point: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice" SCRPC 8.4(e) states: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Citing Comment [1] to SCRPC 3.8, the South Carolina Supreme Court stated in State v. Quattlebaum: "Prosecutors are ministers of justice and not merely advocates. . . . A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics." 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000).

Here, the Attorney General has committed professional misconduct and violated the Sixth Amendment by prosecuting Mrs. Kovach while at the same time undermining her statutory right to have the BCSD provide her a defense.

In United States v. Stein, Assistant United States Attorneys investigating fraudulent tax shelters pressured the accounting firm KPMG to condition the payment of legal fees for its employees on whether the employee cooperated with the government. 541 F.3d 130, 137-39 (2d Cir. 2008). KPMG bowed to this pressure in order to avoid indictment itself. Id. at 138-39. KPMG fired at least one employee for exercising her Fifth Amendment rights. Id. at 139. When employees were indicted, KPMG stopped paying their legal fees. Id. at 139-40.

The indicted KPMG employees moved to dismiss the indictments based on the government's interference with KPMG's advancement of legal fees. Id. at 140. The district court granted the motion, finding that the prosecutors' conduct "shock[s] the conscience." Id. at 142. The Second Circuit affirmed, holding that "the Sixth Amendment prohibits the government from impeding the supply of defense resources (even if voluntary or gratis), absent justification."³ Id. at 156.

The Attorney General is doing to Mrs. Kovach what the Government did to the defendants in Stein: impede her supply of defense resources. The facts here are even more compelling than those in Stein in that Mrs. Kovach has a statutory right to have the BCSD provide a defense. As in Stein, the Attorney General's conduct shocks the conscience.

Nor is this the first time South Carolina courts have addressed a prosecutor's interference with a defendant's Sixth Amendment rights. In State v. Quattlebaum, the Supreme Court of South Carolina reversed a conviction and disqualified the Eleventh Circuit Solicitor's Office from re-prosecuting where a deputy solicitor in that office violated the defendant's Sixth Amendment right to counsel. 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000). In that case, the

³ "Justification" was described as situations where payments to counsel demonstrate the existence of a criminal conspiracy, or possibly where the payments demonstrate a scheme to "circle the wagons" against a criminal prosecution. Stein, 541 F.3d at 156-57. No such justification exists here.

deputy solicitor had eavesdropped on a privileged conversation between the defendant and his attorney. After concluding that this conduct violated the Sixth Amendment and required reversal and disqualification, the Court addressed the issue whether the solicitor's office should also have been disqualified "to protect the integrity of the judicial system." Id. at 449, 527 S.E.2d at 109.

Concluding that it should, the Court wrote:

Although we have disqualified the Eleventh Circuit Solicitor's Office from prosecuting appellant, we address appellant's second assertion because of its importance to judges, attorneys, criminal defendants, and indeed all citizens of this state. Every South Carolinian has a vital interest in the fair administration of justice. This Court bears the ultimate responsibility for maintaining judicial integrity and high standards of professional conduct among the members of the bar, and for protecting and defending the constitutional rights of the accused.

The integrity of the entire judicial system is called into question by conduct such as that engaged in by the deputy solicitor and investigating officers in this case. Prosecutors are ministers of justice and not merely advocates. See Rule 3.8, cmt., Rules of Professional Conduct. A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics. The participation at trial of a prosecutor who has eavesdropped on the accused and his attorney tarnishes us all. We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice.

Id., 527 S.E.2d at 109.

A prosecutor should be disqualified if his misconduct creates even the appearance of impropriety.

The Court's ultimate consideration must be public confidence in the administration of justice, that "justice must satisfy the appearance of justice." United States v. Johnston, 690 F.2d 638 (7th Cir. 1982); General Motors Corp. v. City of New York, 501 F.2d 639, 649 (2d Cir. 1974). As the Supreme Court stated, federal courts have an obligation to ensure "that legal proceedings appear fair to all who observe them." Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692, 1697, 100 L. Ed. 2d 140 (1988).

United States v. Dyess, 231 F. Supp. 2d 493, 498 (S.D. W. Va. 2002) (disqualifying entire prosecutor's office); see also City & Cnty. of Denver v. Cnty. Ct., 37 P.3d 453 (Colo. Ct. App. 2001) (disqualifying entire city attorney's office solely because of the appearance of impropriety,

even though the Colorado Rules of Professional Conduct make no specific mention of "the appearance of impropriety"). The Attorney General's violations of the Rules of Professional Responsibility and his violation of Mrs. Kovach's Sixth Amendment rights more than satisfy the "appearance of impropriety" standard here. See State v. Gonzales, 2005-NMSC-025, ¶ 28, 138 N.M. 271, 278-79, 119 P.3d 151, 158-59 (2005) (stating that when considering whether to disqualify a prosecutor, a court should first "determine whether prosecution by a member of the district attorney's office is inconsistent with a particular standard of professional conduct, justifying disqualification of that person"). Cf. Ingle v. State, 746 N.E.2d 927, 935 (Ind. 2001) (declining to disqualify a prosecutor where there was no indication he violated any ethical duties).

Although the Rules of Professional Responsibility state that a prosecutor must "see that the defendant is accorded procedural justice," and the ABA Standards for Criminal Justice make clear that "[t]he duty of the prosecutor is to seek justice, not merely to convict" (Standard 3-1.2(c), The Function of the Prosecutor), the Attorney General is intent on convicting Mrs. Kovach at any cost, without regard to whether he is doing justice. By undermining Mrs. Kovach's statutory right to have the BCSD provide her a defense in the face of two (now three) opinions of respected legal experts, the Attorney General has shown that this is no mere prosecution subject to the measured application of prosecutorial discretion. The Attorney General will use any means necessary to obtain a conviction. The public should be terrified by this abuse of prosecutorial power. It shows that the Attorney General has little respect for the Rules of Professional Responsibility and citizens' statutory and constitutional rights. As Professor Freeman wrote, in an opinion he provided without compensation as a public service, "A prosecutor's attempt to interfere with an indicted employee's indemnity rights smacks of

impropriety." Exhibit 9 at 2. The appearance of impropriety standard is easily met by the Attorney General's misconduct.

2. The Attorney General Should be Disqualified Because he is Serving Both as Prosecutor and as a Civil Attorney as to the Same Set of Facts.

Section 17-1-20 of the South Carolina Code, "Prosecuting officer shall not accept fees or rewards, nor act in a civil case as counsel for either party," states:

No prosecuting officer shall receive any fee or reward from or in behalf of a prosecutor for services in any prosecution or business to which it is his official business to attend, nor be concerned as counsel or attorney for either party in a civil action depending upon the same state of facts.

(Emphasis added). The Supreme Court of South Carolina has described this statute as "essential for the protection of the public interest." In re Jolly, 269 S.C. 668, 670, 239 S.E.2d 490, 491 (1977).

In Jolly, the prosecutor represented a mother and her children in a civil suit against a person who was also the defendant in a reckless homicide case prosecuted at his direction. Id. at 669, 239 S.E.2d at 491. The Court rejected the prosecutor's argument that he did not violate the statute because an assistant solicitor actually prosecuted the case, noting that this "does not absolve [the prosecutor] in view of the authority possessed by [him] to control the official acts of the Assistant Solicitor." Id. at 670, 239 S.E.2d at 491.

Here, the Attorney General has threatened a civil action to stop indemnification and recover fees paid toward Mrs. Kovach's defense. See Exhibit 14. He has successfully pressured the BCSD to stop paying fees as to the Forgery Indictment. He is acting in two incongruous roles: that of criminal prosecutor taking action on behalf of the State, and that of a civil attorney for the State seeking reimbursement of public funds expended in the defense of the prosecution. The Attorney General is violating Section 17-1-20 of the South Carolina Code because he is

serving as a "prosecuting officer . . . concerned as counsel [for the State] in a civil action depending upon the same state of facts."

3. The Attorney General Should be Disqualified Because he Sits on the Board of Santee Cooper.

The Model Rules of Professional Conduct state that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," and a concurrent conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." Rule 1.7(a)(2); see also Rule 1.11(d)(1) (stating that a lawyer currently serving as a public officer or employee . . . is subject to Rule[] 1.7"). Thus, disqualification is appropriate where (i) a co-defendant has a personal relationship with the prosecutor's office, Fregoso v. Kramer, Case No. CV 08-01115-GW (CT), 2008 U.S. Dist. LEXIS 109225, at *9 (C.D. Cal. Nov. 26, 2008), adopted in 2009 U.S. Dist. LEXIS 31479 (C.D. Cal. Apr. 10, 2009); (ii) the prosecutor's brother is a complaining witness, People v. Doyle, 159 Mich. App. 632, 648, 406 N.W.2d 893, 900, rev'd on other grounds in 161 Mich. App. 743, 411 N.W.2d 730 (1987), and (iii) a witness to the crime is a prosecutor in the District Attorney's office that is prosecuting the case, People v. Conner, 34 Cal. 3d 141, 148, 193 Cal. Rptr. 148, 151, 666 P.2d 5, 8 (1983). In Conner, the court stated that a prosecutor has a conflict "whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner." Conner, 34 Cal. 3d at 148, 193 Cal. Rptr. at 151, 666 P.2d at 8. The South Carolina Supreme Court has also recognized that a conflict in the prosecutor's duties may warrant disqualification. See State v. Hunter, 313 S.C. 53, 55, 437 S.E.2d 41, 42 (1993) (rejecting a due process challenge to denial of a motion to disqualify a prosecutor because "[t]he fact that the prosecutor advises the police department in

matters which may ultimately be prosecuted does not create any type of conflict in the duties of the prosecutor's office").

Here, there is a conflict in that the Attorney General is on the advisory board of Santee Cooper, a public entity that itself is much more culpable than Mrs. Kovach because it provided \$15,000 in public funds and the time of public employees, Laura Varn and Phil Sails, to support the Yes4Schools Campaign. The criminal statute on which the Election Indictment is based, S.C. Code Ann. § 8-13-1346 states: "a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure." A "referendum" is defined in the Ethics Act as a type of "ballot measure." See S.C. Code Ann. § 8-13-1300(2). Thus, Santee Cooper has violated the statute under which Mrs. Kovach is charged. And under the Attorney General's interpretation of the statute,⁴ Yes4Schools co-chair Laura Varn and Phil Sails are equally or more culpable than Mrs. Kovach as they have utilized public time (their time, for which they were paid by Santee Cooper) "to influence the outcome of an election." S.C. Code Ann. § 8-13-1346(a). Even if the Attorney General's conflict is not a traditional conflict on its own compelling disqualification, it is another unseemly fact creating an appearance of impropriety. He is on the board of a public entity that supported the bond referendum for which he is prosecuting Mrs. Kovach. He has specifically targeted her and ignored Santee Cooper and its' employees conduct. Nor is there any indication he has investigated any of the elected officials or school board employees that publically have supported school bond referenda

⁴ Mrs. Kovach disagrees with the Attorney General that a school bond referendum is an "election" because the Ethics Act definitions state that it is not an election. Compare S.C. Code Ann. § 8-13-1300(9) (defining an election without including a referendum or ballot measure) with id. § 8-13-1300(2) (defining a ballot measure as including a referendum or "measure submitted to voters for their approval"). However, the Court recently agreed with the Attorney General's interpretation. See Order Denying Defendant's Motion to Dismiss or Quash the Indictment, Nov. 3, 2014. The Attorney General cannot now argue that its interpretation applies only to Mrs. Kovach and not to Ms. Varn or Mr. Sails.

throughout the state. See Appendix of Media Reports of Bond Referenda Support, filed January 20, 2015. While Mrs. Kovach has absolutely no desire to see any other individual go through the debilitating humiliation of a criminal prosecution for actions taken solely for the benefit of schoolchildren, the glaring fact remains that many others similarly situated have been ignored.

4. The Attorney General Should be Disqualified for Disregarding Mrs. Kovach's Privilege Claim.

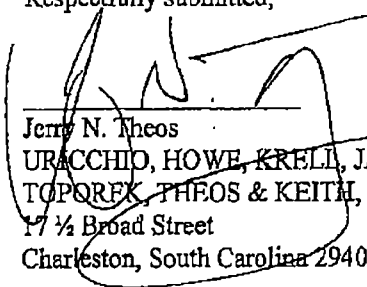
As discussed above, the Attorney General has "the responsibility of a minister of justice and not simply that of an advocate," which includes "specific obligations to see that the defendant is accorded procedural justice." Comment [1] to Rule 3.8, SCRPC. The Court should disqualify the Attorney General if his conduct creates the appearance of impropriety or undermines the integrity of the judicial system. See, e.g., Dyess, 231 F. Supp. 2d at 498; Quattlebaum, 338 S.C. at 449, 527 S.E.2d at 109.

Here, the examination of Mrs. Kovach's computer in total disregard of her privilege claim is another example of the Attorney General's abuse of power in this case. While her motion for a protective order was pending—a motion in which Mrs. Kovach asserted that the computer contained attorney-client communications and work product—the Attorney General had SLED examine her computer. See Exhibit 11. Later, the Attorney General misstated to the Court that no review had been done. See Exhibit 12. "Procedural justice" would have required, first, that the examination not be conducted, and second, that the examination that was conducted be truthfully disclosed to the Court.

CONCLUSION

For the reasons stated above, the Court should disqualify the Attorney General from prosecuting this case, and assign the prosecution to a local solicitor.

Respectfully submitted,



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Charleston, South Carolina
January 19, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY) IN THE COURT OF GENERAL SESSIONS
) NINTH JUDICIAL CIRCUIT
) INDICTMENT NUMBER: 14-GS-08-0266

STATE OF SOUTH CAROLINA,)

versus)

AMY KOVACH,)

Defendant.)

MOTION TO DISMISS

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

14 MAY 22 AM 11:40

FILED
KJM

The Defendant, Amy Kovach (hereinafter "Mrs. Kovach"), by and through undersigned counsel, hereby moves this Court to dismiss the above captioned Indictment.

Exhibit 1. The Indictment states as follows:

That Amy Kovach did, in Berkeley County, on or about the period between August 1, 2012 and November 6, 2012, use and authorize the use of public funds, property, or time to influence the outcome of an election to wit:

While employed as Communications Director by the Berkeley County School District, Amy Kovach did use public funds to pay for the creation of a campaign video and the production of other campaign material, did draft and disseminate speeches during her public employment intended to persuade the voting public, and did perform various other acts using public resources and time, all of which promoted and support a yes vote as to the school board referendum held on November 6, 2012, and all of which was in violation of 8-13-1346 of the S.C. Code of Laws as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

The grounds for this motion are as follows: (1) the Ethics Act provisions at S.C. Code § 8-13-1346 which prohibits the use of public funds, property or time to influence a ballot measure are not applicable to individual persons; and, (2) the conduct was permissible under S.C. Code § 8-13-1346.

I. Background.

This matter involves the 2012 Berkeley County School District Board efforts to promote and approve the passage of a \$198 million bond referendum to build new and/or improve existing public school facilities in Berkeley County. Mrs. Kovach was and is the Director, Communications and Community Relations for Berkeley County School District (hereinafter "BCSD").

On January 10, 2012, the BCSD held a Board meeting at which time Dr. Rodney Thompson, BCSD Superintendent (hereinafter "Thompson"), Mr. Archie Franchini, BCSD Assistant Superintendent (hereinafter "Franchini"), and the BCSD CFO Brantley Thomas (hereinafter "Thomas") outlined an action plan for new schools and improvements to support the growing Berkeley County student population and help improve student test performance.

Exhibit 2. Franchini recommended approval of a bond referendum in the amount of \$250 million to be presented to the Berkeley County voters in November, 2012, and the Board motion was made and passed (6-3) to approve the recommendation.

On April 24, 2012, the BCSD held a Board meeting at which time a BCSD Growth and Building Plan was presented by Franchini and reviewed by the Board. Exhibit 3. The Board minutes note with approval as follows:

The time line at present for this plan calls for preparations for top priority projects in June 2012; a Board resolution and ballot preparation for a bond referendum in August 2012 and a public vote on the building project in November 2012.

Amy Kovach, Director of Communications, continued the report to provide an overview of the YES4Schools Campaign Plan. The mission of this plan is to successfully pursue an estimated \$250 Million Bond Referendum to construct new and renovate existing facilities to accommodate student population growth in the district.

Id.

On June 29 and 30, 2012, the BCSD held a Board and upper BCSD management workshop which included a "Navigating a Bond Referendum" guest speaker prepared and presented by an outside consultant, Herman Gaither (retired Beaufort County Superintendent). Exhibit 4. Excerpts from the minutes of the workshop include the following guidance:

EVERY referendum is difficult but winnable. They are all winnable. (p. 1)

Board must strut their perspective and uphold the referendum. (p. 1)

We WILL win ... focus on winning. (p. 1)

People are going to do what you expect them to do with a focus on winning. (p. 2)

District Office will use the month of July to get the information ready. (p. 2)

In August...bring in the captains, and staff and cascade ready to go. Campaign team is in full swing. (p. 2)

Have a go to person ... the person who will funnel all the information. In BCSD, Amy Kovach. (p. 3)

Do everything you can to WIN. Rotary Club, speakers bureau, do everything to win. (p. 3)

Convince the voters to how we will move the debt forward. (p. 4)

When you go to the realtors...talk about property values. (p. 5)

When you go to the Chamber...talk about the ability to recruit new business and gain membership. (p. 5)

Get children ready. (p. 5)

Messaging: improving schools, improve test scores, create better schools. (p. 5)

Share radio, tv or consulting with a generic Yes 4 Schools. (p. 5)

Educate, Educate...Superintendent and DO staff get an opportunity to be at all schools. (p. 6)

Press announcements and campaign launch. One per week. (p. 6)

There has to be someone who wakes up every day and says we have to get this done today. (p. 6)

Find a group that was supportive and tie together an announcement. (p. 6)

Friday night gatherings are a good place to get messaging. (p. 6)

Direct mail, robocall and paid media gets it done physically. (p. 6)

On July 24, 2012, the BCSD held a Board meeting at which time a BCSD Bond Referendum was discussed by the Board. Exhibit 5. A BCSD Board resolution to go forward with the Bond Referendum was approved. The BCSD Board minutes note, in part, as follows:

Discussion followed with Mr. Obie asking how is the fund raising progressing and why are we waiting until September 5th to start the campaign. Amy Kovach explained that \$52,000 has been raised by the Campaign Committee and the Bond Referendum committee has been meeting. She provided a brief outline for the campaign.... The district is hoping that citizens will step up and vote "Yes" if this is a priority for them because we have shown that it is a priority of the district. Other board members expressed hope that the citizens will support our referendum.

Id.

The Referendum was not formally put on the ballot until August 15, 2012; therefore, even if the statute alleged to be applicable applies, any actions prior to that date would not fall under the statute since there was no potential ballot (or election) for Mrs. Kovach to arguably attempt to influence the outcome of until and/or prior to that date.

On August 28, 2012, the BCSD held a Board meeting at which time a BCSD Bond Referendum was discussed by the Board. Exhibit 6. The BCSD Board minutes note, in part, as follows:

School Improvement Campaign Update

Amy Kovach provided a detailed powerpoint presentation to review the status of the School Improvement Referendum scheduled for the November 6, 2012 election. The update included a timeline for events leading up to the November 6 election day, fund raising efforts, and the extensive plan in place to get the message out to all stakeholders so the Campaign can be successful. The district plans to build 5 new schools and renovate 29 schools with the \$198 Million School Improvement Referendum Funds.

Id.

On September 25, 2012, the BCSD held a Board meeting at which time a BCSD Bond Referendum Campaign was discussed by the Board. Exhibit 7. The BCSD Board minutes note, in part, as follows:

School Improvement Campaign Update

Laura Varn, Campaign Volunteer, provided a power point update of the School Improvement Referendum Campaign that included information on what voters have told the committee, a strategic overview, campaign organization, campaign activities and campaign materials. The Campaign's kick off day will be October 4, 2012, 1:30 p.m. at Stratford High School.

Id.

Throughout the process, the BCSD Board members were repeatedly updated and kept apprised as to the activities of its officials and employees (including Mrs. Kovach) with respect to the 2012 Bond Referendum – through emails, letter correspondence, memoranda, presentations, etc....

On November 6, 2012, the Bond Referendum ballot measure passed with 60% of the electorate voting in favor of the measure.

On March 12, 2013, the BCSD held a Board meeting at which time a resolution was passed that Mrs. Kovach, Mr. Thompson and Mr. Franchini acted in good faith and within the scope of their employment in connection with the school improvement referendum:

"Section 59-17-110 of the South Carolina Code of Laws requires that if any employee of the District is prosecuted in any action, civil or criminal, "by reason of any act done or omitted in good faith in the scope of his employment" it is the duty of the District, when requested, to appear and defend the action. Even though no civil or criminal action has been initiated against any of our employees at the time, based on the advice of the Board's attorneys, we believe as a Board it is our legal obligation to provide those employees involved in this investigation with legal representation at this juncture as they have requested. The Board has reason to believe that its employees' acts or omissions in connection with the school improvement referendum were in good faith and in the scope of their employment. Under these circumstances, it is the District's statutory obligation to provide legal representation for its employees. The District will continue to cooperate with the investigation, will make future public statements concerning this matter as is appropriate to do so, and appreciates the public's patience and understanding of the need for confidentiality while the investigation takes its course."

II. The Ethics Act Ballot Measure Prohibitions Are Not Applicable To Individuals.

The Ethics Act, at S.C. Code § 8-13-1346, which is entitled "Use of public funds, property, or time to influence election prohibited; exceptions," provides as follows:

(A) A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election.

(B) This section does not prohibit the incidental use of time and materials for preparation of a newsletter reporting activities of the body of which a public official is a member.

(C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

(emphasis added)

As noted in the Florence County School District case below, Section 8-13-1346(C) is the provision applied in this matter and for which Mrs. Kovach stands indicted. It provides in part that "a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure".

Note the words "governmental entity". This section does not state that a "person" may not use funds, property or time to influence a ballot measure. In contrast, S.C. Code § 8-13-1346(A) specifically provides that "A person may not use or authorize the use of public funds, property or time to influence the outcome of an election".

While a person may not use public funds, property or time to influence the outcome of an election per Section 8-13-1346(A), the legislature has clearly differentiated the two prohibitions. Section 8-13-1346(A) only applies to "persons", whereas Section 8-13-1346(C) only applies to "governmental entities". The plain meaning of the statute must be acknowledged. Likewise, the rule of lenity must be used to interpret an ambiguous criminal statute in favor of a putative defendant. United States v. Wilson, 10 F.3d 734 (10th Cir. 1993) (rule of lenity applies where statute is ambiguous and courts must construe statute favorably to the criminal defendant).

Furthermore, the word "election" is defined in the Ethics Act, and the definition does not include a "ballot measure". Thus, Section 8-13-1346(A) only applies to "elections" and not ballot measures.

The criminal catch-all provision of the Ethics Act is S.C. Code § 8-13-1520. It states that a "person" who violates the Ethics statute is guilty of a misdemeanor.

However, a "person" cannot violate Section 8-13-1346(C), because it specifically and only states that a "governmental entity" cannot use public funds to influence the outcome of a ballot measure, and does not reference a "person".

III. The Conduct was permissible under S.C. Code § 8-13-1346.

The Conduct was permissible and not a violation of The Ethics Act. S.C. Code § 8-13-1346, which is entitled "Use of public funds, property, or time to influence election prohibited; exceptions," provides in pertinent part as follows:

(B) This section does not prohibit the incidental use of time and materials for preparation of a newsletter reporting activities of the body of which a public official is a member.

(C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity....

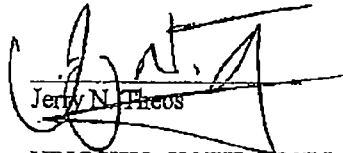
Under Section 8-13-1346(B), the BCSD was clearly allowed incidental use of time and materials for preparing newsletters which related to the 2012 Bond Referendum. The word "newsletters" has not been defined in the Ethics statute, and should be given a broad construction which would encompass all of Mrs. Kovach's conduct. Clearly, the 2012 Bond Referendum was an activity which needed to be reported by BCSD, a "public body" with "public officials".

Under Section 8-13-1346(C), the BCSD was clearly allowed to expend public resources to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning the 2012 ballot measure. The 2012 Bond Referendum was a ballot measure which affected the BCSD governmental entity. The BCSD conduct involved preparing informational materials, conducting public meetings, and/or responding to news media or citizens' inquiries concerning the 2012 ballot measure.

VII. Conclusion.

Based upon the foregoing, Mrs. Kovach hereby respectfully moves and urges this Court to dismiss the Indictment in this case.

Respectfully submitted,



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Charleston, South Carolina
May 21st 2014

Amanda Kramer

From: Janet Smith <janet@uricchio.com>
Sent: Thursday, September 03, 2015 4:11 PM
To: Nancy Bloodgood
Cc: Janet Smith
Subject: Kovach
Attachments: Supp Motion To Dismiss with Exhibits filed 8.19.14.pdf; Nathan Crystal Affidavit.pdf; Revised Affidavit of Nathan Crystal February 9 2015.pdf; Affidavit of Expert Opinion of Dr. Gregory B. Adams filed 01 20 15.pdf

Ms. Bloodgood:

Pursuant to Mr. Theos' instructions, attached are also copies of the following:

Supplemental Motion to Dismiss
Affidavit of Gregory Adams
Affidavit of Nathan Crystal

Thank you,

Janet S. Smith
Legal Assistant to Jerry N. Theos
and Margaret E. Theos

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The undersigned, Nathan M. Crystal, provides the following expert affidavit under oath on behalf of the plaintiff, Amy Kovach.

1. My qualifications to give expert testimony include the following: I am Class of 1969 Professor of Professional Responsibility and Contract Law Emeritus at the University of South Carolina School of Law. I have taught professional responsibility and related subjects for almost 40 years. I am the author or coauthor of three books on Professional Responsibility and Legal Ethics, along with numerous articles in this field. One of my books is *THE ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT* (2013 ed.) (with Dean Robert Wilcox), a comprehensive treatment of professional ethics in this state. I write a bimonthly column on legal ethics for the *South Carolina Lawyer* entitled "Ethics Watch." I was a member of the South Carolina Bar's Ethics Advisory Committee for more than 15 years and have authored a number of opinions that were adopted by the Committee on issues of legal ethics. I was appointed by the President of the South Carolina Bar as chair of the committee from 2002-2003. I also represented the South Carolina Bar in its petition to the Supreme Court in 1990 to adopt the South Carolina Rules of Professional Conduct. I have delivered more than 100 speeches, presentations, and continuing legal education programs to law firms, bar organizations, and other groups, both in South Carolina and nationally. I have appeared as an expert witness by way of testimony, deposition, or affidavit in more than 100 cases involving questions of professional responsibility and legal ethics. I have served as an ethics consultant to and expert witness for lawyers and law firms in South Carolina and nationally for more than 40 years. I am one of the founding members of Crystal & Giannoni-Crystal, LLC, a law firm with offices in Charleston, New York City, and Washington, DC. I serve as a member of the New York City Bar Ethics Advisory Committee. In 2014 I was recognized by the *South Carolina Lawyers Weekly* for one

of its "Leadership in Law" awards. I was recently selected by my peers for inclusion in *The Best Lawyers in America*© 2015 in the fields of Ethics and Professional Responsibility Law.

With regard to the specific issue of prosecutorial conduct involved in this case. I have written about, advised, and counseled prosecutors about their professional conduct. I have served as a reporter for a committee of the South Carolina Law Institute analyzing and making recommendations regarding the South Carolina Ethics Act. I have advised clients about their ethical obligations under the South Carolina Ethics Act and have represented clients before the State Ethics Commission. My complete resume is available at www.cgcfirm.com.

2. In forming my opinion I have reviewed the following:

Ms. Kovach's Motion to Disqualify Attorney General dated January 19, 2015;

Letter from John W. McIntosh, Chief Deputy Attorney General, Kathryn Long Mahoney, Esq., Childs & Halligan, P.A., dated October 14, 2014, with former Attorney General opinions attached;

Letter from Kathryn Long Mahoney to John W. McIntosh, dated October 14, 2014.

Ms. Kovach's Supplemental Motion to Dismiss dated August 19, 2014;

Ms. Kovach's motion to dismiss the Indictment filed against her, which contains a statement of facts regarding this matter, dated May 21, 2014;

Letter from the Hon. A. Victor Rawl, Sr., to Dr. Kent Murray, Chairman of the Berkeley County School District Board of Education, dated May 2, 2014;

Opinion letter of Professor John P. Freeman, to Hon. A. Victor Rawl, Sr., dated April 22, 2014;

Letter from Amy Kovach to Dr. Rodney Thompson dated March 7, 2013.

3. In forming my opinions I have considered the South Carolina Rules of Professional Conduct, relevant South Carolina statutory provisions, case law, and legal literature. I have also considered the Opinions of the South Carolina Attorney General attached to Mr. McIntosh's letter dated October 14, 2014. These authorities are the types of materials customarily relied on by experts in the field of lawyer ethics and professional responsibility in forming their opinions.

SUMMARY OF OPINION

4. In my opinion the Attorney General of South Carolina is interfering with Ms. Kovach's Right to Counsel under the Sixth and Fourteenth Amendments and with her statutory right to indemnification under S.C. Code §59-17-110. In my opinion such conduct violates South Carolina Rule of Professional Conduct (SCRPC) 3.8 and its comments and amounts to conduct prejudicial to the administration of justice under SCRPC 8.4(e). In addition, the Attorney General has engaged in other improper conduct in this proceeding, including representation that involves a conflict of interest. In my opinion such conduct warrants disqualification of the Attorney General's office from prosecution of Ms. Kovach.

OPINION

5. SCRPC 3.8 and comment 1 to the rule provide as follows:

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the

offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. (emphasis added)

6. Rule 3.8 imposes several specific obligations on prosecutors and restricts prosecutors from engaging in certain conduct. As the comment indicates, however, the specific obligations in Rule 3.8 reflect a more general principle: Prosecutors have the obligation as ministers of justice to protect the procedural rights of criminal defendants.¹ One of the most

¹ Prosecutors also have substantive obligations; a prosecutor who knows or reasonably should know that a defendant is innocent of the crimes with which he is accused would have an obligation to take appropriate action.

important procedural rights of a criminal defendant is the Sixth and Fourteenth Amendments right to effective assistance of counsel.

7. The right to counsel has a number of dimensions, but one aspect of the concept is the defendant's right to be represented by counsel of her choosing. The state may not interfere with a defendant's right to be represented by counsel of her choosing without legitimate reason. The Supreme Court stated in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 625-626 (1989):

[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.

Similarly, the Fourth Circuit in *United States v. Farmer*, 274 F.3d 800, 804 (4th Cir. 2001) stated: "[A defendant] possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice."

8. SCRPC 8.4(e) provides: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."

9. Prosecutors have been disciplined in South Carolina for improper interference with the defendant's right to counsel. See *In re Humphries*, 354 S.C. 567, 582 S.E.2d 728 (2003) (prosecutor received one year suspension for failing to ensure that police stopped video recording of defendant's conversation with his counsel and for failing to disclose existence of video tape to defense counsel).

10. South Carolina Code §59-17-110 provides as follows:

SECTION 59-17-110. Duty of school districts to defend actions or proceedings against their employees.

In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in the courts of this State, or of the United States, by reason of any act done or omitted in good

faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

11. By letter dated October 14, 2014, John W. McIntosh, Chief Deputy Attorney General, wrote to Kathryn Long Mahoney, Esq., of the law firm of Childs & Halligan, P.A., which represents the Berkeley County School District, to object to the School Board's authorization of payment of legal fees for Board officials who are the subject of an on-going criminal investigation. The letter stated:

Enclosed are prior opinions of this Office which conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings. These opinions (enclosed) conclude that such expenditures represent the use of public funds for a private purpose in violation of the South Carolina Constitution.

We would suggest that you carefully review these opinions and the legal authorities referenced therein. This Office is reviewing the possibility of legal action to recover the public funds expended for this purpose. Please advise as to the legal basis for such expenditures. It is difficult to understand how the Board concluded that these officials acted in good faith when the criminal investigation remains ongoing. (emphasis added).

12. Mr. McIntosh's letter invites the School Board to "carefully review these opinions and the legal authorities referenced therein" and to advise of the "legal basis for such expenditures." The opinions and Mr. McIntosh's letter appear to be based on two propositions. First, a school board's payment of the legal fees of officials who are under criminal investigation or indictment represents "the use of public funds for a private purpose in violation of the South Carolina Constitution." Second, an official who is under criminal investigation was not acting in good faith.

13. Professor Freeman has already concluded that the Attorney General's interpretation of §59-17-110 is "obviously and egregiously wrong because it contradicts the plain

language” of the statute. I agree with Professor Freeman but add the following reasons to support his conclusion.

14. First, the statute does not contain an exception or any reference to the expenditure of public funds for private purpose. The Attorney General’s reference to this concept comes from the South Carolina Constitution. In essence, therefore, the Attorney General is claiming that the statute is unconstitutional because it authorizes the expenditure of public funds for a private purpose, namely the defense of a criminal proceeding against a school employee. The position of the Attorney General violates a well-established body of case law holding that statutes are presumed to be constitutional and will not be declared unconstitutional unless that conclusion is clear and beyond reasonable doubt. See *S.C. Dep’t of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014), where the Court stated:

This Court begins with a presumption of constitutionality. *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) (“This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid.”). “[A] legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt.” *Id.* at 570, 549 S.E.2d at 597.

15. Second, the South Carolina Legislature enacted §59-17-110. The Legislature is aware of the requirements of the South Carolina Constitution. Its enactment shows that the Legislature found a public purpose in authorizing school districts to pay the legal fees of employees who are subject to civil or criminal proceedings for actions taken in good faith in the scope of their employment. Thus, the Attorney General is improperly attempting to substitute its judgment of what constitutes a public purpose for that of the Legislature. Moreover, an obvious public purpose for the statute exists. Public school employees are at risk of being sued or even prosecuted because they often deal with matters that range from ones that are individual and

personally sensitive to those that are widespread and politically charged. If school employees must defend themselves in litigation out of their personal funds, school districts will find it difficult to attract highly qualified individuals. It should be noted that the statute is not a general indemnification statute for all public employees; the Legislature has carefully tailored the statute to apply only to public school employees who are acting in good faith in the scope of their employment.

16. Third, the opinions cited by Mr. McIntosh are themselves inconsistent in their analysis. The original opinion cited by the Attorney General's office dated February 15, 1985, dealt with payment of fees by county council for an outside attorney when the county attorney was unable to handle the matter due to a conflict of interest. The opinion stated that payment of fees in this situation was proper. The opinion did not deal with statutorily authorized fees. The opinion mentioned a "public purpose" limitation on payment of legal fees only in passing and even there the limitation was quite narrow in scope. The opinion stated that a governmental body may not use public funds to pay legal fees of private counsel "in matters in which it is not directly interested or which lie outside its corporate purpose." Opinion at page 4 (emphasis added).

17. The opinion dated September 14, 1995, states: "Express statutory authority is necessary for expenditure of funds in criminal proceedings . . ." Opinion at 2. In addition, one of the primary authorities discussed in that opinion is *Bowling v. Brown*, 469 A.2d. 869 (Md. Ct. App. 1984). In that case the court found that legal fees paid by a township for defending a criminal proceeding against one of its employees was improper because "the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment." (emphasis added). In Ms. Kovach's situation there is express

statutory authority for the payment of her fees, so the opinion actually supports her position, not that of the Attorney General.

18. The Opinion of May 13, 1997, relies on the 1985 and 1995 opinions and cites again with approval *Bowling v. Brown*. As discussed in the previous two paragraphs, however, both of these opinions actually support payment of Mr. Kovach's fees pursuant to §59-17-110. In addition, the 1997 opinion cited a number of additional authorities in support of the opinion. The leading authority cited in the opinion is *Wright v. City of Danville*, 675 N.E.2d 110 (Ill. 1996). In that case, however, former city commissioners sought indemnification from the city for their legal expenses after they were convicted of criminal violations. The court stated: "In conclusion, the city has neither the duty nor the authority to reimburse plaintiffs for legal fees incurred in the unsuccessful defense of criminal official misconduct and conflict of interest charges." *Id.* at 117. The court also held that the commissioners' fees were not reimbursable because they did not act within the scope of their employment. But even in this respect the decision favors Ms. Kovach. The court stated that an employee's conduct is not within the scope of his employment "if the employee's actions are different from the type of acts he is authorized to perform or were performed purely in his own interest." *Id.* at 118. In that case, unlike Ms. Kovach's situation, the conduct of the commissioners involved self-dealing. *Id.*

19. As described in his letter of May 2, Judge Rawl conducted an investigation lasting several months involving interviews with a number of individuals and review of more the 40 pounds of emails and other documents. He concluded that Ms. Kovach was acting within the scope of her employment in her activities with regard to the School Bond Referendum on November 6, 2012. Judge Rawl also concluded that Ms. Kovach was acting in "good faith" in

connection with the bond referendum. In particular, he found "absolutely no personal or financial benefit to her in the documentation."

20. The Attorney General's attack on Ms. Kovach's right to payment of legal fees under §59-17-110 is particularly egregious in this case because the Attorney General is not simply giving an opinion to a governmental body. The Attorney General is the prosecuting attorney in this case. In other words, the Attorney General is attempting to cripple the defense by interfering with the defendant's ability to retain counsel of her choice.

21. I note also that Mr. McIntosh sent copies of his October 14 letter to the Berkeley County School Board. The letter contains a veiled threat to bring action against them personally for recovery of any fees that have been paid. Moreover, because Board members were represented by counsel, Mr. McIntosh's communication to them raises a question of possible violation of SCRPC 4.2

22. Based on the above analysis, in my opinion Ms. Kovach has a right to indemnification for her attorney fees under S.C. Code §59-17-110. In my opinion the Attorney General is improperly interfering with Ms. Kovach's statutory and constitutional right to counsel. This conduct violates SCRPC 3.8 and its comments and SCRPC 8.4(c), prohibiting conduct that is prejudicial to the administration of justice.

23. The Attorney General's actions continue to undermine Mrs. Kovach's statutory and constitutional rights. On December 9, 2014, the Berkeley County School Board voted to suspend payment of Mrs. Kovach's attorney fees related to her indictment for forgery. See Post & Courier, Berkeley schools halt payment of Amy Kovach's legal fees on felony charge, Dec. 10, 2014.

24. In addition to the improper interference with Mr. Kovach's right to counsel, the Attorney General has engaged in other conduct in this case that is at a minimum highly questionable as set forth in Ms. Kovach's Motion to Disqualify the Attorney General. In particular, I note that Attorney General serves on the Advisory Board of Santee Cooper. Based on information I have been given, Santee Cooper violated the very statute that the Attorney General accuses Ms. Kovach of violating by contributing \$15,000 to the Yes4Schools campaign. In fact, the Attorney General himself may have committed a crime under the statute by authorizing directly or indirectly the expenditure of public funds to support this campaign. Section 8-13-1346(A) states: "A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election." (emphasis added). Under SCRPC 1.7(a)(2) a lawyer has a conflict of interest when "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer."

25. The South Carolina Supreme Court has disqualified a prosecutor's office "to protect the integrity of the judicial system," when the prosecutor's conduct interfered with the defendant's constitutional right to counsel. See *State v. Quattlebaum*, 338 S.C. 441, 449, 527 S.C. 441, 449, 527 S.E.2d 105, 109 (2000). In this case the Attorney General has not only interfered with Ms. Kovach's statutory and constitutional right to counsel, but has also engaged in a number of other actions that affect the integrity of this prosecution. In my opinion, for these reasons the Office of the Attorney General should be disqualified from prosecution of this case.

This ____ day of February 2015.

Nathan M. Crystal

Sworn to and subscribed before me

Notary Public

This ____ day of February 2015

Kwm

STATE OF SOUTH CAROLINA **FILED** IN THE COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY 14-12-12 NINTH JUDICIAL CIRCUIT
INDICTMENT NUMBER: 14-GS-08-0266

STATE OF SOUTH CAROLINA
BERKELEY COUNTY, S.C.

versus)
AMY KOVACH,) SUPPLEMENTAL
Defendant.) MOTION TO DISMISS
_____)

The Defendant, Amy Kovach (hereinafter "Mrs. Kovach"), by and through her undersigned counsel, submits the following to supplement her Motion to Dismiss filed May 22, 2014. For the reasons stated below and in her initial Motion, the Court should dismiss this case.

Defendant refers the Court to the statement of facts set forth in her initial Motion, which are adopted herein. She also refers the Court to the grounds for dismissal stated in her initial Motion: (1) the Ethics Act provisions at S.C. Code § 8-13-1346 that prohibit the use of public funds, property or time to influence a ballot measure are not applicable to individual persons like Mrs. Kovach but only to governmental entities, and (2) her conduct was permissible under S.C. Code § 8-13-1346 because she was merely providing information and reporting activities about the ballot measure, which is explicitly permitted under the statute. In addition to these grounds, this case should be dismissed for the following reasons.

1. The Indictment charges conduct that is not criminal.

Section 8-13-1346 of the South Carolina Code states:

(A) A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election.

(B) This section does not prohibit the incidental use of time and materials for preparation of a newsletter reporting activities of the body of which a public official is a member.

(C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

The Indictment alleges first, copying the language of § 8-13-1346(A), that Mrs. Kovach did "use and authorize the use of public funds, property, or time to influence the outcome of an election" "Election" as used in this statute is defined as:

- (a) a general, special, primary, or runoff election;
- (b) a convention or caucus of a political party held to nominate a candidate; or
- (c) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States or the Constitution of this State.

S.C. Code Ann. § 8-13-1300(9).

The Indictment then goes on to allege that the conduct constituting a violation of § 8-13-1346(A) was, "to wit," improper involvement in a "school bond referendum." There is no indication in § 8-13-1300(9) that a school bond referendum is a type of election. Indeed, a "referendum" is defined elsewhere in the Ethics Act as a type of "ballot measure," not as an "election." See S.C. Code Ann. § 8-13-1300(2) ("Ballot measure" means a referendum, proposition, or measure submitted to voters for their approval."). Indeed, the definition of "election" was amended in 1995 to include a "ballot measure" as a type of "election," but was amended again in 2003 to remove it. Compare 1995 S.C. H.B. 4070, § 36 with 2003 S.C. H.B. 3206, § 21. This legislative history specifically shows that a "ballot measure" is not a type of

"election." Section 8-13-1346(A) does not prohibit a "person" from doing anything in support of a ballot measure. Nor does any other provision of the statute.

In effect, the Indictment charges that Mrs. Kovach was improperly involved in an election when she acted in support of a ballot measure, but an election and a ballot measure are separate and distinct under the Ethics Act, and her alleged conduct as to the latter is not prohibited of any person.¹ Quite simply, the Indictment charges conduct that is not criminal. It therefore is defective and this case must be dismissed. See Hooks v. State, 353 S.C. 48, 51, 577 S.E.2d 211, 213 (2003) (holding that the omission of an element necessary to make conduct criminal renders an indictment defective; "We judge the sufficiency of an indictment against whether it contains the necessary elements of the offense to be charged and whether it sufficiently appraises the defendant of what he must be prepared to meet."); State v. Marshall, 273 S.C. 552, 554, 257 S.E.2d 740, 742 (1979) (stating that the absence of a material allegation in an indictment renders the indictment "fatally defective"); see also State v. Patterson, 261 S.C. 362, 366, 200 S.E.2d 68, 70 (1973) (holding that an indictment was defective where the statute failed to give a person of ordinary intelligence fair notice that his conduct is prohibited). Only a "governmental entity" is prohibited from conduct intended to influence a ballot measure. See S.C. Code Ann. § 8-13-1346(C). Mrs. Kovach is not a governmental entity.

Nor can the "Penalties" provisions of the Ethics Act amend S.C. Code Ann. § 8-13-1346(C) to make it apply to persons and not just governmental entities. These provisions state that a "person" who violates the Ethics Code is guilty of a misdemeanor. However, a "person"

¹ That the Indictment charges Mrs. Kovach—indisputably a "person"—with conduct only prohibited of a governmental entity was a point made in her initial Motion.

cannot violate § 8-13-1346(C) because that statute specifically and only prohibits a "governmental entity" from using public funds to influence the outcome of a ballot measure, and does not reference a "person".

In sum, only a forced construction of the Ethics Code that cobbles together bits and pieces from distinct provisions can permit this case to proceed. The Court must dismiss this case, or it must conclude either that: (1) Mrs. Kovach is a governmental entity; (2) a bond referendum is a type of election even though the statutory definition clearly states it is not; or, (3) the Penalties provisions amend the substantive statute, expanding § 8-13-1346(C) to make it apply not just to governmental entities, but also to persons. The Court may not entertain such forced constructions of any statute, much less a criminal one. As the Supreme Court of South Carolina has stated time and time again:

When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.

State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (internal citations omitted) (citing Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988); State v. Cutler, 274 S.C. 376, 264 S.E.2d 420 (1980); First South Savings Bank, Inc. v. Gold Coast Assoc., 301 S.C. 158, 390 S.E.2d 486 (Ct.App.1990)).

To the extent there is any ambiguity (Mrs. Kovach contends there is not), the rule of lenity requires that such ambiguity be interpreted in her favor. In Berry v. State, the Supreme Court of South Carolina addressed a challenge to a statute enhancing a criminal sentence. The enhancement applied to a defendant with a prior conviction "relating to" specified drugs. The

defendant in Berry had a prior conviction for possession of drug paraphernalia. The Court held that the enhancement was inapplicable, because "[t]o construe a paraphernalia conviction as 'relating to' drugs would be contrary to unambiguously expressed legislative intent and additionally violate the rule of lenity long established in our jurisprudence." Berry v. State, 381 S.C. 630, 634, 675 S.E.2d 425, 426 (2009); see also, e.g., Liparota v. United States, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.").

Berry is applicable here: interpreting the Ethics Code to make Mrs. Kovach's conduct criminal violates the legislature's clear intent in enacting the Code, and to the extent there is any ambiguity, for example by reading the penalty provision as amending the substantive statute, it would violate the rule of lenity to interpret the ambiguity against Mrs. Kovach.

2. Mrs. Kovach's conduct was either the permitted reporting of information related to a ballot measure, or S.C. Code Ann. § 8-13-1346 is unconstitutionally vague.

In her initial Motion to Dismiss, Mrs. Kovach argued that the conduct the State alleges was criminal—using public funds to pay for a video and other materials concerning the bond referendum, drafting speeches about the referendum, and performing "various other acts" in support of the bond referendum—is not criminal under the statute. The statute at subsection (B) permits "the incidental use of time and materials" for preparation of a "newsletter" reporting activities of a governmental body, and "newsletter" is undefined. The statute also, at subsection (C), permits the expenditure of public resources "to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity." Apparently, the State contends that Mrs. Kovach's conduct

crossed the line from the permitted acts of communication, to prohibited acts of communication. To the extent her actions may be considered criminal under these provisions of the statute (Mrs. Kovach contends first that they cannot), the line drawn by the statute is too vague to be enforceable—these “informational exceptions” to what would otherwise be criminal conduct are unconstitutionally vague in violation of the Due Process Clause of the 14th Amendment to the United States Constitution.

A criminal statute is unconstitutionally vague on its face if it (1) fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) is so standardless that it authorizes or encourages arbitrary or discriminatory enforcement. City of Chi. v. Morales, 527 U.S. 41, 56 (1999). A criminal statute is unconstitutionally vague as applied if it does not give the defendant sufficient notice that her actions were prohibited. See Chapman v. United States, 500 U.S. 453, 467-68 (1991). Although a defendant whose conduct was clearly proscribed by a statute generally cannot complain the statute is vague as applied to others, a facial challenge is more readily available to such a defendant when, as is the case here, the statute infringes expressive conduct. See Hoffman Estates v. Flinside, Hoffman Estates, 455 U.S. 489, 499 (1982). Section 8-13-1346 is unconstitutionally vague as applied to Mrs. Kovach’s conduct, and also on its face.

As explained in her initial Motion, Mrs. Kovach did nothing more than report information to the BCSD board and the public, which is expressly permitted by the statute. She cannot fairly be charged with notice that these acts were criminal, and certainly not with constitutionally sufficient notice. The statute therefore is unconstitutionally vague as applied to her actions.

It is unconstitutionally vague on its face because it allows reporting, and even the expenditure of public resources in support of the reporting, but fails to draw any intelligible line between what types of reporting are permitted and what types are prohibited. As explained above and in her initial Motion, subsection (A), despite being quoted by the State in the Indictment, is not pertinent because there is no "election" at issue. Subsection (B) permits the preparation of a "newsletter reporting" activities of a public body, but does not define "newsletter." The term itself is antiquated and therefore confusing, harkening to the days when a secretary would distribute mimeographed copies of memoranda. Subsection (C) is even less clear about what is excepted from criminal conduct (by a "governmental entity" no less), stating that it is permissible to expend public resources to prepare "informational materials" and do other acts concerning a ballot measure that affects that governmental entity. "Informational materials," like "newsletters," are not defined. Quite simply, the statute fails to provide a person of ordinary intelligence fair notice of what is prohibited and what is permitted, and therefore it is unconstitutionally vague on its face. See Morales, 527 U.S. at 56.

It also is so standardless that it authorizes or encourages arbitrary or discriminatory enforcement, id., and this can be seen from the way it has been enforced in this case compared to elsewhere. First, there is precedent in which activities similar to Mrs. Kovach's were not criminally prosecuted and instead were referred to the State Ethics Commission. In 2008, a Consent Order was executed and filed by the State Ethics Commission and the Florence County School District (hereinafter the "FCSD") regarding 2007 conduct by the FCSD to distribute flyers in support of the "VOTE YES November 6th" ballot measure, a bond referendum to fund school improvements. See Exhibit 1 (Consent Order). FCSD Superintendent Larry Jackson

personally approved a request to distribute the pro-Vote flyers among the district's schools. The Association of Parents and Teachers distributed the flyers to students in eighteen (18) FCSD elementary and middle schools. The flyers clearly stated "VOTE YES November 6th". The FCSD also sent emails and "telephone blasts" from the district offices to its staff. See Exhibit 2 (Post and Courier Article Excerpts).

There were no criminal prosecutions in the Florence County matter. Rather, the State Ethics Commission issued a public reprimand against the FCSD governmental agency. It was agreed that FCSD was a "governmental entity" as defined by S.C. Code § 8-13-100(17). The Consent Order noted that S.C. Code § 8-13-1346(C) provided as follows:

(C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

Thus, the State Ethics Commission deemed it appropriate to only find that a "governmental entity," to wit, the FCSD, had violated Section 8-13-1346(C), and not any individuals. The State Ethics Commission's sanction was exceedingly mild: It simply ordered that FCSD "be more diligent in complying with the Campaign Practices of the Ethics Reform Act" and further ordered that the FCSD pay the Commission an administrative fee of \$50.00. Clearly, the State Ethics Commission felt this result was appropriate for the FCSD and its officials and employees for activities similar to the conduct of Mrs. Kovach and that of the BCSD school officials and other employees. The FCSD Consent Order clearly demonstrates that

any criminal prosecution of BCSD officials and employees and, in particular, Mrs. Kovach would be excessive and unwarranted. It is arbitrary enforcement of a standardless statute.

Second, the Dorchester County School District Two (the "DCSD2") also held a bond referendum in 2012. DCSD officials engaged in activities similar to the conduct of Mrs. Kovach and other BCSD officials and employees, and BCSD employees helped DCSD2 employees draft pro-referendum materials. In fact, there was at least one joint pro-referendum presentation by both BCSD and DCSD2 school participants. See Exhibit 3. Appropriately, there has been no investigation or prosecution of the DCSD2's activities by SLED or the Attorney General's office. Like in the DCSD2 matter, no criminal charges should be pursued against Mrs. Kovach in this BCSD matter.

In at least one strikingly similar case in Alabama, there was no criminal prosecution. In Alabama Libertarian Party v. City of Birmingham, Alabama, 694 F.Supp. 314 (N.D. Ala. 1988), the plaintiffs were seeking redress due to the city's alleged unconstitutional use of tax funds for advertising to influence elections regarding, among other things, a bond issue. The Alabama statute in question, Alabama Code Section 17-1-7, provided in part as follows:

(c) No person in the employment of the state of Alabama, whether classified or unclassified, shall use any state funds, property or time, for any political activities. Any person who is in the employment of the state of Alabama must be on approved leave to engage in such political action or such person must be on personal time before or after work and on holidays. It shall be unlawful for any officer or employee to solicit any type of political campaign contributions from other employees who work for said officer or employee to coerce or attempt to coerce any subordinate employee to work in any capacity in any political campaign or cause. Any person who violates the provisions of this section shall be guilty of the crime or trading in public office and upon conviction thereof, shall be fined or sentenced or both, as provided by section 13A-10-63.

The court in the case noted as follows:

Defendants contend that § 17-1-7 is a penal statute and that it therefore fails to provide a remedy to plaintiffs. Plaintiffs allege that they approached both the District Attorney and the State Attorney General concerning enforcement of this statute. Both declined. Plaintiffs also complained to the State of Alabama Ethics Commission about the alleged violations and it too declined to prosecute.

Id. at 822 (emphasis added).

As noted above, the Attorney General's office and SLED have not conducted criminal investigations and prosecutions involving similar conduct by actors similarly situated to Mrs. Kovach. This is so in spite of the fact that the Attorney General's office was provided with and asked to consider a CD containing hundreds of emails that other BCSD staff and employees disseminated using District resources. The Attorney General's office refused.

3. Mrs. Kovach lacked the mens rea necessary to violate Section § 8-13-1346.

Although the legislature may declare an act criminal regardless of the actor's mental state, "[c]riminal liability is normally based upon the concurrence of two factors, an evil meaning mind [and] an evil doing hand." State v. Jefferies, 316 S.C. 13, 17, 446 S.E.2d 427, 430 (1994).

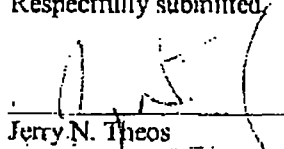
Here, the statute states no specific criminal intent, and therefore the State must prove an "evil meaning mind" and "an evil doing hand." There is no evidence of this here. There is no evidence that Mrs. Kovach received any personal gain or benefit as a result of her conduct or activities. Indeed, the BCSD passed a resolution on March 12, 2013, stating that Mrs. Kovach acted in good faith. See Exhibit 4. Furthermore, the BCSD engaged retired state circuit court Judge A. Victor Rawl, Sr. to conduct an independent investigation and render an impartial and objective opinion regarding whether Mrs. Kovach at all times pertinent to this matter (1) acted in good faith, and (2) acted within the scope of her employment. Judge Rawl concluded as follows: "I clearly conclude as a matter of fact that Ms. Kovach's activities were clearly within the course

and scope of her employment and clearly performed in good faith with her only concern being the benefit of and in the best interest of the Berkeley County School District". See Exhibit 5. The evidence is overwhelming that all acts by Mrs. Kovach regarding the Bond Referendum were performed in good faith and solely for the purpose of benefitting the students of the Berkeley County School District and for no other reason. There was thus no *mens rea* that would support the prosecution of Mrs. Kovach.

CONCLUSION

For the reasons stated above and in her initial Motion to Dismiss, Mrs. Kovach respectfully moves and urges this Court to dismiss this case.

Respectfully submitted,



Jerry N. Theos
URICCHIO, HOWE, KRELL, JACOBSON,
TOROREK, THEOS & KEITH, P.A.
17 1/2 Broad Street
Charleston, South Carolina 29401

Charleston, South Carolina
August 19, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
IN THE MATTER OF:)
COMPLAINT C2008-063)
)
Florence School District One,)
Respondent,)
)
)
State Ethics Commission,)
Complainant;)
_____)

BEFORE THE STATE ETHICS COMMISSION

CONSENT ORDER

2008 AUG -5 PM 2:42
FILED

This matter comes before the State Ethics Commission by virtue of a complaint filed by the State Ethics Commission on November 14, 2007. The complaint against the Respondent, Florence School District One, was considered by the Commission on January 16, 2008 and probable cause found to warrant an evidentiary hearing.

Prior to the call of the case Respondent Florence School District One agreed to entry of the following statement of facts, conclusions of law, admission, and disposition in this matter as follows.

STATEMENT OF FACTS

1. The Respondent, Florence School District One (hereinafter the District), is a governmental entity located in Florence County.

2. Florence School District One Superintendent Larry Jackson advised that prior to the November 2007 election, representatives from Florence Citizens for Education met with him and requested that a flyer in support of a ballot referendum be distributed to students at the 18 elementary and middle schools within the District. Mr. Jackson reviewed this request with D. Lawrence McIntosh, attorney for the District and received Mr. McIntosh's approval of the request. Mr. Jackson then personally approved the request. As a result, boxes of the flyers were

SPM
ps

2008 AUG 13 PM 1:33
FILED

EXHIBIT
1
00829

distributed to 18 schools by the Association of Parents and Teachers.

3. The flyer distributed in the schools clearly stated "VOTE YES November 6th".

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes, as a matter of law:

1. During all times relevant, the Respondent, Florence School District One, was a governmental entity as defined by S.C. Code Ann. § 8-13-100(17)(Supp. 1997).
2. The State Ethics Commission has personal and subject matter jurisdiction.
3. Section 8-13-1346(C) provides as follows:

This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

ADMISSIONS

SPMC
pg. 2 The Respondent, Florence School District One, admits it violated Section 8-13-1346 of the Ethics Reform Act.

DISPOSITION

The State Ethics Commission hereby finds Florence School District One in violation of Section 8-13-1346 of the Ethics Reform Act, and hereby adopts the Statement of Facts, Conclusions of Law, Admissions, and Disposition as agreed upon by Florence School District One.

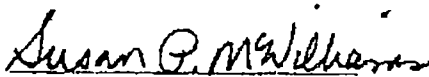
THEREFORE, the State Ethics Commission hereby publicly reprimands Florence School District One for violation of Section 8-13-1346 of the Ethics Reform Act,

AND, orders that Florence School District One be more diligent in complying with the Campaign Practices of the Ethics Reform Act.

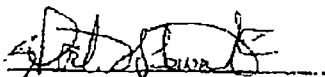
AND, orders Respondent to pay an administrative fee of \$50.00 within 30 days of receipt of the signed order,

AND IT IS SO ORDERED THIS 13th DAY OF August, 2008.

STATE ETHICS COMMISSION



Susan P. McWilliams
Chair


Florence School District One
Respondent

The Post and Courier

3/6/2013 Article Excerpts

"More often than not, this comes up with schools because they have the most bond referendums," said Cathy Hazelwood, general counsel and deputy director of the Ethics Commission. Hazelwood would not speak specifically about the Berkeley County investigation.

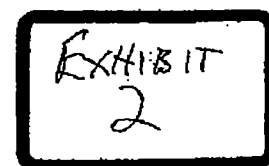
She said it has been four or five years since complaints were filed against a district in Florence County for sending emails or "telephone blasts" from the district office to the staff and distributing pro-referendum correspondence via students.

"I thought that the word had gone out because of the Florence cases," said Hazelwood, who addressed referendum and election ethics at a S.C. School Boards Association meeting last month.

In those cases, the district admitted the violation and was publicly reprimanded, she said.

Last year, three school districts in South Carolina put school improvement referendums to voters: Marlboro County School District sought \$20 million to build a new K-8 school; Dorchester District 2 wanted \$186.4 million for an aquatic center, four new schools and upgrades to 10 others; and Berkeley County School District asked for \$198 million for five new schools and improvements to more than 20 others.

All three referendums passed...



00842

From: KovachA@bcstdschools.net
To: Christopher Swetckie <SwetckieC@bcstdschools.net> Susan Haire <haire@bcstdschools.net>
Date: Tue 18 Sep 2012 11:21:44 AM -0400
Cc:
Subject: RE: School Improvement Referendum Follow Up

Chris, you are the best! Susan will set you up with a letter to the editor draft and suggest how we may leverage the opportunity in Goose Creek.

How about Wed., Sept. 26 at 6 p.m. at Berkeley Electric Co Op in Goose Creek (across the street from Westview Elem)

Amy

-----Original Message-----

From: Christopher Swetckie
Sent: Tuesday, September 18, 2012 9:19 AM
To: Amy Kovach; Susan Haire
Subject: RE: School Improvement Referendum Follow Up

Please send me a template or draft of a letter to the editor and I will be happy to send in a letter to the Goose Creek Gazette wearing both my educator and BCSD parent hat. I would also be happy to speak on behalf of BCSD at one of the meetings to pinch hit for Rodney. I would prefer to do it in the Goose Creek area since it would be close to work and home.

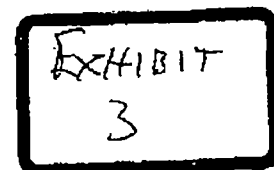
See you soon!

Chris

From: Amy Kovach
Sent: Monday, September 17, 2012 11:52 PM
To: Archie Franchini; Melissa LaBerge; Karen Whitley; Marcy Gasperson; Katie Taie; Michael Petry; Kevin Ogorman; Christopher Swetckie; Chris Buchholz; Kelli Farless; Lee Westberry; Susan Haire; Amy Kovach; ejkeeter@bellsouth.net; tom sparkman; angela adams; alicia jowers; james gaskins
Cc: lapulling@homesec.com
Subject: School Improvement Referendum Follow Up

Thank you for taking time this evening to attend a School Improvement Referendum meeting. Your commitment to the children of Berkeley County is an amazing gift and will yield great return in the weeks, months and years to come.

Key Messages for District Staff, aka Elevator Speech: More families are choosing Berkeley County Schools which leads to overcrowding. Overcrowded



00843

schools means it is harder to keep kids safe at arrival and dismissal, it is harder to provide small class sizes, it is harder to provide high tech learning opportunities to prepare children for career and college. And, it is really hard to provide teachers with facilities that they deserve to work in as we expect more of them in the classroom.

Things you can do to help us organize our employees around the referendum are:

1) Make sure all of your colleagues, friends and family are registered to vote by Oct. 6. Here is the link to the voter registration form:

http://www.berkeleycountysc.gov/forms/elections/VR_Blank_Form.pdf

2) Share and share some more! Tell your colleagues, friends and family to join us for one of the grass roots meetings planned between now and Nov 5. Meeting schedule is posted on the website at

www.berkeley.k12.sc.us/community<<http://www.berkeley.k12.sc.us/community>>

3) Write a letter to the editor or collaborate with colleagues to cowrite a letter. Want to, but aren't sure where to begin? No problem, call Susan Haire and we will help you out with the writing and the placement.

4) Sport a yard sign! Beginning about Oct. 8, yard signs will be available from all school offices. We will deliver a supply to you that you can let any staff or parent take with them. Here is the trick to keep this logistics and not advocacy.....you may not ask anyone to take a sign or suggest that they take a sign. You may have them in your front office and easy to pick up and take at their own will. And, you may NOT have signs on school property yards as tempting as it is. You can take them home and pass them out to neighbors, friends and family.

5) Spot Dr. Thompson a night off! :) Would you be willing to lead one community meeting to share the referendum message? Would you be willing to speak at a community event on behalf of the district? It is really easy and we will give you a script.

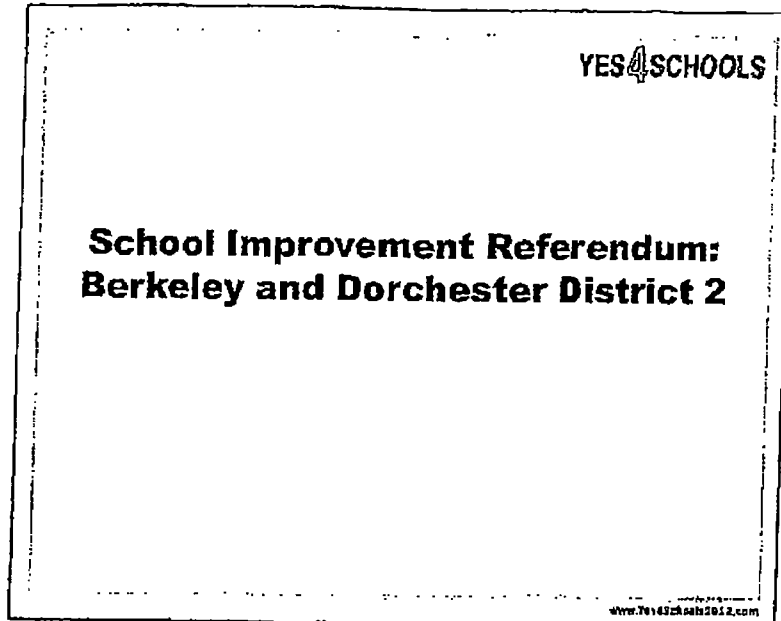
6) Join us at a Football Game beginning this Friday. We need someone to work at the gate and hand out information and stickers. We need people just to sit in the stands and talk it up. We need people to put flyers on cars parked in the parking lot. Easy, minimal effort. Let me know what game you can attend and we will arm you with supplies.

7) VOTE! As we near November 6, please remind everyone at your school to exercise their democratic right to vote.

Again, many thanks for your commitment and enthusiasm for this effort.

Amy Kovach

843.899.8553 Office
843.737.3396 Mobile



Presentation for Berkeley County School Improvement Referendum

Thank you for letting me speak with you today. Introduce yourself and Joe Pye. Talk about why you are doing this together. Talk about how critically important this is to our region for all children. And, why this collaboration is unique and completely different than any other approach taken in South Carolina. Never before have two districts joined together to rally around common goals.

YES4SCHOOLS

The Lowcountry: A Great Place to Live



World's Best City
Charleston ranked #3 in the world
CNN/Go October 2011



Best Cities for Job Growth
Charleston region ranked 8th, up 17 spots from last year.
New Geography May 2011



Brain Gain: Metro
Charleston Metro listed as #1 brain gainer for highest growth in adults with college degrees
Wall Street Journal September 2011



Cooler Small Cities in America
Charleston's lifestyle and culinary attributes highlighted
GQ November 2010



Best Towns of 2011
Charleston ranked 5th
Outside Magazine September 2011



2010 Best Performing Cities
Charleston ranked among nation's top 20 "large cities"
Miles Institute October 2010



Best Places for Business & Careers
Charleston MSA ranked in top 50
Forbes July 2011



2010 Small Business Vitality Scores
Charleston ranked 4th in the nation
Portfolio January 2010

2

www.Yes4Schools2012.com

Like you, I am proud to live in the Lowcountry. I am proud of our schools – our wonderful teachers, principals, and – most importantly – students.

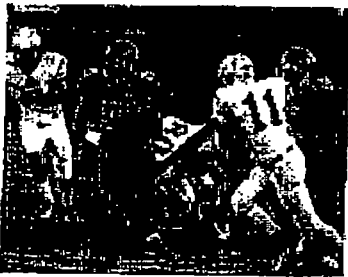
But, we are changing fast. The economy is challenging. Jobs are harder to get. More than ever, good jobs require high tech skills. We all want our kids to be ready for today's world.

And our schools are doing their best to get them ready. But they are severely handicapped by the state of our school buildings.

District Priorities

1. Student and Staff Safety
2. High Academic Achievement
3. Community Engagement & Communications
4. Financial Responsibility
5. Highly Qualified Staff

YES4SCHOOLS



www.Yes4Schools2012.com

We are committed key priorities that drive everything we do and all decisions:

Student and staff safety is our number one priority. Kids can't learn and teachers can't teach if they are not safe.

Expecting more out of our students' academic abilities is a must. Students own their work; teachers are being developed to not just pour on content, but to develop critical thinkers who can make decisions, rationalize, communicate and work in teams.

We are engaging our community with accountability, collaboration and trust. We want to produce a product our businesses want and need; and, we need business support to identify changes in work culture and technology.

We are leveraging every dollar we have.

We want to retain our current teacher leaders and we are working to identify our next generation of teacher and principal leaders. We are thinking differently about some roles and increasing our skill and talent pool.

Finally, we are taking communications to a whole new platform. More web, more video, more interviews with media....we want the world to know that our kids are bright, our teachers are capable, and we can compete with any region in the US and abroad.

YES4SCHOOLS

Our Results

- Both districts earned an "A"
- Graduation rates are up
- Reading Scores have improved
- Budget stewardship and accountability
- Highly qualified staff



www.Yes4Schools.org

Our results are terrific and Mr. Pye and I are so proud of the work we are doing:

- Both districts earned an A – 2 of 26 statewide.
- Graduation rates continue to climb. More children are finding more reasons to stay in school. And, children who graduate are less likely to become dependent on social services or end up in the criminal justice system.
- We are saving money and finding ways to gain rebate opportunities; we are cutting our utility bills with new heating and cooling systems that can endure our hot, humid climate; and, we both districts have consistently received outstanding bond ratings for fiscal management and that keeps our interest rates low.
- And, we are retaining the most qualified teachers, developing our leaders, implementing new models for processes and procedures.

Our Growth

- Local, regional and national school recognition
- A "best place to live and raise kids" designation
- New jobs + New families + 2007 Baby Boomlet = We're Overcrowded!
- 1,600 more children in 2012 than in 2011

YES4SCHOOLS



www.Yes4Schools2012.com

Summerville and Moncks Corner are not the tiny little towns they used to be. They are the "go to" place to live and raise kids.

Our chambers of commerce are working hard to bring more jobs to our county; that means more families. And, in 2007, more babies were born than in any year of the official babyboom from 1948 to 1958. That boomlet of children is now starting Kindergarten.

Between the two school districts, we've got more than 1600 new children this year a year ago. Can you imagine what would happen if 1600+ new people showed up at one time on your doorstep? You'd be thrilled; and then you'd scramble to try to serve them, seat them, give them books and handouts. Now, imagine serving them without any additional revenue. No additional busses. No additional food allowance. And, serve them at the same or better ability as before they arrived in the existing buildings and space. It's an impossible task.

YES  SCHOOLS

Overcrowded classrooms
Students crammed into trailers

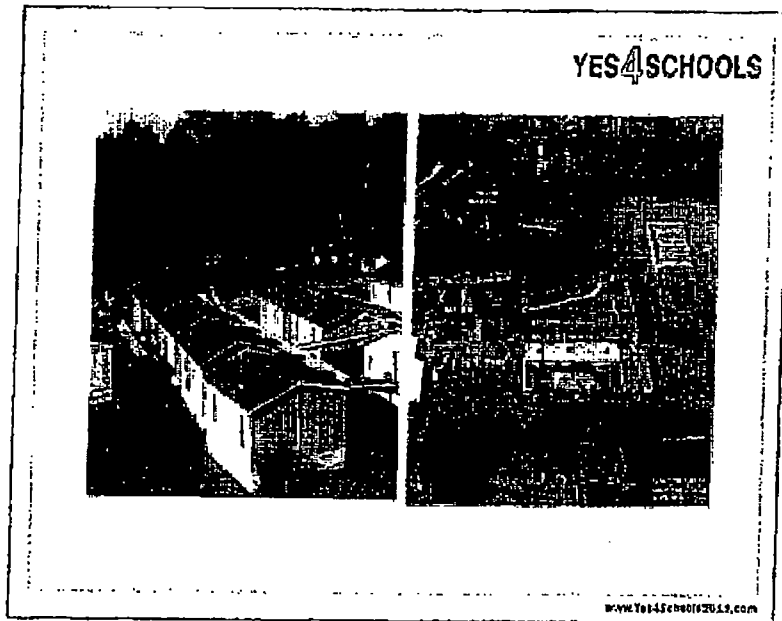
SAFETY ISSUES

Lack of high-tech learning
No neighborhood schools (in certain areas)
The need for better teaching facilities



Overcrowded and out of date classrooms mean:

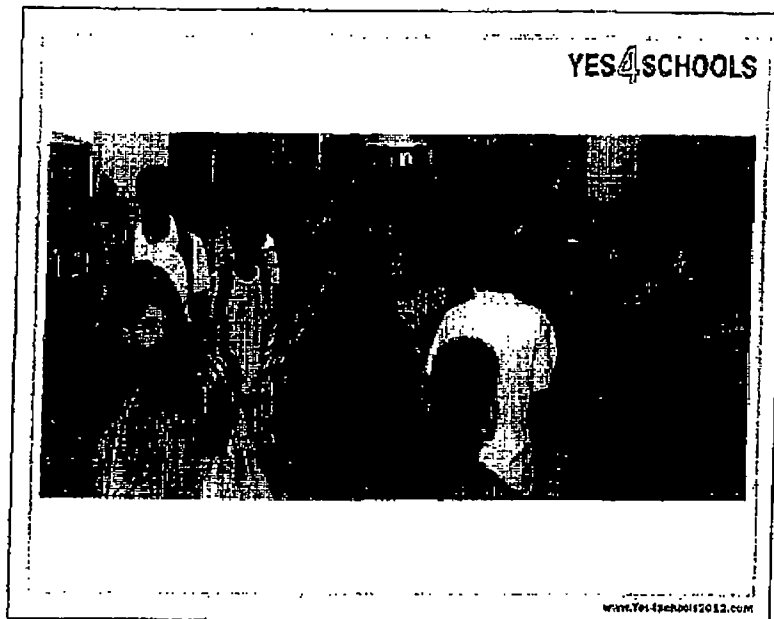
- Students crammed into trailers
- Kids eating lunch on the floor
- Safety Issues
- Lack of high-tech learning
- No neighborhood schools (in certain areas)
- The need for better teaching facilities



Many of our students are crowding into trailers like this. In Dorchester District Two, 177 trailers are in use; in Berkeley County, over 60 are in use. They're trying to learn...and teachers are trying to teach. But, when you're stuffed into a trailer, it's hard.

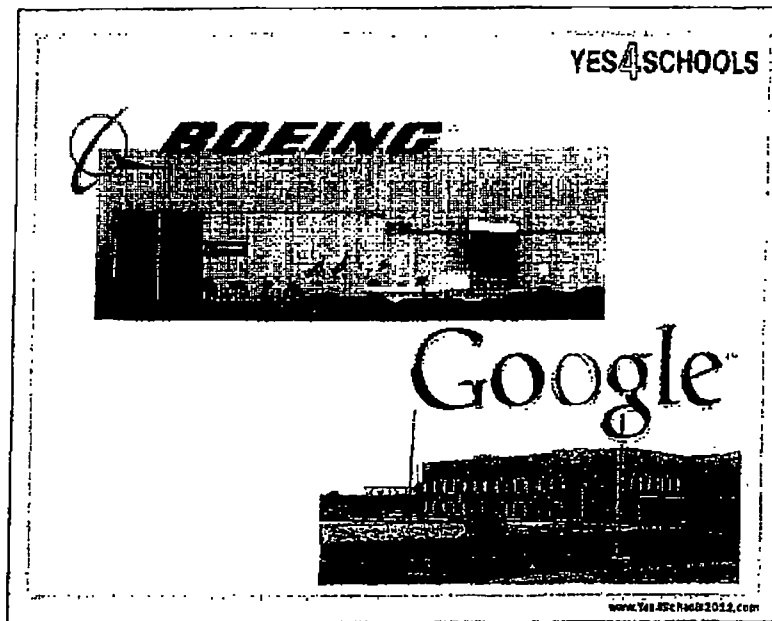
Trailers are not safe. Being outside of the building and separate, means it is harder to provide security for children on campus and it is harder to keep them protected from wet weather.

And, these units cost our tax payers more money. They are harder to heat and cool and are easily broken into.



A typical high school class change. Overcrowded conditions make it hard to monitor and move children efficiently.

And, many of our buildings were not designed or built with high tech learning in mind – learning that is needed for today's jobs at Boeing or Google.

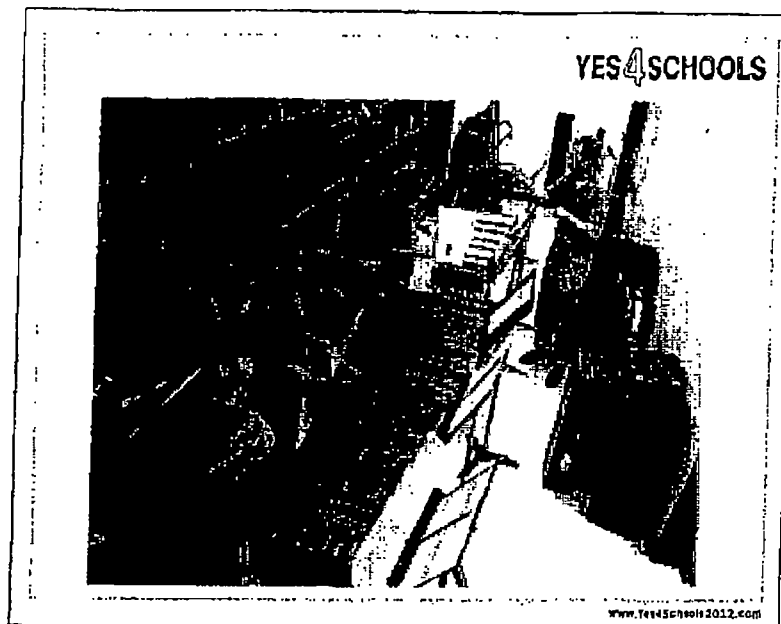


Here's a picture of Boeing and Google....two of the great new companies in our area. We'd all like our kids to be learning the skills to qualify for jobs at places like this.

To work at Google or Boeing, you need high tech skills..That's not happening at the rate it could be at our schools.

It's not happening because many of our buildings are too old to support the technology needed for this 21st century learning.

So our kids are being held back.



Finally, there are teachers. The key to great learning is a great teacher. We have so many great, hard-working teachers in Berkeley County School District. Good teachers make do, in spite of teaching in what is literally a closet. Imagine what they can do in buildings that are modern, up to date, and support high tech learning.

YES4SCHOOLS

Berkeley County

- Five new schools
- Renovations and additions to 4 high schools and 25 other schools including technology and capital improvements.

Dorchester District Two

- Four new schools
- Renovations and additions at the high schools, repairs and renovations to existing facilities including technology and other capital improvements

www.YES4SCHOOLS.com

Each superintendent talks about their district

YES 4 SCHOOLS

Smaller Class Sizes

Reduced use of trailers

SAFER SCHOOLS

More high-tech learning

Stronger Workforce

Better Teaching Facilities

www.Yes4Schools.org

{Series of type slides}

Smaller class sizes

No trailers

Safer schools

More high tech learning

Stronger Neighborhoods

Better teaching facilities

What Can You Do?

- Advocate for children in our region
- Become educated & aware of school district needs
- Know how this impacts your community and you personally
- Spread the word
- Register to vote by October 6
- Vote on November 6

www.Yes4Schools2012.com

We get it all, if we get the School Improvement Referendum.

And that's why we need your help. Our children need your organization's endorsement.

Here are five things you can do:

Register to vote – the deadline is OCTOBER 6!

Spread the word. Encourage friends, family, co-workers, etc. to support the School Improvement Referendum. Let them know about it through Facebook and Twitter.

Volunteer! There are lots of volunteer opportunities. Just contact us through the website, and we'll help you find just the right opportunity for you.

VOTE! At the end of the day, voting is the key to winning! If you vote, and you get your friends and family to vote, we'll win....and – most importantly – our kids will win.

This is a once-in-a-lifetime opportunity to help our kids and our community succeed. With your help, we can do it!

BERKELEY COUNTY BOARD OF EDUCATION

}

Call to Order, Declaration of Quorum, Media Notice

Approval of Agenda

Opening Prayer and Pledge of Allegiance

Approval of Minutes

Special Recognition

Principal Robin Rogers of Hanahan Middle School and Principal Jim Spencer of Marrington Middle School of the Arts, joined by staff and parents, were celebrated and recognized by the Board and Superintendent Dr. Rodney Thompson for this outstanding achievement.

There were none.

EXHIBIT
4

00859

Administration and Facilities

Letter of Intent: Charleston Water System Property

Archie Franchini, Deputy Superintendent, requested approval of a Letter of Intent with Charleston Water System for the purpose of purchasing approximately 28 acres adjacent to Tanner Plantation, and the Goose Creek Reservoir, Berkeley County TMS# 265-02-00-015, and for the school district to pay \$25,000.00 in earnest money to be held in an escrow account with Nexsen Pruet, LLC. On motion by Kent Murray, seconded by Kathy Schwalbe, the board gave unanimous approval to the Letter of Intent with Charleston Water System.

Financial Services

Resolution to Refund the 2003 SAFE Bonds

Brantley Thomas, Chief Financial Officer, presented a Resolution for approval that would authorize the execution and delivery of documents relating to and approving the issuance and sale of not exceeding \$205,000,000 installment purchase refunding Revenue Bonds Series 2013 by Securing Assets for Education. On a motion by Phillip Oble, seconded by Scott Marino, the board gave unanimous approval to the Resolution.

Proposal for Continuing Audit Services

Mr. Thomas presented a proposal from the accounting firm of Greene, Finney & Horton, to provide audit services to the district. He requested approval of a five-year contract. On motion by Sheldon Etheridge, seconded by Shannon Lee, the proposal was approved as presented. Phillip Oble and Scott Marino voted no.

Procurements Reports for the Period July 1, 2012 – December 31, 2012

Mr. Thomas presented for information Procurements Reports for the period July 1, 2012 – December 31, 2012 that included Sole Source Procurement, Minority Business Procurements, Emergency Procurement and Purchases over \$100,000.

Instruction and Accountability

Elementary and Middle Mathematics Textbook Adoption for 2012-13

Dr. Kevin O'Gorman, Chief Academic Officer, presented a request for 1st reading approval of elementary and middle Mathematics Textbooks for adoption for 2012-13. Textbooks are available for viewing in the boardroom and on line. On motion by Kathy Schwalbe, seconded by Shannon Lee, the board unanimously approved first reading of textbooks as presented.

Portable Advanced Science Exploration (PASE)

Dr. O'Gorman provided a power point presentation to review Portable Advanced Science Exploration (PASE). PASE promotes advanced science exploration through the use of technology. It targets middle

school science teachers in South Carolina and their students. Eighth grade science teachers will attend a week-long summer professional development seminar offering in-depth training for integrating learning technologies and science equipment into the curriculum with engaging, challenging and hands-on activities. Seventh grade teachers will receive training in year 2 and sixth grade teachers in year 3.

Superintendent's Report

Superintendent Dr. Rodney Thompson expressed congratulations to Hanahan Middle School and Marrington Middle School of the Arts for winning Palmetto's Finest in their respective categories. This achievement shows great leadership, exceptional school management and a desire by teachers, staff and parents to support students in an innovative learning environment.

Human Resources will host the annual Teacher Recruitment Fair on March 23, 2013, 9 – 11:30 a.m., at Cane Bay High School. We look forward to meeting potential new teachers who may be interested in working in Berkeley County.

Our "Report to the Community" will go on the road next week as we will present to the Berkeley County Chamber members. The presentation that you saw at our last board meeting was more of a year in review. During our presentation with the Chamber, we will focus on engaging local business and industry into our goal of achieving high academic growth for all students.

Executive Session

On motion by Kathy Schwalbe, seconded by Phillip Obie, the Board voted unanimously to enter Executive Session to discuss Personnel Considerations, Contractual Matters and Legal Briefing regarding SC Code 59-17-110.

Return to Regular Session

On motion by Phillip Obie, seconded by Kathy Schwalbe, the Board voted to return to regular session. No action was taken in Executive Session.

Action as Required from Executive Session

Action

The following motion was made by Kent Murray, seconded by Shannon Lee and was unanimously approved:

After reviewing the requests of District employees during executive session that the District provide for independent legal counsel to appear and represent them as provided for in S.C. Code Ann. § 59-17-110 and Board policy GAEA (Staff Protection), and based on the advice of the Board's legal counsel, I move that we approve the requests to provide reasonable and customary legal fees and expenses under the circumstances, and subject to the approval of the Board Chair in consultation with the Board's legal counsel. I further move that the Board issue the following statement in connection with this matter.

"Last November, the citizens of Berkeley County overwhelmingly approved the school improvement bond referendum. Thereafter, as made public last week, opponents of the referendum sought an investigation into the efforts of the Berkeley County School District in connection with the school improvement referendum and the District is cooperating with the investigation. Nevertheless, we understand that being involved in such an investigation, especially one instigated at the request of out-spoken and persistent political opponents of the District's proposed referendum, is unsettling to the employees involved. Because the District understands that it has been asked not to discuss the investigation, we will continue to honor that request so as not to interfere with the investigation.

Section 59-17-110 of the South Carolina Code of Laws requires that if any employee of the District is prosecuted in any action, civil or criminal, "by reason of any act done or committed in good faith in the scope of his employment," it is the duty of the District, when requested, to appear and defend the action. Even though no civil or criminal action has been initiated against any of our employees at this time, based on the advice of the Board's attorneys, we believe as a Board it is our legal obligation to provide those employees involved in this investigation with legal representation at this juncture as they have requested. The Board has reason to believe that its employees' acts or omissions in connection with the school improvement referendum were in good faith and in the scope of their employment. Under these circumstances, it is the District's statutory obligation to provide legal representation for its employees. The District will continue to cooperate with the investigation, will make future public statements concerning this matter as is appropriate to do so, and appreciates the public's patience and understanding of the need for confidentiality while the investigation takes its course."

Adjournment

On a motion by Kathy Schwalbe and seconded by Wilhelmina Moore the board without objection voted to adjourn.

Doug Cooper, Chair

Shannon Lee, Secretary

A. Victor Rawl, Sr.
2835 Preakness Stakes, Charleston, SC 29414

(843) 766-7334
avrawl@aol.com

May 2, 2014

Dr. Kent Murray, Chairman
Berkeley County School District Board of Education
P.O. Box 608
Moncks Corner, SC 29461

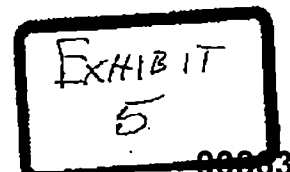
Dear Dr. Murray:

I am writing you to comply with your request dated February 26, 2014. Please understand, my methodology is terse; therefore, I am attaching documents that I may refer to in this memorandum. You asked me the following:

- (1) Whether, based on the information available to the board at this time, the conduct of Ms. Kovach as outlined in the indictment constitutes an "act done or omitted in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110; and
- (2) If you conclude that Ms. Kovach was acting "in good faith in the course of [her] employment" as provided for in S.C. Code Ann. § 59-17-110, in regard to the issues referenced in the indictment, whether the board is precluded from appearing and defending Ms. Kovach under the statute simply by virtue of the fact that she has now been indicted?

In answering question one, which I feel comfortable in so doing, I have reviewed some forty pounds of e-mails and documents submitted to me by Childs & Halligan, your attorneys. I have conducted lengthy conversations with Jerry Theos, attorney for Amy Kovach, and reviewed some of his materials. I have spoken with Jane Pulling. I have also tried to talk with Laura Varn, and was only able to speak to her attorney, Ben Hagood. I have intentionally not spoken to anyone else, as it would have entailed a very lengthy and continuous process. I note for the edification of yourself and the board that SLED and the Attorney General's office have purportedly reduced their investigation to a report that is unavailable to the school district or Ms. Kovach's defense attorney, Mr. Theos, at this time.

The standard for review to determine "acting within the course and scope of employment" is most clearly defined in the body of law surrounding the area of workers' compensation. The course and scope of employment is obviously controlled by the employment agreement the



Board of Education entered into with Ms. Kovach. It is very clear to me in reviewing the material that her job description, a copy of which is attached, covers a very broad area of public information, coordination, outreach, education, and, of course, community involvement. You will see from the timeline attached that Ms. Kovach was very active in complying with her job description. It is clear to me that she has an outgoing, effervescent personality that compelled her to over-perform her responsibilities as outlined in her job description. It is also clear that she was extremely communicative, especially by e-mail, to everyone. The material clearly supports my decision that all of her actions were within the course and scope of her employment.

The next question, of course, is "good faith." In determining whether someone is acting in good faith, the standard is whether she was acting for her own benefit or for the benefit of her employer or someone else. In reviewing and discussing that standard, it is necessary to determine what, if any, personal benefit she derived from the activities outlined in the documentation. I can find absolutely no personal or financial benefit to her in the documentation. Questions have been raised concerning a video and payment for some banners and signs. These questions focus narrowly on a small number of selected documents without regard to the records or issues as a whole. The alleged video is clearly for the benefit of the school district, and not for her personal benefit. The alleged signs and banners may raise an issue of personnel matters or expenditure authority, but certainly in no way, shape, or form, are they an indication of personal benefit to her. Remember, it is her job to coordinate everything. She did her job.

The second question you asked me to provide a response to deals with a legal interpretation of South Carolina Code § 59-17-110. I did not feel comfortable for a myriad of reasons in responding to that question, and have taken the liberty of requesting that John Freeman, Esq., an expert in the field of statutory construction, as well as corporate governance, provide me with an opinion to give to you. I attach that opinion for the benefit of yourself and the board.

As you can see from the above-discussion, I clearly conclude as a matter of fact that Ms. Kovach's activities were clearly within the course and scope of her employment and clearly performed in good faith with her only concern being the benefit of and in the best interest of the Berkeley County School District. I will be more than happy to discuss, in person, my decisions, as well as give you and the board the ability to question me on the basis therefore.

Sincerely,

A. Victor Rawl
South Carolina Circuit Judge, Retired

Attachments (Kovach Job Description, Timeline, Letter from Freeman)

Kwm
FILED

STATE OF SOUTH CAROLINA IN THE COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY 15 JAN 20 PM 4:20 NINTH JUDICIAL CIRCUIT

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.
#a 2014-GS-08-0266
2014-GS-08-01403

State of South Carolina

vs.

Amy Kovach,

Defendant.

AFFIDAVIT OF
EXPERT OPINION OF
DR. GREGORY B. ADAMS

PERSONALLY APPEARED before me Gregory B. Adams who, being duly sworn,
deposes and says that:

- I. It is my expert opinion, held to a reasonable degree of professional certainty, that the persistent, ongoing, unprofessional misconduct by the South Carolina Attorney General, Alan M. Wilson, and his subordinate lawyers in the Office of the Attorney General [collectively, the "Attorney General"] in connection with the prosecution of these criminal charges, violates the constitutional rights of the defendant, Amy Kovach, especially her rights to counsel and to due process, and warrants the disqualification of the Attorney General as prosecutor.
- II. My primary field of expertise, and most of my testimony as an expert witness, involves the ethical and professional duties of lawyers, with a substantial focus on the duties of prosecutors and defense counsel in criminal matters.
 - A. I regularly teach a course in Ethical Issues in Criminal Practice, in which renowned South Carolina and Federal judges, prosecutors, and defense counsel assist me in exploring with my students the duties and issues faced by prosecutors and defense counsel.

- B. I was the organizer and moderator of a national Symposium on Prosecutorial Duties & Ethics in March 2012. Federal and South Carolina judges participated in this symposium, as did experienced and highly-respected prosecutors and criminal defense lawyers from South Carolina and other states, academics, and journalists. Following the Symposium, a number of the prosecutors commented on how balanced and helpful the Symposium had been.
- C. I also regularly teach prosecutorial ethics to the prosecutors in the Fourteenth Circuit Solicitor's Office and the law students in the Fourteenth Circuit Solicitor's Office Externship & Career Prosecutor Program. (Fourteenth Circuit Solicitor Duffie Stone started this program, the first of its kind in South Carolina, as a result of his service as the "voice of South Carolina prosecutors" on the Board of the National District Attorneys Association.)
- D. Additionally, three South Carolina Attorneys General, a South Carolina Secretary of State, and a United States Attorney for the District of South Carolina have relied upon my expertise to guide and assist them in significant criminal investigations and prosecutions, and I have also provided expert services and opinions for the United States Securities and Exchange Commission in an enforcement action it brought with the United States Attorney in Federal Court for the District of South Carolina.
- III. My detailed expert opinions and the facts, law, and reasoning supporting them are set forth below:
- A. These charges are being prosecuted by the Attorney General, not by the duly-elected Solicitor for the Ninth Circuit. In the course of the prosecution, the Attorney General has engaged in an extensive pattern of unethical professional conduct, violating a number of the South Carolina Rules of Professional Conduct (S.C.A.C.R. 407) and Ms. Kovach's constitutional rights.

B. The Attorney General has violated Rule 3.8 of the South Carolina Rules of Professional Conduct in several different ways.

1. The Attorney General has violated his "responsibility of a minister of justice" and has acted "simply [as] an advocate." See Comment 1 to Rule 3.8, adopted by the South Carolina Supreme Court. This is shown by his specific violations of his mandatory obligations under Rule 3.8 and other Rules of Professional Conduct, as set forth below.
2. The Attorney General has violated his duty under Rule 3.8 not to interfere with Ms. Kovach's ability to retain counsel.
 - a) Paragraph (b) of Rule 3.8 requires that a prosecutor "make reasonable efforts" to ensure that the accused knows of their constitutional right to counsel and how to exercise that right and that the accused is "given reasonable opportunity" to do so.
 - b) In marked contrast to this duty to respect and facilitate an accused's exercise of the constitutional right to counsel, the Attorney General has unethically sought to undermine Ms. Kovach's exercise of her right to counsel and her statutory right to counsel fees.
 - (1) In 1984 the South Carolina General Assembly enacted a statute, codified as § 59-17-110 of the South Carolina Code of Laws, which creates a "Duty of school districts to defend actions or proceedings against their employees." The statute specifically creates a duty of a school district to pay the legal costs of defense of "any employee of any school district in South Carolina [who] is prosecuted in any action, civil or criminal, ... by reason of any act done or omitted in good faith in the course of his employment," whenever the employee makes a request for indemnification in writing.

- (2) Ms. Kovach, who is an employee of a school district covered by § 59-17-110, made such a written request to the Berkeley County School Board on March 7, 2013.
- (3) Berkeley County School district Policy GAEA, August 2005, entitled "Staff Protection" creates a similar duty of the School Board and parallel legal right of Ms. Kovach to indemnification of her legal fees and other defense costs.
- (4) On February 11, 2014, the Attorney General caused Ms. Kovach to be indicted for violating § 8-13-1346 of the S.C. Code for using public funds to influence an election.
- (5) In February 2014, the Berkeley County School Board sought advice of legal counsel about its legal duties in regard to the indemnification requests it had received;
 - (a) The Berkeley County School Board is represented by Childs & Halligan, recognized as a preeminent law firm in school law, with extensive experience in representing and advising school districts, and was advised and represented by the firm throughout this time.
 - (b) On February 26, 2014, the Berkeley County School Board retained the Honorable A. Victor Rawl, retired circuit judge, to determine whether Ms. Kovach's alleged conduct forming the basis for her indictment "constitutes an 'act done or omitted in good faith in the course of [her] employment'" thus meeting the test of § 59-17-110 for entitlement to indemnification of her legal fees and defense costs. Judge Rawl reviewed "some forty pounds of e-mails and documents" and conducted interviews he believed appropriate.

- (c) On May 2, 2014, Judge Rawl issued his formal legal opinion letter to the Berkley County School Board, that
 - i) "The material clearly supports my decision that all of her actions were within the course and scope of her employment."
 - ii) That she was acting in good faith because he could "find absolutely no personal or financial benefit to her in the documentation."
 - iii) Judge Rawl summarized "I clearly conclude as a matter of fact that Ms. Kovach's activities were clearly within the course and scope of her employment and clearly performed in good faith with her only concern being the benefit of and in the best interest of the Berkeley County School District."
- (d) Judge Rawl referred BCSD's second question to John P. Freeman, University of South Carolina Distinguished Law Professor Emeritus, because his expertise is particularly well suited to address it. After a thorough analysis, Professor Freeman issued his expert opinion letter on April 22, 2014, concluding that
 - i) it was the legal duty of the Berkeley County School Board to pay for Ms. Kovach's legal defense to the criminal charges against her, and that
 - ii) the fact that she had been indicted did not negate her good faith or her entitlement to payment of her legal fees and costs.
- (e) The legal opinion of Judge Rawl and the expert legal opinion of Professor Freeman were provided to the School Board and were made public at the School Board's meeting on May 13, 2014.

- (f) The Berkeley County School Board, on advice of legal counsel and in reliance upon these opinions, performed its legal duty to pay for Ms. Kovach's legal defense.
 - (g) I completely agree with the expert opinion of Professor Freeman and his reasonable reliance upon the factual determinations of Judge Rawl. So does Professor Nathan M. Crystal, who issued his affidavit of expert opinion on December 15, 2014. Ms. Kovach is legally entitled to payment of her legal defense costs by the Berkeley County School Board, and the Board is legally obligated to authorized those payments.
 - (h) It is my expert opinion, held to a reasonable degree of professional certainty, that the Berkeley County School Board acted prudently and lawfully in determining its legal duty to Ms. Kovach and in performing that duty until it was bullied by the Attorney General into violating its legal obligations to Ms. Kovach. The Attorney General's threats to the Berkeley County School Board, set forth in the paragraph below, violated Rule 3.8 and the Attorney General's duty to act as a minister of justice.
- c) On October 14, 2014, John W. McIntosh, Chief Deputy Attorney General, wrote a letter to Kathryn Long Mahoney, Esq., of Childs & Halligan, P.A., counsel to the Berkeley County School Board, seeking to halt the Board's payment of Ms. Kovach's legal fees and costs as required by state law.
- (1) The letter shows that it was mailed to Ms. Mahoney. That threatening letter, seeking to force the Berkeley County School Board to stop paying Ms. Kovach's counsel fees and costs of defense, was intentionally sent by

Mr. McIntosh via email to the members of the Berkeley County School board, in blatant violation of Rule 4.2 of the South Carolina Rules of Professional Conduct, as is discussed further below, inasmuch as this conduct not only violated Rule 3.8 but also the specific prohibition of Rule 4.2.

- (2) Additionally, the letter violates the spirit of Rule 4.5 of the Rules of Professional Conduct, and thus constitutes another abuse of the immense power of the prosecutor, which Rule 3.8 seeks to constrain in the interest of justice.
- (3) South Carolina Code § 17-1-20 seeks to prevent this same abuse, the use of the immense power of the prosecutor in connection with civil proceedings (and similarly, the use of civil proceedings by a prosecutor to affect a criminal case).
 - (a) Chief Deputy Attorney General McIntosh, in his October 14, 2014, letter, threatens legal action that would violate § 17-1-20 if undertaken by the Attorney General, because he would "be concerned as counsel or attorney for either party in a civil action depending upon the same state of facts" as the criminal case.
 - (b) In the case *In re Jolly*, 269 S.C. 668, 670, 239 S.E.2d 490, 491 (1977), the our Supreme Court described this statute as "essential for the protection of the public interest." (Of course, if the ambiguous threat is referring to a criminal – rather than civil – action, the Attorney General is squarely violating the literal prohibition of Rule 4.5 and not just its spirit.)
- d) This misconduct of the Attorney General violates Ms. Kovach's Sixth

Amendment right to counsel, and thus Rule 3.8. It is reminiscent of the conduct of the federal prosecutors in *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

(1) In *Stein*, the district court found that the prosecutors' conduct shocked the conscience, mandating dismissal of the charges.

(2) In affirming, the Second Circuit held that "the Sixth Amendment prohibits the government from impeding the supply of defense resources." 541 F.3d at 156.

(3) Professor Crystal has reached a similar opinion in this case. In paragraph 20 of his December 15, 2014 affidavit of expert opinion, he concludes

The Attorney General's attack on Ms. Kovach's right to payment of legal fees under §59-17-110 is particularly egregious in this case because the Attorney General is not simply giving an opinion to a governmental body. The Attorney General is the prosecuting attorney in this case. In other words, the Attorney General is attempting to cripple the defense by interfering with the defendant's ability to retain counsel of her choice. [emphasis supplied]

(4) My expert opinion is the same as Professor Crystal's.

3. The facts discussed in paragraph D below, regarding the Attorney General's violation of Rule 3.3 by misleading the Court, establish that the Attorney General, through SLED, was seeking (and continues to seek) Ms. Kovach's attorney-client privileged materials, including her confidential communications with her defense counsel. This professional misconduct not only violates her rights under the Fifth and Sixth Amendments to the United States Constitution but also the Attorney General's duties under Rule 3.8.

4. The South Carolina Supreme Court has warned, in Comment 1 to Rule 3.8, that "knowing disregard of [the legal] obligations" of a prosecutor, as well as the

prosecutor's "systemic abuse of prosecutorial discretion" can "constitute a violation of Rule 8.4," which defines professional misconduct by a lawyer.

- a) Rule 8.4(e) outlaws "conduct that is prejudicial to the administration of justice." See *In re Humphries*, 345 S.C. 567, 582 S.E.2d 728 (2003), in which the South Carolina Supreme Court suspended the license of Assistant Solicitor Francis A. Humphries, Jr. for one year for, *inter alia*, violating Rule 8.4(e) in prosecuting a case. In connection with that misconduct, the Supreme Court also disciplined Humphries supervisor, Solicitor Donald V. Myers, for violations of Rules 5.1 and 8.4. *In re Myers*, 355 S.C. 1, 584 S.E.2d 357 (2003).
- b) Rule 8.4(d) outlaws "conduct involving dishonesty, fraud, deceit or misrepresentation."
- c) Rule 8.4(a) defines professional misconduct as including when lawyers, including prosecutors "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

5. I have studied the affidavit of expert opinions of Professor Nathan M. Crystal dated December 15, 2014, in which Professor Crystal concludes that

the Attorney General of South Carolina is interfering with Ms. Kovach's Right to Counsel under the Sixth and Fourteenth Amendments and with her statutory right to indemnification under S.C. Code §59-17-110. In my opinion such conduct violates South Carolina Rule of Professional Conduct (SCRPC) 3.8 and its comments and amounts to conduct prejudicial to the administration of justice under SCRPC 8.4(e). In addition, the Attorney General has engaged in other improper conduct in this proceeding, including representation that involves a conflict of interest. In my opinion such conduct warrants disqualification of the Attorney General's office from prosecution of Ms. Kovach.

My expert opinion is the same.

6. The South Carolina Supreme Court has held, like federal and state courts all across the country, that violations of Rule 3.8 are extremely serious. In *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105, 109 (2000), a case in which our Supreme Court disqualified the Solicitor's Office from prosecuting the case due to prosecutorial misconduct interfering with the defendant's Sixth Amendment right to counsel, the Court emphasized the importance of the prosecutor's duties as a minister of justice under Rule 3.8 – not only to judges, lawyers, and defendants:

Every South Carolinian has a vital interest in the fair administration of justice. This Court bears the ultimate responsibility for maintaining judicial integrity and high standards of professional conduct among the members of the bar, and for protecting and defending the constitutional rights of the accused.

The integrity of the entire judicial system is called into question by conduct such as that engaged in by the deputy solicitor and investigating officers in this case. Prosecutors are ministers of justice and not merely advocates. See Rule 3.8, cmt., Rules of Professional Conduct. A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics. The participation at trial of a prosecutor who has eavesdropped on the accused and his attorney tarnishes us all. We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice. [emphasis supplied]

- C. The Attorney General has also violated Rule 4.2 of the South Carolina Rules of Professional Conduct.

1. On October 14, 2014, Chief Deputy Attorney General John W. McIntosh mailed a letter to Kathryn Long Mahoney, Esq., of Childs & Halligan, counsel to the Berkeley County School Board, and intentionally emailed copies of the letter directly to the members of the Berkeley County School Board, who he knew were represented by Ms. Mahoney and her law firm.

2. This communication by Mr. McIntosh violated Rule 4.2 Communication with Person Represented by Counsel, which mandates

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

3. Mr. McIntosh was not authorized by Ms. Mahoney to communicate directly with her clients.
4. Mr. McIntosh was not authorized by law or court order to communicate directly with Ms. Mahoney's clients.
5. Mr. McIntosh knew that the Berkeley County School Board was represented by Ms. Mahoney and her law firm, Childs & Halligan, in connection with the Attorney General's investigation and prosecution of employees of the School Board, including Ms. Kovach.
6. The South Carolina Supreme Court has explained that when the lawyer's client is an organization, such as a corporation or a government board, the prohibition on communications extends to every "constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Comment 7 to Rule 4.2, as amended by order of the Court on June 20, 2005, effective October 1, 2005. Rule 4.2 protects the attorney-client relationship between Ms. Mahoney and the Berkeley County School Board by prohibiting the Attorney General from communicating directly with the school board members to whom Mr. McIntosh sent his letter about the prosecutions and the Board's indemnification of Ms. Kovach and other defendants.

7. The law is settled that Rule 4.2 applies to prosecutors, not just private lawyers.
8. There is no exception to Rule 4.2 for the Attorney General providing unsolicited legal advice to members of a school board that is represented and advised by its own counsel. Mr. McIntosh wrote Jerry Theos, Ms. Kovach's counsel, on October 31, 2014, seeking to justify his letter as "merely extending the courtesy of notifying the school district of contemplated action by this Office." Of course, such notification could have been given to the school district's counsel; copying the individual members of the school board served no legitimate purpose whatsoever.
9. To make matters even worse, in his improperly threatening letter on behalf of the Attorney General, Mr. McIntosh gives the school board members bad legal advice, advice that is incorrect, incompetent, and illogical. He essentially declares that § 59-17-110 is unconstitutional and that the Attorney General might bring actions against the school board and individual board members to recover the payments.
 - a) Professors Freeman and Crystal thoroughly analyze the advice given by Mr. McIntosh and the earlier opinions of the attorney general he cites and encloses, showing indisputably that Mr. McIntosh's legal advice is incorrect and the prior Opinions of Attorney General are irrelevant and wrong. In my expert opinion, Professors Freeman and Crystal are correct. I agree with their analysis and adopt it, but will spare the Court a full exposition of it for a third time.
 - b) Central to this analysis is § 59-17-110's express statutory authorization for the payments – indeed not merely authorization but an express statutory mandate that the school board pay Ms. Kovach's legal fees and other costs of defense.
 - c) The Attorney General does not have constitutional power to invalidate a statute duly enacted by the South Carolina General Assembly and signed into law by the Governor.

d) Chief Deputy Attorney General John W. McIntosh's letters of October 14 & 31, 2014 evidence that the Attorney General is operating on the basis of a presumption of guilt that would automatically destroy any possibility that Ms. Kovach was acting in good faith, contrary to the factual conclusion of Judge Rawl and the unanimous expert opinions of Professor Freeman, Professor Crystal, and me.

- (1) In his letter to the school board, Mr. McIntosh summarizes the position of the Attorney General: "It is difficult to understand how the Board concluded that these officials acted in good faith when the criminal investigation remains ongoing."
- (2) In his October 31 letter, Mr. McIntosh concludes "a judicial official found probable cause to issue a warrant for Ms. Kovach, and on two separate occasions, grand juries have issued indictments against Ms. Kovach. We believe this, among other [unspecified] matters, negates any finding of good faith on her part."
- (3) When I was a visiting professor in a Russian law school in 2001, I observed a criminal trial. What I saw was a criminal "justice" system functioning as envisioned in this case by the Attorney General and articulated by his Chief Deputy, McIntosh, where a criminal defendant is presumed to have violated the law, presumed to have acted in bad faith, presumed to be guilty because she has been arrested and charged with a crime. Somehow, if there were any doubt, it is removed by the second indictment. And Mr. McIntosh is comfortable with this conclusion even though he does not know what evidence Judge Rawl and Professor Freeman relied on and notes that "[t]hey did not have access to any of the

information developed in the course of the criminal investigation." So the presumption of guilt and bad faith is not based on the facts or all of the evidence, much less a verdict of a jury after adversarial presentations of evidence in a trial. It is simply an *ipse dixit* pronouncement by the prosecutor – just like in Russia.

- D. The Attorney General has violated Rule 3.3 of the South Carolina Rules of Professional Conduct by misleading the Court and failing to tell Judge Young the truth about SLED's forensic examination of Ms. Kovach's computer during the pendency of a motion for a protective order to safeguard attorney-client privileged materials.
1. "But after the execution of the search warrant, Mr. Theos filed this motion for protective order. While this motion is -- has been waiting to be ruled on, SLED has not moved forward on conducting this examination." Representation to the Honorable Roger M. Young, Sr., by Senior Assistant Deputy Attorney General Wayne Allen Myrick, Jr. on October 28, 2014. [Transcript of Hearing 5:22-6:1]
 2. SLED's Case Management History on Ms. Kovach's case shows that the truth, however, is that SLED "started file search" on the hard drive on August 29, 2014 -- twenty-three days after Ms. Kovach's counsel had filed the motion for protective order and two months before Mr. Myrick's statement to Judge Young -- and continued searching and reviewing the files for nearly a month before creating a Preliminary Report on September 25, 2014.
 3. Just a little over a month later, after consultations with SLED and its general counsel, Adam Whitsett, over a procedure to protect privileged communications on the hard drive Mr. Myrick falsely told the Court that "SLED has not moved forward on conducting this examination."

4. I have not seen any evidence yet on whether Mr. Myrick or other lawyers in the Attorney General's office had read the SLED Preliminary Report that had been created the month before or knew of its existence.
 5. Rule 3.3 requires Candor Toward the Tribunal. It prohibits a lawyer from knowingly making "a false statement of fact" to a judge and it requires a lawyer who has made "a false statement of material fact" to a judge to correct it promptly upon learning that it was false, Rule 3.3(a)(1). This duty to tell the truth is a continuing one to the conclusion of the case. Rule 3.3(c).
 6. I am unaware of any attempt by the Attorney General to correct Mr. Myrick's false statement to Judge Young; apparently the violations of Rule 3.3 are continuing.
- E. I have seen evidence that the Attorney General has violated Rule 5.1 of the South Carolina Rules of Professional Conduct and may have violated Rule 5.3.
1. Rule 5.1(a) requires the Attorney General to have made "reasonable efforts to ensure that the [Office of the Attorney General] has in effect measures giving reasonable assurance that all lawyers in the [Office] conform to the Rules of Professional Conduct." The myriad violations of the Rules, described in this Affidavit of Expert Opinion, including those by Chief Deputy Attorney General John W. McIntosh and Senior Assistant Deputy Attorney General Wayne Allen Myrick, Jr., make it doubtful that the Attorney General has done so.
 2. Rule 5.1(b) requires the Attorney General to have made "reasonable efforts to ensure that [any lawyer he directly supervises, such as Chief Deputy Attorney General John W. McIntosh,] conforms to the Rules of Professional Conduct." The extremely serious violations of the Rules, described in this Affidavit of Expert Opinion, such as those by Chief Deputy Attorney General John W. McIntosh, make it doubtful that the Attorney General has done so.

3. Rule 5.1(c)(1) makes the Attorney General responsible for violations of the Rules of Professional Conduct by other lawyers in the Office of Attorney General if he "order[ed] or, with knowledge of the specific conduct, ratifie[d] the conduct involved."
 4. Rule 5.3(c)(1) makes the Attorney General responsible for conduct of SLED or other non-lawyers "that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if [the Attorney General] order[ed] or, with knowledge of the specific conduct, ratifie[d] the conduct involved."
 5. Rule 5.1(c)(2) makes the Attorney General responsible for violations of the Rules of Professional Conduct by other lawyers in the Office of Attorney General if he "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."
 6. The South Carolina Supreme Court has held that Rule 5.1 applies to government legal offices, such as prosecutors offices, and that it governs chief prosecutors such as solicitors and the Attorney General. *In re Myers*, 355 S.C. 1, 584 S.E.2d 357 (2003).
- F. The Attorney General has violated the South Carolina Lawyer's Oath, (S.C.A.C.R. 402(k)) by breaking these solemn promises:
1. "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;"
 2. "I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the judge or jury by a false statement of fact or law."

IV. My resumé, attached as Exhibit A, demonstrates why federal and state courts, including the South Carolina Supreme Court and the South Carolina Court of Appeals, have held that I am qualified as an expert witness.

A. I am a tenured law professor at the University of South Carolina School of Law, where I have been teaching since 1978. My subjects of expertise include lawyers' ethics and professional responsibility – with a focus on the ethical responsibilities of prosecutors and defense counsel in criminal cases, judicial ethics, corporate law, fiduciary duties, contract law, agency, and partnership law.

B. I have earned a J.S.D. (Doctor of Juridical Science) and an LL.M. from Columbia University School of Law, as well as my J.D. from Louisiana State University.

C. Federal and state courts in South Carolina have recognized my expertise, including the South Carolina Supreme Court in *State v. Morris*, 376 S.C. 189, 656 S.E.2d 359 (2008) (holding that I am qualified as an expert witness (I was retained by the Attorney General in that and related criminal prosecutions) and that my expert testimony on behalf of the State was accurate and proper) and *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 472 S.E.2d 612 (1996) (holding that I was qualified as an expert witness on issues of lawyers' duties), and the Court of Appeals in *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) (holding it was reversible error to discount my expert opinion in a legal malpractice case and to fail to give it efficacy).

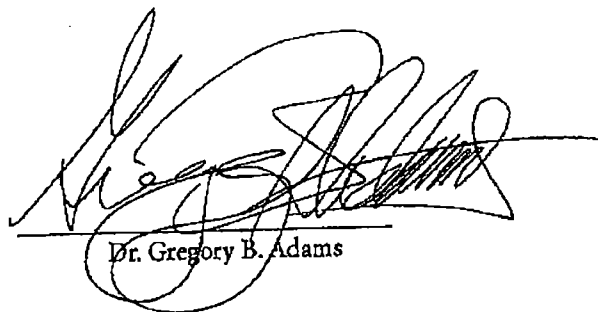
D. Additionally, three South Carolina Attorneys General, a South Carolina Secretary of State, and a United States Attorney for the District of South Carolina have relied upon my expertise to guide and assist them in significant criminal investigations and prosecutions. I have also provided expert services and opinions to the lawyers of the

United States Securities and Exchange Commission, the South Carolina Department of Health and Environmental Control, the South Carolina General Assembly, the South Carolina Workers' Compensation Commission, the South Carolina Department of Natural Resources, and South Carolina Solicitors, as well as the South Carolina Association of Criminal Defense Lawyers.

V. Documentary evidence I have reviewed supports my expert opinions. This evidence includes the kinds of factual sources customarily relied upon by experts in this field, such as the materials specifically identified and expressly relied on in this Affidavit and other supporting materials relevant to the issues I have opined on.

VI. I have carefully read and analyzed the legal opinion of Judge Rawl dated May 2, 2014, the expert opinion of Professor Freeman dated April 22, 2014, and the affidavit of expert opinions of Professor Nathan M. Crystal dated December 15, 2014. My expert opinions concur with and are reinforced by theirs. The Attorney General's conduct in prosecuting Ms. Kovach has been unethical and unconstitutional, warranting his disqualification from further prosecuting her.

Further the affiant sayeth not.



Dr. Gregory B. Adams

Sworn to and subscribed before me
this 19th day of January 2015.



Notary Public for South Carolina
My Commission Expires: 6/14/17

JANET SCOTT SMITH
SOUTH CAROLINA
NOTARY PUBLIC
MY COMMISSION EXPIRES
JUNE 14, 2017

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DR. GREGORY B. ADAMS

University of South Carolina School of Law
Columbia, South Carolina 29208

Professional Experience

Law Professor (tenured), University of South Carolina, 1978-present.

SUBJECTS TAUGHT: Professional Responsibility; Ethical Issues in Criminal Practice; Judicial Ethics; Legal Profession; Legal Technology; Contracts; Corporate Law; Business Planning; Agency, Partnership & Limited Liability Companies; Antitrust; International Business Law; European Union Law.

Associate, University of South Carolina Rule of Law Consortium (2011-present).

Founding Director, Program on Judicial Ethics, Selection, Accountability, and Independence,
University of South Carolina School of Law (2003-12).

Visiting Professor of Law, Pskov Volny University, Pskov, Russia, Spring 2001.

Visiting Professor of Law, University of Southampton, Southampton, England, Fall 1989.

Visiting Professor of Law, Rutgers University, Newark, NJ, 1983-1984.

Stagiaire, Commission of the European Communities (European Union), Brussels, Belgium, 1979.

Research Associate, Institute of European Studies, University of Brussels (U.L.B.), 1979.

Visiting Scholar, Faculté de Droit, Université Catholique de Louvain, Louvain-la-Neuve, Belgium, 1978.

Assistant Professor, Southern University School of Law, 1975-1977.

Consultant, Louisiana Legislative Council, 1976-1977.

Attorney with Breazeale, Sachse & Wilson, Baton Rouge, LA, 1973-1975.

Education

J.S.D. 1986

Columbia University School of Law New York, New York

Dissertation: Control of Monopoly Power in Europe and the United States

I.L.M. 1979

Columbia University School of Law New York, New York

Thesis: E.E.C. and U.S. Antitrust Regulation of Monopolists' Refusals to Deal

Jervey Fellow in Foreign Law, Parker School, Columbia University, 1977-1979.

J.D. 1973

Louisiana State University Law Center Baton Rouge, LA

Order of the Coif; Louisiana Law Review; Moot Court Board; Winner, Robert Lee Tullis Moot Court Competition before the Louisiana Supreme Court.

B.S. 1977

Louisiana State University Baton Rouge, LA

Phi Kappa Phi

College of Arts & Science, Vanderbilt University Nashville, TN 1966-1968

1/18/2013

00883

Honors and Recognition

Outstanding Faculty Publications Award, University of South Carolina School of Law (April 2006, Book, Runner Up)
Louisiana State University Law Center Hall of Fame
Twenty Year Who's Who Honoree
Who's Who in the World
Who's Who in America
Who's Who in American Law
Who's Who in American Education
Who's Who in the South and Southwest
Who's Who of Emerging Leaders in America
Who's Who in Law Education
Dictionary of Int'l Biography (Cambridge, U.K.)
State v. Morris, 376 S.C. 189, 656 S.E.2d 359 (2008) (holding GBA qualified as an expert witness and that GBA's expert testimony was accurate and proper)
Smith v. Haynsworth, Marion, McKay & Guerard, 322 S.C. 433, 472 S.E.2d 612 (1996) (holding GBA qualified as an expert witness; reversible error to rule otherwise)
Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App., 2004) (holding it was reversible error to discount GBA's expert opinion and fail to give it efficacy)
Davis v. Haman, 300 S.C. 284, 387 S.E.2d 676 (Ct. App., 1989) ("excellent discussion of the ramifications of these statutes" in "Litigation of Corporate Law Disputes After the Recent Amendments of the Corporate Code," in Current Issues in Civil Litigation, S.C. Bar Continuing Judicial Legal Education Seminar 1989)

Publications

South Carolina Corporate Practice Manual (2nd ed. 2005, S.C. Bar) (lead author, coauthors: Burkhard, Cleveland, Clark, Hellwig, Merline).
"Reflections on the Reactions to Proposed Rule 8.5: Consensus of Failure," 36 S. Texas Law Review 1101 (1995).
"Introductory Remarks to the Conference on the Commercialization of the Legal Profession," 45 S.C. L. Rev. 883 (1994) (with Nathan M. Crystal).
Report of the Proceedings, Conference on the Commercialization of the Legal Profession (with Nathan M. Crystal): "Summary of Discussion of Frankel Paper," 45 S.C.L. Rev. 901; "Summary of Discussion of Palay/Galanter Paper," 45 S.C.L. Rev. 929; "Summary of Discussion of Martyn Paper," 45 S.C.L. Rev. 961; "Summary of Discussion of Dimitriou Paper," 45 S.C.L. Rev. 999 (1994).
"The Ethical Lawyer," occasional column in the S.C. Trial Lawyer Bulletin since 1994.
"Suing Corporations and Those Behind Them," 1992 S.C. Trial Lawyer Bulletin 17.
South Carolina Corporate Practice Manual (S.C. Bar, 1989) (with Cleveland, Burkhard, McWilliams).
"European and American Antitrust Regulation of Pricing by Monopolists," 18 Vanderbilt Journal of Trans. Law 1 (1985).
"Antitrust Constraints on Single-Firm Refusals to Deal by Monopolists in the European Economic Community and the United States," 20 Texas Int'l L. J. 1 (1985).
"The 1981 Revision of the South Carolina Business Corporation Act," 33 S.C. L. Rev. 405 (1982).
"Inheritance Taxation of Trusts," in 11 L. Oppenheim & S. Ingram, Louisiana Civil Law Treatise, Trusts (1977).

Amicus Curiae Briefs Drafted

Ex Parte Strom, in re Collins Entertainment Corp. v. Columbia "20" Truck Stop, 343 S.C. 257, 539 S.E.2d 699 (2000) (establishing that attorney's duties to client continued until court granted motion relieving attorney as counsel of record).
Linder v. Insurance Claims Consultants, 348 S.C. 477, 560 S.E.2d 612 (2002) (on behalf of the S.C. Bar, clarifying scope of activities constituting the practice of law).
Brown v. Bi-Lo, 354 S.C. 436, 581 S.E.2d 836 (2003) (on behalf of the S.C. Trial Lawyers Association, protecting the confidentiality of physician-patient relationship).

Public Service

Expert Witness, United States Securities and Exchange Commission, *U.S. S.E.C. v. Staples* (2013)
Invited Expert Witness, Judicial Merit Selection Study Committee, SC Senate (9/17/07)
Member, S.C. Bar, Professional Responsibility Committee, 1993-2012 (chair or member of numerous subcommittees, including Ethics 2000 Subcommittee; presented Ethics 2000 recommendations to S.C. Bar House of Delegates).
Member, S.C. Bar, Unauthorized Practice Committee, 1994, 2000-2003.
Member, S.C. Bar, Technology Committee, 1996-1998.
Ethics Consultant, South Carolina Association for Justice, 1994-2014.
Co-Founder and Vice-President, South Carolina Association of Ethics Counsel, 2000-present.
Expert Witness and advisor to the South Carolina Attorney General in the criminal investigation and prosecutions for securities fraud in connection with the failure of Carolina Investors and HomeGold Financial, 2003-2008.
Expert Consultant for the South Carolina Department of Health and Environmental Control, re: piercing the corporate veil to impose environmental liability under CERCLA, 1997-1999.
Reporter, South Carolina Uniform Commercial Code Article 2A (South Carolina Law Institute for the South Carolina General Assembly, 1996-2001).
Expert Witness and advisor to the South Carolina Attorney General in criminal prosecution of John O'Quinn, Esq. for unauthorized practice of law and illegal solicitation, 1996-1997.
Co-Reporter, Conference on the Commercialization of the Legal Profession, Charleston, S.C., May 1993.
Expert Witness for the United States before the Federal Grand Jury investigating securities fraud, May 1993.
Member, Governing Board, Center for Law, the Legal Profession, and Public Policy, 1991-93, 1998-2000.
Member, Blue Ribbon Committee on Corporate Law, South Carolina Secretary of State, 1991-95.
Securities Law Expert for the South Carolina Attorney General in connection with the bankruptcy of Patriots Point Associates, 1989-91.
Advisor to the S.C. Deputy Securities Commissioner and the S.C. Senate Judiciary Committee on Corporate Law issues.
Co-Reporter, South Carolina Business Corporation Act of 1988 (South Carolina Law Institute for the South Carolina General Assembly, 1986-88).
Member, Louisiana State Law Institute, Civil Code Revision Committee, 1975-1977.

Presentations

"Ethics of Confidentiality Online Cybersecurity & Encryption," Fourth Annual Everything You Need To Know About Ethics, S.C.A.E.C. - S.C. Bar CLE, Columbia, SC (1/16/15)
"*Fabian v. Lindsay*: Lawyers' Liability to Intended Beneficiaries," with S. Alan Medlin, Nineteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/12/14)
"CyberSecurity: Lawyers Safely Using Smartphones, Email, and the Cloud in the Age of International Hackers and Government Spies," S.C. Bar CLE, Columbia, SC (8/26/14)
"Modification of Fees and Other Contract Questions: Rules 1.8 and 1.5," Third Annual Everything You Need To Know About Ethics, S.C.A.E.C.-S.C. Bar CLE, Columbia, SC (1/17/14)
"Modification of Fee Agreements During the Representation: Ethical Duties, Fiduciary Duties, Contract Law," Eighteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/12/13)
"Legal Ethics and Social Media: How to Stay Out of Trouble and Protect Your Lawyer's Law License," Palmetto Paralegal Association Seminar, Columbia, SC (10/16/13)
"War of the Roses & Roses, LLC: The Sequel - When Partners Leave the Firm," Everything You Need To Know About Ethics, S.C.A.E.C.-S.C. Bar CLE, Columbia, SC (1/18/13)
"Getting Paid, Keeping the Money, and Safeguarding Your License: How to Manage Your Cash Flow, Trust Account, and Bottom Line Under the New Rules Without Inviting a Visit from Disciplinary Authorities," Seventeenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/6/12)

- "Getting Paid, Keeping the Money, and Safeguarding Your License: How to Manage Your Cash Flow, Trust Account, and Bottom Line Under the New Rules Without Inviting a Visit from Disciplinary Authorities," S.C. Association for Justice, Auto Torts Seminar, Buckhead Ritz Carlton, Atlanta, GA (12/1/12)
- "Mike Nifong -- Aberrational Rogue?," U.S.C. Law School Symposium on Prosecutorial Ethics and Duties, Columbia, SC (3/16/12)
- "How to Get Paid Now!," Everything You Need To Know About Ethics, S.C.A.E.C.-S.C. Bar CLE, Columbia, SC (1/13/12)
- "Current Professional Responsibility Issues for Litigators," S.C. Tort Law Update, S.C. Bar CLE, U.S.C. Law School (1/6/12)
- "Fiduciary Duties of Estate Planning & Probate Lawyers: General Principles and S.C. Cases," Sixteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/13/11)
- "Advanced Ethics for Legislative Attorneys," South Carolina General Assembly, Columbia, SC (10/5/11)
- "Judicial Ethics for S.C. Workers' Compensation Commissioners," S.C. Workers' Compensation Commission Continuing Judicial Ethics Seminar, Columbia, SC (11/16/10)
- "Ethics for Legislative Attorneys," South Carolina General Assembly, Columbia, SC (10/6/10)
- "Current Ethical Issues and Trends," York County Bar Association Ethics CLE, Panel with S.C. Supreme Court Justice Costa M. Pleicones and S.C. Disciplinary Counsel Lesley M. Coggiola, Esq., Rock Hill, SC (3/12/10)
- "Lawyers in the Crosshairs: Recent South Carolina Cases of Concern to Estate Planning and Probate Lawyers," Fourteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/15/09)
- "Judicial Ethics for S.C. Workers' Compensation Commissioners," S.C. Workers' Compensation Commission Continuing Judicial Ethics Seminar, Columbia, SC (11/17/09)
- "Regulating Lawyer Behavior Through Recent South Carolina Tort Cases: Issues of Lawyer Ethics, Professionalism, and Liability," S.C. Tort Law Update, S.C. Bar CLE, U.S.C. Law School (11/13/09)
- "Lawyers' Ethical Responsibilities and the Torture Memoranda," Amnesty International Panel Discussion, University of South Carolina, Columbia, SC (4/15/09)
- "The 'Of Counsel' Agreement," S.C. Bar Annual Convention, Myrtle Beach, SC (1/24/09)
- "Ethical Duties in Family Estate Planning," Thirteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/11/08)
- "Teaching Professional Responsibility in U.S. Law Schools," Southeastern Ass'n of Law Schools, Ritz Carlton, Palm Beach, FL (7/31/08)
- "Judicial Selection in the United States," S.C. Supreme Court Teachers Institute, Columbia, SC (6/23/08)
- "Corporate Lawyers as Fiduciaries," S.C. Bar Annual Convention, Charleston, SC (1/25/08)
- "My Heroes Have Always Been Lawyers and They Still Are, It Seems," Twelfth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/13/07)
- "Prosecutorial Ethics: Was the Duke Lacrosse Case an Aberration or the Tip of the Iceberg?," SCTLA Annual Convention, Hilton Head Island (8/3/07)
- "Malpractice Liability of Estate-Planning Lawyers," Eleventh Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, S.C. (12/7/06)
- "Ethics for Trial Lawyers: How to Avoid Those Hidden J and Mines," S.C.T.L.A. Auto Torts Seminar XXIX, Ritz-Carlton, Buckhead, Atlanta, GA (12/2/06)
- "Ethical Issues for the Sports Attorney-Agent: Lessons from *Vortex v. Ware*," International Sport and Entertainment Management Conference, Metropolitan Convention Center, Columbia, SC (11/9/06)
- "Ethics in Workers Comp Practice: Negotiation," ASCCA WC Annual Convention, Grove Park Inn, Asheville, NC (11/4/06)
- "Probate Judges and Lawyers: Prohibition of *Ex Parte* Communications," Fourteenth Annual Probate Bench/Bar Conference, Columbia, SC (9/15/06)
- "The Future Regulation of Lawyer Advertising Under the Proposed S.C. Rules of Professional Conduct," SCTLA Annual Convention, Hilton Head Island (8/4/06)
- "Free Speech and Judicial Selection: Implications of *White v. Republican Party*," Southeastern Association of Law Schools, The Breakers Hotel, Palm Beach, FL (7/20/06)
- "The New South Carolina Rules of Professional Conduct," Tenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, S.C. (12/15/05)

- "Ethical Use of Discovery Under the Workers' Compensation Act; Contact with Employer Witnesses; Use of Subpoenas in a Workers' Compensation Case; Frivolous Defenses: What to do About Them," ASCCAWC Annual Meeting, Grove Park Inn, Asheville, N.C. (11/4/05).
- "Applying the SC Code of Judicial Conduct to Workers' Compensation Commissioners: Lessons for Lawyers Practicing Before the Commission," SCWCEA Educational Conference CLE, Marriott Myrtle Beach Resort (10/24/05).
- "The New SC Rules of Professional Conduct: You Really Can't Do THAT Anymore!," SCWCEA Educational Conference, Marriott Myrtle Beach Resort (10/24/05).
- "Newly Revised Frivolous Procedures Act & Other Ethical Issues," SCTLTA Tort Reform Seminar, Columbia, S.C. (10/14/05).
- Moderator and Coordinator, S.C. Corporate Practice Seminar, S.C. Bar CLE, U.S.C. Law School (9/30/05).
- Speaker: "Ethical Issues in S.C. Corporate Law for the General Practitioner and the Corporate Lawyer: Ethical Issues Presented by Choices of Control Devices
Ethical Issues Arising from Threats of Owner Liability
The Big Ethical Question: Who Is The Client?"
- "The Code of Judicial Conduct: Does It Effect How We Practice Workers' Comp?," S.C. Bar CLE, U.S.C. Law School (8/26/05).
- "Ethics Seminar: The New Rules of Professional Conduct," SCTLTA Annual Convention, Hilton Head Island (8/5/05).
- "Ethics 2000: The New Rules of Professional Conduct — You Can't Do That Anymore!," C.L.E. Ethics Seminar, Richland County Bar Association (11/5/04).
- "Judicial Ethics Review," J.C.L.E. Ethics Seminar, S.C. Court Administration Magistrates' Training Program, Charleston, S.C. (8/18/04).
- "The New S.C. Lawyers' Oath," C.L.E. Seminar, S.C. Bar, Charleston, S.C. (6/25/04).
- "Judicial Ethics Review," J.C.L.E. Ethics Seminar, S.C. Court Administration Magistrates' Training Program, Columbia, S.C. (4/23/04).
- "Ethics 2000 and Lawyers' Fees," C.L.E. Ethics Seminar, S.C. Bar & S.C. Association of Ethics Counsel, Columbia, S.C. (11/15/03).
- "The Ethical Implications of *Brown v. Bi-Lo*," S.C. Workers Comp. Educational Ass'n Educational Conference, Kingston Plantation, Myrtle Beach, S.C. (10/20/03).
- "Ethics 2000: The New Rules of Professional Conduct & Multi-Jurisdictional Practice of Law," C.L.E. Ethics Seminar, Investors Title Insurance Co. Seminars (9/17/03 Rock Hill, 9/12/03 Hilton Head).
- "Ethics 2000: The New Rules of Professional Conduct — You Can't Do That Anymore!," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/8/03).
- "Political & Legal Ethics: The Pitfalls to Avoid," C.L.E. Ethics Seminar, S.C. Bar Annual Convention (Young Lawyers Division) (1/24/03).
- "Recent Developments in Legal Ethics," C.L.E. Ethics Seminar, S.C. Bar & S.C. Association of Ethics Counsel (12/14/02).
- "Current Ethical Issues in Real Estate Practice," C.L.E. Ethics Seminar, Security Title Insurance Company (11/8/02).
- "Ethics of Attorney's Fees for Domestic Law Attorneys," C.L.E. Ethics Seminar, S.C. Bar (9/20/02).
- "Discovery Abuse and Litigation Ethics," Paralegal Continuing Education Seminar, S.C.T.L.A. Convention (8/3/02).
- "Discovery Abuse, Litigation Ethics, Supervision and Other Horrors," C.L.E. Ethics Seminar, S.C.T.L.A. Convention, Hilton Head, S.C. (8/2/02).
- "Ethical Issues in Attorney Marketing Under the Amended Rules," C.L.E. Ethics Seminar, S.C. Bar (7/26/02).
- "Ethics in the Practice of Criminal Law," C.L.E. Ethics Seminar, S.C. Bar (5/10/02).
- "Professional Ethics in the Real World: Communication with Witnesses," C.L.E. Ethics Seminar, Ass'n S.C. Claimants' Attorneys for Workers Comp. (5/3/02).
- "Lawyers and Paralegals Practicing Law When and Where They Shouldn't," C.L.E. Ethics Seminar, S.C. Bar and South Carolina Ass'n of Ethics Counsel (12/15/01).
- "Proposed Disclosure Rule and Goods Funds Statute in South Carolina," C.L.E. Ethics Seminar, S.C. Bar (8/17/01).
- "Recent Developments in Ethics and Professional Responsibility," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/3/01).

- "Ethical Perils for Family Practitioners: Keeping Your License and Keeping Your Practice," C.L.E. Ethics Seminar, S.C. Bar (12/2/00).
- "Ethical Issues in Workers Compensation Practice," C.L.E. Ethics Seminar, S.C. Workers' Comp. Educational Ass'n, Kingston Plantation, Myrtle Beach, S.C. (10/23/00).
- "The Things That Make Paralegals Indispensable: Technology and the Future of the Practice of Law," Paralegal Continuing Education Seminar, S.C.T.L.A. Convention (8/5/00).
- "Recent Developments in Ethics and Professional Responsibility," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/4/00).
- "The Internet - Legal Ethics in Cyberspace: Marketing on the Web and Communicating Via Email Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," SC Defense Trial Attorney's Association & SC Claim Manager's Association CLE at Grove Park Inn, Asheville, N.C. (7/29/00).
- "The Internet - Legal Ethics in Cyberspace: Marketing on the Web and Communicating Via Email Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," C.L.E. Ethics Seminar, S.C. Bar (4/28/00).
- "The Responsibility of Administrative Law Judges to Control Unethical and Unprofessional Conduct by Lawyers: Ethical Prohibitions, Remedies and Sanctions," ALJ CLE Seminar, Southern States Association of Administrative Law Judges (3/17/00).
- "S.C. Appellate Procedure: The New Relationship Between the Supreme Court and the Court of Appeals," Paralegal Continuing Education Seminar, Ass'n S.C. Claimant Attorneys for Workers Comp., Asheville, N.C. (1/22/00).
- "Professionalism: Advertising Ethically Under the Amended S.C. Rules of Professional Conduct," C.L.E. Ethics Seminar, S.C. Bar (1/14/00).
- "Multi-Jurisdictional Practice of Law: *Pro Hac Vice* Admission and Unauthorized Practice," C.L.E. Ethics Seminar, S.C. Bar (12/11/99).
- "Hot Issues in Ethics: Marketing Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," C.L.E. Ethics Seminar, S.C. Bar (10/29/99).
- "Ethical and Professional Responsibility Issues in Litigation: Discovery Abuse," C.L.E. Ethics Seminar, S.C. Bar and Univ. of South Carolina School of Law (12/12/98).
- "Multi-Jurisdictional Practice of Law: *Pro Hac Vice* Admission and Unauthorized Practice," C.L.E. Ethics Seminar, S.C. Bar (12/8/98).
- "Discovery Abuse: Bane of Professionalism? Ethical Prohibitions & Court-Ordered Sanctions," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/14/98).
- "*Hedgepath & McCormick* and the Ethics of Ex-Parte Communication with Treating Physicians," Workers Comp. C.L.E. Seminar, S.C.T.L.A. Convention (8/14/98).
- "Legal Ethics for a Multi-State Law Firm," C.L.E. for a Major S.C. Law Firm (8/8/98).
- "Prudent Ethical Conduct after *Hedgepath*," Medical Staff, McLeod Hospital, Florence, S.C. (4/6/98).
- "What is the Effect of *Hedgepath* on Doctors' Duties to Workers' Comp Patients?" S.C. Workers Comp. Educational Ass'n Annual Meeting, Charleston, S.C. (2/22/98).
- "Confidentiality, Privilege, and the Attorney as Witness, Gossip, or Snitch," C.L.E. Ethics Seminar, S.C. Bar and Univ. of South Carolina School of Law (1/10/98).
- "Law Firm Breakups and Departing Lawyers," C.L.E. Ethics Seminar, S.C. Bar and University of South Carolina School of Law (12/13/97).
- "*Hedgepath* & Lawyers' Professional Conduct: Implications in Workers' Compensation Proceedings," C.L.E. Seminar, The Association of South Carolina Claimant Attorneys for Workers' Compensation, Asheville, N.C. (11/14/97).
- "Ethics: Judicial Immunity for Administrative Law Judges," J.C.L.E. Seminar, Chief Administrative Law Judges Conference, Charleston, SC (11/6/97).
- "*Hedgepath* and the Rules of Professional Conduct: Who Can We (and They) Talk to Now?" C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/15/97).
- "Ways to Get in Trouble: Old and New," C.L.E. Ethics Seminar, University of South Carolina School of Law (12/7/96).
- "Ethics for the Modern Lawyer on the Information Superhighway," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/9/96).

- "Mobile Lawyers and Mobile Clients," C.L.E. Ethics Seminar, University of South Carolina School of Law (12/95).
- "Constitutional Restrictions on Regulation of Lawyer Advertising," House of Delegates, S.C. Bar (1/21/94).
- "Ethical Issues Facing Law Firms," C.L.E. Seminar, University of South Carolina School of Law (1/9/93).
- "Ethical Issues in Office Practice," C.L.E. Seminar, University of South Carolina School of Law (12/5/92).
- "Lawyer Television Advertising: A Video Presentation," U.S.C. Law School Faculty Ethics C.L.E. Seminar (10/22/92).
- "The Ethical Dilemma of Corporate Counsel," C.L.E. Seminar, Farm Credit Sys. General Counsels Conference (10/7/92).
- "Lawyer Advertising - The Great Debate," Moderator, C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/14/92).
- "Civil Litigation," in Ethical Issues in Litigation, C.L.E. Seminar, University of South Carolina School of Law (1/11/92).
- "Shareholders' Rights in Disputes with a Corporation and those in Control," in Planning for Business Corporations: A Guide for General Practitioners, C.L.E. Seminar (1/3/92).
- "Ethical Issues in Civil Litigation," in Legal Ethics and Professional Responsibility, a Video/C.L.E. Seminar (12/6/91).
- "A Walk Through the New South Carolina Rules of Professional Conduct," C.L.E., U.S.C. School of Law (1/12/91).
- "Corporate Litigation and Liabilities of Corporations, Directors, Officers, and Shareholders after the 1988 Revision of the South Carolina Business Corporation Act," in Current Issues in Civil Litigation, a C.J.E. Seminar (4/14/89).
- "Fundamental Corporate Changes and Dissenters' Rights under the South Carolina Business Corporation Act of 1988," in The New South Carolina Corporation Act, a Video/C.L.E. Seminar (12/16/88).

University and Community Service

- Parliamentarian, University of South Carolina School of Law Faculty, 2004-2007, 2008-2014.
- Member, Dean Review Committee for the Dean of the College of Criminal Justice, 2003.
- Member, Faculty Manual Revision Committee, Faculty Senate, University of South Carolina, 1998-1999.
- Parliamentarian, University of South Carolina Faculty, 1997-2004.
- Member, Steering Committee, University of South Carolina Faculty Senate, 1997-2004.
- Faculty Senator, University of South Carolina, 1983-1985, 1995-1998, 2000-2003.
- Faculty Advisor, ABA National Appellate Advocacy Competition Team, University of South Carolina School of Law, 1995-1996.
- Faculty Advisor, ABA National Appellate Advocacy Competition Team, University of South Carolina School of Law, 1982-1983 (winner Regional Competition).
- Faculty Advisor, National Moot Court Competition Team, University of South Carolina School of Law, 1980-1981.
- Committee Chairman, BSA Troop 788, St. David's Episcopal Church, Columbia, SC 1996-2003.
- Scoutmaster & Founder, BSA Troop 788, St. David's Episcopal Church, Columbia, SC 1992-1996.
- Assistant Scoutmaster, Committee Chairman, Committee Member, BSA Troop 388, Windsor United Methodist Church, Columbia, SC 1986-1992.
- Junior Warden, Vestry, St. David's Episcopal Church, Columbia, SC 1984-1987.
- Chorister, Good Shepherd Episcopal Church, Columbia, SC 1999-2004.
- Chorister, St. David's Episcopal Church, Columbia, SC 1984-1998.
- Chairman, Christian Education Committee, St. Michael and All Angels Episcopal Church, Columbia, SC 1981-1983.
- President, Richland Northeast High School Parents, Teachers, Students Organization, Columbia, SC 1992-1997.
- Member, Richland School District Two Strategic Planning Committee, Columbia, SC 1995-96.
- Member, Richland School District Two New High School (Ridge View) Planning Committee, Columbia, SC 1993-1994.

The undersigned, Nathan M. Crystal, provides the following expert affidavit under oath on behalf of the plaintiff, Amy Kovach.

1. My qualifications to give expert testimony include the following: I am Class of 1969 Professor of Professional Responsibility and Contract Law Emeritus at the University of South Carolina School of Law. I have taught professional responsibility and related subjects for almost 40 years. I am the author or coauthor of three books on Professional Responsibility and Legal Ethics, along with numerous articles in this field. One of my books is THE ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT (2013 ed.) (with Dean Robert Wilcox), a comprehensive treatment of professional ethics in this state. I write a bimonthly column on legal ethics for the *South Carolina Lawyer* entitled "Ethics Watch." I was a member of the South Carolina Bar's Ethics Advisory Committee for more than 15 years and have authored a number of opinions that were adopted by the Committee on issues of legal ethics. I was appointed by the President of the South Carolina Bar as chair of the committee from 2002-2003. I also represented the South Carolina Bar in its petition to the Supreme Court in 1990 to adopt the South Carolina Rules of Professional Conduct. I have delivered more than 100 speeches, presentations, and continuing legal education programs to law firms, bar organizations, and other groups, both in South Carolina and nationally. I have appeared as an expert witness by way of testimony, deposition, or affidavit in more than 100 cases involving questions of professional responsibility and legal ethics. I have served as an ethics consultant to and expert witness for lawyers and law firms in South Carolina and nationally for more than 40 years. I am one of the founding members of Crystal & Giannoni-Crystal, LLC, a law firm with offices in Charleston, New York City, and Washington, DC. I serve as a member of the New York City Bar Ethics Advisory Committee. In 2014 I was recognized by the *South Carolina Lawyers Weekly* for one

of its "Leadership in Law" awards. I was recently selected by my peers for inclusion in *The Best Lawyers in America*© 2015 in the fields of Ethics and Professional Responsibility Law.

With regard to the specific issue of prosecutorial conduct involved in this case, I have written about, advised, and counseled prosecutors about their professional conduct. I have served as a reporter for a committee of the South Carolina Law Institute analyzing and making recommendations regarding the South Carolina Ethics Act. I have advised clients about their ethical obligations under the South Carolina Ethics Act and have represented clients before the State Ethics Commission. My complete resume is available at www.cgcfirm.com.

2. In forming my opinion I have reviewed the following:

Ms. Kovach's motion to dismiss the Indictment filed against her, which contains a statement of facts regarding this matter, dated May 21, 2014;

Ms. Kovach's Supplemental Motion to Dismiss dated August 19, 2014;

Letter from Amy Kovach to Dr. Rodney Thompson dated March 7, 2013;

Letter from the Hon. A. Victor Rawl, Sr., to Dr. Kent Murray, Chairman of the Berkeley County School District Board of Education, dated May 2, 2014;

Opinion letter of Professor John P. Freeman, to Hon. A. Victor Rawl, Sr., dated April 22, 2014;

Letter from John W. McIntosh, Chief Deputy Attorney General, Kathryn Long Mahoney, Esq., Childs & Halligan, P.A., dated October 14, 2014, with former Attorney General opinions attached;

Letter from Kathryn Long Mahoney to John W. McIntosh, dated October 14, 2014.

3. In forming my opinions I have considered the South Carolina Rules of Professional Conduct, relevant South Carolina statutory provisions, case law, and legal literature.

I have also considered the Opinions of the South Carolina Attorney General attached to Mr. McIntosh's letter dated October 14, 2014. These authorities are the types of materials customarily relied on by experts in the field of lawyer ethics and professional responsibility in forming their opinions.

SUMMARY OF OPINION

4. In my opinion the Attorney General of South Carolina is interfering with Ms. Kovach's Right to Counsel under the Sixth and Fourteenth Amendments and with her statutory right to indemnification under S.C. Code §59-17-110. In my opinion such conduct violates Carolina Rule of Professional Conduct (SCRPC) 3.8 and its comments and amounts to conduct prejudicial to the administration of justice under SCRPC 8.4(e).

OPINION

5. SCRPC 3.8 and comment 1 to the rule provide as follows:

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;
(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. (emphasis added)

6. Rule 3.8 imposes several specific obligations on prosecutors and restricts prosecutors from engaging in certain conduct. As the comment indicates, however, the specific obligations in Rule 3.8 reflect a more general principle: Prosecutors have the obligation as ministers of justice to protect the procedural rights of criminal defendants.¹ One of the most important procedural rights of a criminal defendant is the Sixth and Fourteenth Amendments right to effective assistance of counsel.

7. The right to counsel has a number of dimensions, but one aspect of the concept is the defendant's right to be represented by counsel of her choosing. The state may not interfere with a defendant's right to be represented by counsel of her choosing without legitimate reason.

¹ Prosecutors also have substantive obligations: a prosecutor who knows or reasonably should know that a defendant is innocent of the crimes with which he is accused would have an obligation to take appropriate action.

The Supreme Court stated in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 625-626 (1989):

{T}he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.

Similarly, the Fourth Circuit in *United States v. Farmer*, 274 F.3d 800, 804 (4th Cir. 2001) stated: "[A defendant] possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice."

8. SCRPC 8.4(e) provides: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."

9. Prosecutors have been disciplined in South Carolina for improper interference with the defendant's right to counsel. See *In re Humphries*, 354 S.C. 567, 582 S.E.2d 728 (2003) (prosecutor received one year suspension for failing to ensure that police stopped video recording of defendant's conversation with his counsel and for failing to disclose existence of video tape to defense counsel).

10. South Carolina Code §59-17-110 provides as follows:

SECTION 59-17-110. Duty of school districts to defend actions or proceedings against their employees.

In the event that any employee of any school district in South Carolina is prosecuted in any action, civil or criminal, or special proceeding in the courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the school district, when requested in writing by any such public school employee, to appear and defend the action or proceeding in his behalf.

11. By letter dated October 14, 2014, John W. McIntosh, Chief Deputy Attorney General, wrote to Kathryn Long Mahoney, Esq., of the law firm of Childs & Halligan, P.A., which represents the Berkeley County School District, to object to the School Board's

authorization of payment of legal fees for Board officials who are the subject of an on-going criminal investigation. The letter stated:

Enclosed are prior opinions of this Office which conclude that a school district may not expend public funds to pay a school board member's or an employee's expenses of representation in criminal proceedings. These opinions (enclosed) conclude that such expenditures represent the use of public funds for a private purpose in violation of the South Carolina Constitution.

We would suggest that you carefully review these opinions and the legal authorities referenced therein. This Office is reviewing the possibility of legal action to recover the public funds expended for this purpose. Please advise as to the legal basis for such expenditures. It is difficult to understand how the Board concluded that these officials acted in good faith when the criminal investigation remains ongoing. (emphasis added).

12. Mr. McIntosh's letter invites the School Board to "carefully review these opinions and the legal authorities referenced therein" and to advise of the "legal basis for such expenditures." The opinions and Mr. McIntosh's letter appear to be based on two propositions. First, a school board's payment of the legal fees of officials who are under criminal investigation or indictment represents "the use of public funds for a private purpose in violation of the South Carolina Constitution." Second, an official who is under criminal investigation was not acting in good faith.

13. Professor Freeman has already concluded that the Attorney General's interpretation of §59-17-110 is "obviously and egregiously wrong because it contradicts the plain language" of the statute. I agree with Professor Freeman but add the following reasons to support his conclusion.

14. First, the statute does not contain an exception or any reference to the expenditure of public funds for private purpose. The Attorney General's reference to this concept comes from the South Carolina Constitution. In essence, therefore, the Attorney General is claiming that the statute is unconstitutional because it authorizes the expenditure of public funds for a

private purpose, namely the defense of a criminal proceeding against an school employee. The position of the Attorney General violates a well-established body of case law holding that statutes are presumed to be constitutional and will not be declared unconstitutional unless that conclusion is clear and beyond reasonable doubt. See *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014), where the Court stated:

This Court begins with a presumption of constitutionality. *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) ("This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid."). "[A] legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt." *Id.* at 570, 549 S.E.2d at 597.

15. Second, the South Carolina Legislature enacted §59-17-110. The Legislature is aware of the requirements of the South Carolina Constitution. Its enactment shows that the Legislature found a public purpose in authorizing school districts to pay the legal fees of employees who are subject to civil or criminal proceedings for actions taken in good faith in the scope of their employment. Thus, the Attorney General is improperly attempting to substitute its judgment of what constitutes a public purpose for that of the Legislature. Moreover, an obvious public purpose for the statute exists. Public school employees are at risk of being sued or even prosecuted because they often deal with matters that range from ones that are individual and personally sensitive to those that are widespread and politically charged. If school employees must defend themselves in litigation out of their personal funds, school districts will find it difficult to attract highly qualified individuals. It should be noted that the statute is not a general indemnification statute for all public employees; the Legislature has carefully tailored the statute to apply only to public school employees who are acting in good faith in the scope of their employment.

16. Third, the opinions cited by Mr. McIntosh are themselves inconsistent in their analysis. The original opinion cited by the Attorney General's office dated February 15, 1985, dealt with payment of fees by county council for an outside attorney when the county attorney was unable to handle the matter due to a conflict of interest. The opinion stated that payment of fees in this situation was proper. The opinion did not deal with statutorily authorized fees. The opinion mentioned a "public purpose" limitation on payment of legal fees only in passing and even there the limitation was quite narrow in scope. The opinion stated that a governmental body may not use public funds to pay legal fees of private counsel "in matters in which it is not directly interested or which lie outside its corporate purpose." Opinion at page 4 (emphasis added).

17. The opinion dated September 14, 1995, states: "Express statutory authority is necessary for expenditure of funds in criminal proceedings . . ." Opinion at 2. In addition, one of the primary authorities discussed in that opinion is *Bowling v. Brown*, 469 A.2d. 869 (Md. Ct. App. 1984). In that case the court found that legal fees paid by a township for defending a criminal proceeding against one of its employees was improper because "the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment." (emphasis added). In Ms. Kovach's situation there is express statutory authority for the payment of her fees, so the opinion actually supports her position, not that of the Attorney General.

18. The Opinion of May 13, 1997, relies on the 1985 and 1995 opinions and cites again with approval *Bowling v. Brown*. As discussed in the previous two paragraphs, however, both of these opinions actually support payment of Mr. Kovach's fees pursuant to §59-17-110. In addition, the 1997 opinion cited a number of additional authorities in support of the opinion.

The leading authority cited in the opinion is *Wright v. City of Danville*, 675 N.E.2d 110 (Ill. 1996). In that case, however, former city commissioners sought indemnification from the city for their legal expenses after they were convicted of criminal violations. The court stated: "In conclusion, the city has neither the duty nor the authority to reimburse plaintiffs for legal fees incurred in the unsuccessful defense of criminal official misconduct and conflict of interest charges." *Id.* at 117. The court also held that the commissioners' fees were not reimbursable because they did not act within the scope of their employment. But even in this respect the decision favors Ms. Kovach. The court stated that an employee's conduct is not within the scope of his employment "if the employee's actions are different from the type of acts he is authorized to perform or were performed purely in his own interest." *Id.* at 118. In that case, unlike Ms. Kovach's situation, the conduct of the commissioners involved self-dealing. *Id.*

19. As described in his letter of May 2, Judge Rawl conducted an investigation lasting several months involving interviews with a number of individuals and review of more than 40 pounds of emails and other documents. He concluded that Ms. Kovach was acting within the scope of her employment in her activities with regard to the School Bond Referendum on November 6, 2012. Judge Rawl also concluded that Ms. Kovach was acting in "good faith" in connection with the bond referendum. In particular, he found "absolutely no personal or financial benefit to her in the documentation."

20. The Attorney General's attack on Ms. Kovach's right to payment of legal fees under §59-17-110 is particularly egregious in this case because the Attorney General is not simply giving an opinion to a governmental body. The Attorney General is the prosecuting attorney in this case. In other words, the Attorney General is attempting to cripple the defense by interfering with the defendant's ability to retain counsel of her choice. As Ms. Kovach states

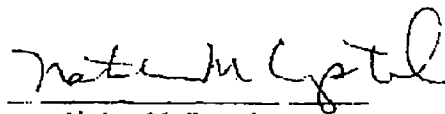
in her affidavit the effect of the Attorney General's letter of October 14 would be devastating to her legally and personally:

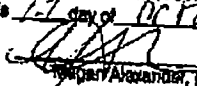
Based on Defendant's October 14 letter, I am now faced with the prospect of (1) having to pay for my own defense in the criminal matter, which likely would necessitate a change in counsel to someone less expensive and less experienced whom I also would have to pay to become educated about the case, (2) being sued by Defendant seeking to recover the fees already paid on my behalf, and having to pay for my defense in that matter myself, and (3) a judgment against me for the attorney fees already paid on my behalf. Affidavit of Amy Kovach ¶28.

21. I note also that Mr. McIntosh sent copies of his October 14 letter to the Berkeley County School Board. The letter contains a veiled threat to bring action against them personally for recovery of any fees that have been paid. Moreover, because Board members were represented by counsel, Mr. McIntosh's communication to them raises a question of possible violation of SCRPC 4.2

22. Based on the above analysis, in my opinion Ms. Kovach has a right to indemnification for her attorney fees under S.C. Code §59-17-110. In my opinion the Attorney General is improperly interfering with Ms. Kovak's statutory and constitutional right to counsel. This conduct violates SCRPC 3.8 and its comments and SCRPC 8.4(e), prohibiting conduct that is prejudicial to the administration of justice.

This 22 day of October, 2014.


Nathan M. Crystal

State of Columbia 88
Subscribed and sworn to before me, in my presence,
this 22 day of October, 2014

Notary Alexander, Notary Public, D.C.
My commission expires May 31, 2018.



Amanda Kramer

From: Chris and Amy Kovach <call.kovach@yahoo.com>
Sent: Friday, September 04, 2015 3:47 PM
To: Nancy Bloodgood
Cc: call.kovach@yahoo.com
Subject: Amy Kovach Affidavit
Attachments: Amy Affidavit for N Bloodgood.doc

Categories: Red Category

Nancy, per your instruction, I have completed a draft of the Affidavit requested of me. I have exhibit samples to bring to you on Monday as supporting evidence.

I have erred on the side of too much information, knowing that it is easier to cut out information than it is to add in when under a deadline. I hope this proves satisfactory.

I look forward to speaking with you or meeting with you at any time on Monday afternoon and/or Tuesday morning.

Best wishes for a restful weekend.

Amy

On Fri, 9/4/15, Nancy Bloodgood <nbloodgood@fosterfoster.com> wrote:

Subject: Fwd: Amy Kovach
To: "call.kovach@yahoo.com" <call.kovach@yahoo.com>
Date: Friday, September 4, 2015, 11:39 AM

Here it is - I'll have to work on this Monday as we have to hand in all of the materials Tuesday - the only thing I might want is some affidavits - can you call me?
Cell phone is 452-9342

Sent from my iPhone

Begin forwarded message:

From: Kathryn Long Mahoney <kmahoney@childs-halligan.net>

Date: September 4, 2015 at 11:30:26 AM EDT

To: Nancy Bloodgood <nbloodgood@fosterfoster.com>

Subject: Amy Kovach

Nancy, please see the
attached. Please confirm receipt. Thanks, Kathy

Kathryn Long Mahoney,
Esq.
Childs & Halligan,
P.A.
PO Box 11367
Columbia, SC
29211
(803) 254-4035

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above immediately.

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT

Field Code Changed

INDICTMENT #s:

~~2014-GS-08-0266~~
2014-GS-08-1403
2015-GS-08-1072
2015-GS-08-1073
2015-GS-08-1074

~~2014-GS-08-0266~~

~~2014-GS-08-01403~~

STATE OF SOUTH CAROLINA,

vs.

AFFIDAVIT OF AMY KOVACH

IN SUPPORT OF EMPLOYEE
GRIEVANCE AND APPEAL PROCESS
MOTIONS TO

AMY KOVACH,

Defendant.

CONSOLIDATE AND CHANGE VENUE

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PERSONALLY APPEARED before me Amy Kovach who, being duly sworn, states as follows:

1. I am the ~~Defendant~~ EMPLOYEE in this action, and I am submitting this Affidavit in support of my Motion to Change Venue and my Motion to Consolidate Grievance and Appeal of a Termination of Employment Letter received on September, 4, 2015, from Dr. Michael Turner.

2. ~~By way of background, I began working for the Berkeley County School District (the "BCSD") (BCSD) on July 11, 2011, on a contract basis. Q; and, on July 1, 2012, I was named Director of Communications in a full-time capacity. Before that I worked in marketing, sales and public relations in the private sector, including most recently as a Marketing Director for MeadWestvaco from June 2008 until April 2011. I graduated from Ohio University Summa Cum~~

Laude in 1993. I earned my MBA Magna Cum Laude from Kent State University in 2005.

3. I chose to work for the BCSD instead of remaining in the private sector because I wanted to work toward bettering the public education system in South Carolina. I grew up in a family of teachers, and I was raised to value education. My husband and I live on St. Thomas Island in Berkeley County with our three girls, ages 15, 10 and 7. I believe the most important thing we can give our children is a good education.

3. I have never taken anything from the school system, or personally profited from my position with the BCSD Berkeley County School District. I therefore was surprised in January 2013 to learn that the South Carolina Law Enforcement Division was investigating my involvement in a 2012 bond referendum to raise funds to renovate and build new schools in Berkeley County. I understand an attorney named Josh Whitley, an opponent of the referendum and son of the BCSD Associate Superintendent (Dr. Karen Whitley), complained to the Attorney General's office about my involvement and that of some of my colleagues, Dr. Rodney Thompson and Mr. Archie Franchini.

4. At all times and in all matters related to my employment as Director of Communications for Berkeley County School District, I acted at the direct orders and under the supervision of Dr. Rodney Thompson, Mr. Archie Franchini, and the elected officials of the Board of Education.

5. Dr. Thompson and Mr. Franchini knew all details of my work; were present with me at community meetings; were daily in my office (or I was requested to appear in their office) with directives for work to be created, revised or prepared at their direct request throughout the entire Referendum process. I have numerous emails and hand-written notes from both instructing me of

work expected regarding the referendum (See Exhibits).

6. At no time did either Dr. Thompson or Mr. Franchini ask me to not work, change my work, or restrict my work in any way. In fact, both Dr. Thompson and Mr. Franchini were highly complementary of the efforts to support the dual role assigned to me by them: Director of Communications and Liaison to the Yes4Schools Campaign.

7. Additionally, Dr. Thompson requested that I attend a Board Meeting Workshop on June 29, 2012, where he had invited Mr. Herman Gaither, retired and former superintendent of Beaufort County Schools and currently a consultant to school districts, hear Mr. Gaither give a presentation on how best to "win" a referendum campaign. All Board members, except Mr. Frank Wright, were present, as were other members of Dr. Thompson's staff including Dr. Karen Whitley, Dr. Glenda Levine, Dr. Susan Gehlmann, and Mr. Archie Franchini. Dr. Thompson specifically told the Board that I would be the district liaison to the volunteer campaign and that all questions or information could and should be funneled to me as needed. No one questioned or suggested a different scenario. (See Exhibit, Board Meeting Minutes, June 29-30, 2012).

8. I presented directly and transparently to the elected officials of the Board of Education on five separate occasions: DATES INSERT (NANCY HAS LETTER). I responded to numerous email and telephone requests from Board Members asking for information, data, prepared scripts and talking points, signage, and handouts. I was specifically asked to support Board Members at community meetings (Examples: Philip Obie and Shannon Lee at a meeting of members of the Berkeley County Republican Tea Party 911 group; Kathy Schwalbe at a meeting held at Goose Creek Primary School on October 4, 2012; Dr. Kent Murray and Philip Obie at a meeting held at Ibis Glade Community Center, October 11, 2012; Mr. Frank Wright at a meeting of the Cainhoy Community

held at a community church, October X, 2012 Get DATE FROM LIST with NANCY; Mr. Doug Cooper requested an updated Fact Sheet to use at meetings he attended; Mr. Philip Obie came to my home on Saturday, October 6, 2012, to collect campaign signs for his distribution in his district and had a brief conversation with my husband, Chris Kovach, in the driveway).

9. At no time, did any of the Board of Education elected officials ask me to refrain, stop, change, alter or otherwise not work to their expectations as required.

10. Further, at the Board of Education meeting on July 24, 2012, Mr. Philip Obie, upon having heard my public presentation regarding the work of the campaign committee specifically asked questions regarding campaign fundraising and "why are we waiting until September 5 to start the campaign." (see Exhibit, Board Meeting Minutes, July 24, 2012)

11. All legal questions regarding the campaign, its work and the process being used were made clear to District council, Childs & Halligan, representative Kathy Mahoney, Ken Childs, and John Reagle. In fact, Childs & Halligan, at the behest of Ken Childs donated to the campaign and directly contacted me about fundraising and how he and/or the firm could assist. At no time did the attorney's representing the district question, ask for clarity, or better define the work in progress as being unusual or abnormal in any way. All work presented to Dr. Thompson was presumably cleared with legal counsel on numerous occasions.- Telephone calls to and from legal counsel were of regular occurrence throughout this period of time.

12. Dr. Thompson requested that I coordinate communication with Dorchester District Two, which I did. Dorchester District Two was also campaigning a referendum called "Yes4Schools".

13. In mid-October 2012, I was alerted by Dr. Thompson that opposition to the campaign,

led by Mr. Josh Whitley, requested that all effort to cease and desist work on the campaign be immediately enacted. Mr. Whitley threatened legal action. Mr. Whitley met with Dr. Thompson and Mr. Brantley Thomas at Mr. Whitley's offices on Daniel Island, in full knowledge that Dr. Thompson and Mr. Thomas were represented by counsel, Childs & Halligan.

14. On November 4, 2012, Mr. Whitley demanded via local media, the Post and Courier, that an apology be provided by Dr. Thompson to the community for using district resources on the campaign. Again, he threatened legal action. Dr. Thompson, on the advice of legal counsel, did not offer requested apology. At no time was I ever approached or given the opportunity to know of the offer to apologize, the threat of legal action or the impending doom that was about to descend on me for not apologizing for doing my job as directed.

15. In November 2012 (on or about November 15), Dr. Thompson and I were asked to meet Kathy Mahoney and John Reagle in the Childs & Halligan offices regarding a FOIA request made by Mr. Whitley. We were asked to review all documents, which we did.

16. I specifically asked Kathy Mahoney if 1) I had done something wrong or inappropriate; 2) if I should be concerned or worried in any way regarding the FOIA or Mr. Whitley's actions; and, 3) if I should retain legal counsel. Ms. Mahoney replied that I had done nothing wrong; that I should not worry or be concerned; that Mr. Whitley was "family", would "get bored with this and move on", that "Mr. Whitley's actions were self-serving to further his own career"; and, that should I did not require independent counsel, however, if at any time that changed, she would let me know."

17. In February 2013, I was interviewed by SLED in the presence of attorney John Reagle, Childs and Halligan. At no time did Mr. Reagle intervene or stop the questioning, ask

clarifying questions, or further explain to me and my husband (who was in attendance) that I had acted abnormally or not in line with the District's wishes and leadership.

18. On March 5, 2013, my husband, Christopher Kovach, received a phone call from Dr. Thompson, telling us that he had been informed by Ms. Mahoney that we should be advised to seek legal counsel. Ms. Mahoney never directly advised me to seek counsel or had any further conversation with me from that point forward. At Dr. Thompson's suggestion, Chris called Attorney Joe Griffith. Mr. Griffith advised contacting Mr. Jerry Theos, which we did immediately. Mr. Theos met with us in his offices on March 6, 2013 and we retained his services.

4.19. On Friday, November 22, 2013, in Mr. Theos' office, and under his advisement with a proffer signed by me, I met with SLED a second time. On Monday, November 25, 2013, I provided to Mr. Theos all materials that SLED had requested of me.

5. I understand that Josh Whitley is a powerful member of the Republican Party in Berkeley County, and has served as Chairman of the Berkeley County Republican Party. He is an elected representative of the Berkeley County Council, District Two, which represents includes my neighborhood.

6.20. On February 11, 2014, I learned that I had been indicted (Indictment # 2014-GS-08-0266) for "use of public funds to influence an election." The indictment alleged that I used public funds to pay for a referendum campaign video and other campaign material, and performed various other acts in support of the referendum and the related "Yes4Schools" campaign.

In response to the indictment, the BCSD placed me on administrative leave with pay. I have been on administrative leave with pay since February 11, 2014, have limited contact with my professional community or colleagues, and have lost all ability to practice at my successful 22-year

career. I have not been in the District Office building, attended any BCSD meetings, or appeared publicly at any time during the course of this matter.

On September 2, 2015, Dr. Turner asked me to appear before him in his office in Moncks Corner, SC, to allegedly hear my information in order to make an informed decision regarding my reinstatement, resignation or termination from the Berkeley County School District. Dr. Turner duly listened as required by the policy process and then immediately asked for my resignation and/or choice to be terminated, effective the following day at 12:01 p.m.

7-21. On September 2, 2015, I retained Attorney Nancy Bloodgood to represent me in this employment matter as I believe Dr. Turner and the Berkeley County School District have violated its contractual obligations, time during the course of this matter.

22. After I moved to dismiss the first indictment, the Attorney General sought and, on September 9, 2014, obtained a second indictment (Indictment # 2014-GS-08-1403, this time accusing me of forging a backdated invoice related to the Yes4Schools campaign. The document was reviewed by two separate forensic analysts/scientists of international renown and have proven beyond a reasonable doubt using electromagnetic and highly technical laboratory equipment (the same used by the Federal Bureau of Investigation), that the document was indeed not forged, but created on the posted date. SLED and Attorney General's Office dismissed this charge against me.

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23. I was thereafter indicted on June 23, 2015 with Perjury (Indictment Number: 2015-GS-08-1072), Misconduct In Office (Indictment Number: 2015-GS-08-1073), and Forgery Under —\$10,000 (Indictment Number: 2015-GS-08-1074).

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24. SLED and the Attorney General's office did not provide

any documentation or evidence to my Criminal Defense Attorney, Jerry Theos, regarding the Perjury Charge. To date, I have no idea or information regarding why this charge was brought against me or what/when/where it was I allegedly perjured myself. It was subsequently dismissed by the Attorney General's office.

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25. Regarding the Misconduct in Office indictment (Indictment #2015-GS-08-1073), I was told that I violated the State of South Carolina Procurement Code and then was dishonest in a cover up scheme that the Attorney General's office calls "smurfing". This is factually untrue and the attached emails between myself, Brantley Thomas, Chief Financial Officer for the district, Marcie Abrahamson of the district, and Julie Hedrick, also of the district, prove that there was no "smurfing" and that the indictment charge was patently false. I followed Mr. Thomas's directions for the procurement process to the letter, documented the changes requested of me, and submitted all paperwork as requested. It is my belief that Mr. Thomas, as the district CFO, is the authority on procurement related matters and thus in following his instruction to the letter, I was in full compliance with his advice.

26. Regarding the indictment of Forgery (Indictment # 2015-GS-08-1074), I was presented with an allegedly doctored invoice on May 28, 2015. The document was not mine, nor was it created by me or ever in my possession. The document appeared two and half years after the start of SLED's investigation, having never before been in any file previously appropriated from BCSD by SLED. This claim is unfounded and no evidence has been delivered or provided by the Attorney General despite repeated attempts to receive discovery information

27. The aforementioned document is a poorly created copy, not an original, which makes

forensic analysis impossible. SLED and the Attorney General's Office could not provide information regarding its origin and could not provide detail to its creation. The Attorney General alleged that I snuck into the District Office building and planted the document in the procurement file. I have not been in the District Office; I have had no access to the building since being put on Administrative Leave; and, I have never had access to financial or procurement files.

28. On May 29, 2015, I undertook a polygraph test with a nationally renowned polygraph examiner, Mr. Frank Bloomingburg. I passed the polygraph test regarding the document. Mr. Bloomingburg shared the polygraph materials were shared with SLED and the Attorney General's office

29. This Indictment was dismissed by the Attorney General; however, at my hearing on August 28, 2015, the Attorney General submitted the allegedly doctored document as evidence of Misconduct in Office even though they knew they could not prove it was mine and in full knowledge that I could not rebut their argument. It was underhanded and inappropriate to agree to drop the charge and then use evidence therein under another charge.

On May 29, 2015, I undertook a polygraph test with a nationally renowned polygraph examiner, Mr. Frank Bloomingburg. I passed the polygraph test regarding the document.

8,30. It is of note that the allegedly forged and doctored document matches exactly the typeface identically of a typeface used by Mr. Josh Whitley in a letter to community members on September 25, 2012 on his letterhead. (See Exhibit).

9. I vehemently dispute deny that I have done anything wrong, much less committed the crimes of which I stood and accused. However,

31. I believe that the Attorney General's prosecution is politically motivated, and that I have become the target of retaliation by powerful members of the Republican party who that opposed the referendum to raise money for the Berkeley County Public Schools.

32. Further, it is my opinion that Dr. Karen Whitley, through her son, Mr. Josh Whitley, fabricated and/or created evidence against me.

33. On July 31, 2015, my hearing for the Motion to Disqualify the Attorney General and the motion to Change Venue, were heard in Berkeley County Court, under Judge Jeffrey Young. Judge Young admitted on record that he had not read or reviewed the motions or my affidavit therein. He denied both motions.

34. On August 24, 2015, I made the decision to negotiate a plea agreement with the Attorney General's office to bring this matter to a close. I do not believe under Judge Young's directives, the prosecution's politically motivated and retaliatory conduct, or in the Berkeley County Judicial System, I could receive a fair and just trial of my peers.

35. This decision came at great cost and much personal struggle, as I vehemently disagree with the charges or my position to be forced to plead guilty. In doing so, I saved the Berkeley County School District an additional \$200,000 in additional related legal fees.

36. Further, it is my belief that because of my action to plead, Mr. Archie Franchini will not be indicted or further investigated; and, that my colleagues at BCSD would not be put into a position of testifying for or against me in a grueling two week trial situation. Further, the Attorney General's position on the Board of Directors of Santee Cooper (a supporting contributor to the campaign), Mr. Whitley's numerous disgruntled relations inside of BCSD, and other radical Republican party members have sought to create chaos and disruption to BCSD operations, as well

as intentionally harm myself and colleagues for work we did as publicly outlined by the BCSD Board of Trustees and through our roles/responsibilities as outlined by Human Resources.

37. The investigation and indictments have been heavily reported in the press. By my count, ~~The Post & Courier alone has~~ local news outlets have published 18-32 reports ~~articles~~ on the subject. Most articles include a picture of me.

~~41. Articles have been biased and have included information that is not accurate or truthful.~~

~~42-38.~~ The publicity from all of this ~~is causing~~ has caused severe distress and damage to my family. I cannot shop or use services in Berkeley County without someone saying something to me. Strangers have approached me and said things like "I hope you go to jail," and "Your children should be taken from you."

~~43-39.~~ Other parents have told my husband and ~~me~~ that our children may not play with their children anymore. Another child at school told my now fifth ~~fourth~~ grade daughter "your mommy is going to jail." My daughter came home panicked and in tears, and it is now an ongoing issue how we can reduce her anxiety about this and keep her calm.

~~44. Most of the neighbors will not speak to us anymore.~~

~~45-40. Someone hacked into My LinkedIn account was hacked in to by someone who then and posted about the case as if it were mine who was posting. In response, I had to take~~ ook down my LinkedIn and Facebook accounts My personal social media resources have been hacked into.

~~46-41.~~ My high school teenager has things said ~~to her all the time by~~ to her by other students, and even teachers. She is now seeing a psychiatric therapist to help her assess and work through anxiety caused by this situation.

~~17-42. I have suffered a nervous breakdown, required psychiatric counseling and medical care for treatment of depression, anxiety, insomnia, and a host of stress-induced gastrointestinal issues, all caused by the indictments and the surrounding publicity.~~

~~18-43. I believed strongly that my case would that I will prevail if granted a fair trial with unbiased jurors. I do not believe I that possibility existed will receive such a trial in Berkeley County.~~

~~44. A trial located in Berkeley County will present disadvantages to achieving a fair trial by a jury of my peers. The Berkeley County jury pool may be comprised of people who could have voted for/against the referendum, have or have had children in the BCSD system, and who are tax payers in Berkeley County with a potentially biased perspective of school district issues. Further, a~~

~~19. jury pool in Berkeley County may consist of persons with a biased interest in the political, economic, or social life of Berkeley County.~~

~~20. A trial held in Charleston County will present the opportunity for a fairly selected involve a jury pool of peers people who did not vote for/against the referendum; who do not are much less likely to have a political, economic, or social claim interest in Berkeley County; who do not currently have children in the BCSD system; and who are not motivated or affected by the political and social media driven atmosphere in Berkeley County.~~

~~21. A jury pool in Berkeley County will likely pull from residents who may likely to work for one of the three largest county employers, all of which have some connection to facts of the case: (a1) Santee Cooper (who provided financial and employee resource support to the campaign); and, the Advisory Board of which includes as a member to whom Attorney General Alan Wilson is a member of the Board of Directors); (b2) Berkeley County School District (a clear conflict of~~

interest); and/or, (c3) Berkeley County Government (where the complaining witness represented by Mr. Josh Whitley, serves on County Council and also serves as chairman of the Berkeley County Republican Party).

22. — The SLED Agent assigned to this investigation, Detective Ryan Kelly, is a resident of Goose Creek, SC, located in Berkeley County. His children attend Goose Creek (BCSD) schools. During investigative interviews with Mr. Kelly, he made mention that he voted for the referendum and has friends, relatives and a "special interest" in the Berkeley County School District. This revelation makes him a biased and subjective investigator who has pursued indictments to prove a hypothesis of guilt, rather than investigating for facts to sort out the complex nature of the case.

23-45. Social media sites such as Berkeley County Republican Party Facebook page (Official Page of BCRP), Berkeley County Republican Party SC Facebook page, and Berkeley County Republican Party Public Group Facebook Page have posted defamatory information about me, including photos of me, on their sites. Phrases such as "....she gets hurt", "....get her for what she deserves", and "...put her in jail with other criminals" are routinely shared on these sites. Thus, social media's vast influence on society at large and a Berkeley County jury pool in particular. These sites, directed at the Berkeley County residents that will make up the Berkeley county jury pool, I believe may ~~will~~ would have impacted the ability to select an unbiased jury of peers in Berkeley County.

46. ~~Having~~ Although I cooperated fully and with transparency throughout the investigative process, it is my position I believe that the indictments are ~~were~~ based on ~~I have been~~ indicted based on incomplete information gathered to prove a hypothetical conclusion of guilt rather than the investigative outcome coming from a properly motivated and managed investigation. Both

~~indictments should be consolidated into one trial. If not for the first indictment, and perhaps in part because of my motion to dismiss the first indictment, I do not believe there would have been a second indictment. And though I do not believe the facts support the indictments, they do arise from the same set of facts.~~

~~Both indictments should be consolidated into one trial.~~

24. ~~;~~ but for the first indictment, there would not be a second indictment. Both indictments are intricately linked by facts supporting my claim of innocence in any wrong doing.

47. ~~Withstanding a two trials, as the lone employee of BCSD, including the substantive extended publicity, will was not going to be mentally or emotionally feasible for me or my family my family or me.~~ This ordeal has caused undue stress and strain on my 21-year marriage, on the lives of our children, and on my physical, emotional and mental well-being well being. ~~It is unfair to extend the prosecution beyond a single trial. To eradicate the scourge of conclude this process in one Charleston County trial would also will be more efficient and cost effective for the overwhelmed courtjudicial system, will alleviate unnecessary anguish to me and my family, wouldill consolidate costs associated with trial preparation and legal fees, and is more likely to provide me with the fair trial to which I am entitled under the United States Constitution~~

48. ~~I do not believe I ever acted inappropriately or dishonestly in any way. In fact, I was over zealous, to my detriment, in my desire to fully communicate and be transparent to all community members, the Board of Education, the employees of BCSD, and to my direct supervisors.~~

49. ~~At no time, has any member of the District, the Board of Education, or my supervisors publicly stood up for me or provided relief beyond what was legally required of them. As I worked~~

at their behest and at their explicit direction, I fully expected that all aforementioned parties will do the right thing by me to resolve this matter effectively and efficiently.

50. On September 2, 2015, Dr. Turner asked me to appear before him in his office in Moncks Corner, SC, to allegedly hear my information in order to make an informed decision regarding my reinstatement, resignation or termination from the Berkeley County School District. Dr. Turner duly listened as required by the policy process, took notes and then immediately asked for my resignation and/or choice to be terminated, effective the following day at 12:01 p.m. The process was a farce as there was no reason to bring me to Moncks Corner when the end result was already foregone and concluded.

51. On September 3, 2015, I retained Attorney Nancy Bloodgood to represent me in this employment matter as I believe Dr. Turner and the Berkeley County School District Board of Education have violated its contractual and moral obligations.

25. will result in an outcome that is fairly assessed and in compliance with my United States Constitutional Rights under the Fifth Amendment and Sixth Amendment.

26-52. I am over the age of twenty-one (21) years and am competent to testify to the matters stated herein. I have read the foregoing paragraphs, and all matters stated therein are correct and true and based on my personal knowledge and belief, except as to those matters stated on information and belief and as to those matters I believe them to be true.

FURTHER DEPONENT SAYETH NOT.

SWORN to before me this
____ day of ~~September~~ April, 2015

Amy Kovach

Notary Public for North Carolina
My commission expires:

Amanda Kramer

From: Nancy Bloodgood
Sent: Tuesday, September 22, 2015 1:45 PM
To: Amanda Kramer
Subject: summons

Can you do a summons and coversheet for Kovach? Complaint on z drive

Nancy Bloodgood, Partner
Foster Law Firm, LLC
895 Island Park Drive
Charleston, S.C. 29492
office: 843-972-0313
fax: 1-888-519-0934
nbloodgood@fosterfoster.com

Nancy Bloodgood

From: Nancy Bloodgood
Sent: Wednesday, September 23, 2015 8:31 AM
To: Chris and Amy Kovach
Subject: Re: Claim modifications

We'll need to get together and talk so I understand this - can we
Meet (with Chris) tomorrow morning?

Sent from my iPhone

On Sep 23, 2015, at 8:28 AM, Chris and Amy Kovach <call.kovach@yahoo.com> wrote:

Good morning, Nancy!

Chris and I have talked at length and we would like to have the following changes considered.

- 1) Chris would like all reference to our girls removed. He is concerned that the girls would become subject to depositions, which could further traumatize them.
- 2) add Laura Varn either to Civil Conspiracy claim or in a new claim for fraud.
- 3) add the following to the Civil Conspiracy claim: Terry Hardesty, Jim Merrill, Larry Grooms, Linda Corbin, Greg Adams, Jeff Reuer, and The Berkeley County Republican Party; additionally, add Brenda Rindge, in her individual capacity and as an employee of The Post and Courier.
- 4) paragraph 53; please remove footnote as second forensic report opinion has not been completed or provided. His verbal analysis has been received. The first forensic report opinion was provided to SLED and AG office, as well as Board of Education.
- 5) paragraph 59, amend to say that I never, at any time in my employment before or after administrative leave had access to financial files or procurement files.
- 6) Paragraph 73, add the Berkeley County Republican Party created and passed a resolution in 2013 expressly for the purpose of seeking criminal prosecution against me and was signed by its members, thereby making them included in the conspiracy charge.
- 7) Paragraph 78. Modify sentence to say "Plaintiff has never been dishonest in the performance of her job duties (or in any other capacity outside of her job duties) and has been fully transparent, honest and cooperative during the entire Referendum process and the criminal investigation."

Chris is available to talk today, if needed, at 440-463-2670. I am also available today, with the exception of 11:15-12:45.

Thank you, Amy

Sent from Yahoo Mail for iPhone

Amanda Kramer

From: Jerry Theos <jerry@uricchio.com>
Sent: Thursday, September 24, 2015 7:54 AM
To: Nancy Bloodgood
Subject: Re: phone call re Amy Kovach

How about 10:30 this morning ?

Sent from my iPad

On-Sep 24, 2015, at 7:40 AM, "Nancy Bloodgood" <nbloodgood@fosterfoster.com> wrote:

Jerry, what time are you available to talk late morning or early afternoon? Nancy

Nancy Bloodgood, Partner
Foster Law Firm, LLC
895 Island Park Drive
Charleston, S.C. 29492
office: 843-972-0313
fax: 1-888-519-0934
nbloodgood@fosterfoster.com

Amanda Kramer

From: Jerry Theos <jerry@uricchio.com>
Sent: Thursday, September 24, 2015 8:04 AM
To: Nancy Bloodgood
Subject: Re: phone call re Amy Kovach

OK

Sent from my iPad

On Sep 24, 2015, at 8:02 AM, "Nancy Bloodgood" <nbloodgood@fosterfoster.com> wrote:

That's good- I'll call you then. Thanks, N

Nancy Bloodgood, Partner
Foster Law Firm, LLC
895 Island Park Drive
Charleston, S.C. 29492
office: 843-972-0313
fax: 1-888-519-0934
nbloodgood@fosterfoster.com

From: Jerry Theos [<mailto:jerry@uricchio.com>]
Sent: Thursday, September 24, 2015 7:54 AM
To: Nancy Bloodgood
Subject: Re: phone call re Amy Kovach

How about 10:30 this morning ?

Sent from my iPad

On Sep 24, 2015, at 7:40 AM, "Nancy Bloodgood" <nbloodgood@fosterfoster.com> wrote:

Jerry, what time are you available to talk late morning or early afternoon? Nancy

Nancy Bloodgood, Partner
Foster Law Firm, LLC
895 Island Park Drive
Charleston, S.C. 29492
office: 843-972-0313
fax: 1-888-519-0934
nbloodgood@fosterfoster.com

Amanda Kramer

From: Janet Smith <janet@uricchio.com>
Sent: Thursday, September 24, 2015 11:31 AM
To: Nancy Bloodgood
Cc: Janet Smith
Subject: Kovach
Attachments: Misconduct in Office Indictment filed 06 23 15.pdf

Ms. Bloodgood:

Pursuant to Mr. Theos' instructions, please see attached.

Janet S. Smith
Legal Assistant to Jerry N. Theos
and Margaret E. Theos

URICCHIO, HOWE, KRELL, JACOBSON,
TOPOREK, THEOS & KEITH, P.A.
17 ½ Broad Street
Charleston, South Carolina 29401
(843) 723-7491
Fax: (843) 577-4179

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WITNESSES

S/A Ryan Kelly, SLED

ARREST WARRANT NUMBER

Direct Presentment

ACTION OF GRAND JURY

True Bill

[Signature]
Foreperson of Grand Jury
Date: 6-23-15

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015-GS-08-01073

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

JUNE 2015 TERM

THE STATE

v.

Amy Kovach
DEFENDANT

Indictment for
MISCONDUCT IN OFFICE

(Common Law)

QDR Code: 0819
Unclassified Misdemeanor

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and
plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

00923

FILED
JUN 23 2015
CLERK OF COURT
BERKELEY COUNTY, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

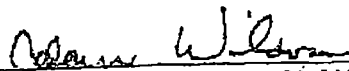
INDICTMENT

At a Court of General Sessions, convened on JUNE 23, 2015, the Grand Jurors of Berkeley County present upon their oath:

MISCONDUCT IN OFFICE

That Amy Kovach did, In Berkeley County, from on or about January 1, 2012 to on or about November 30, 2013, while serving as Director of Communications and Community Relations for the Berkeley County School District, did willfully and unlawfully commit misconduct in her public office, by acts and omissions of malfeasance, misfeasance, and nonfeasance in breach of her duties to the public including her duty of good faith, honesty, and accountability, to wit: Amy Kovach continuously used public resources and time to influence the outcome of a bond referendum and covered up her actions with dishonesty. This was done in violation of the Common Law of South Carolina.

Against the peace and dignity of the State, and contrary to the law in such case made and provided.



ALAN WILSON (scw)
ATTORNEY GENERAL

00924

Nancy Bloodgood

From: Nancy Bloodgood
Sent: Thursday, September 24, 2015 2:25 PM
To: Amanda Kramer
Subject: FW: berkeley CNTY GOP Resolution
Attachments: berkeley cnty GOP resolution0001.pdf

For file

Nancy Bloodgood, Partner
Foster Law Firm, LLC
895 Island Park Drive
Charleston, S.C. 29492
office: 843-972-0313
fax: 1-888-519-0934
nbloodgood@fosterfoster.com

-----Original Message-----

From: Chris and Amy Kovach [<mailto:call.kovach@yahoo.com>]
Sent: Thursday, September 24, 2015 2:25 PM
To: Nancy Bloodgood
Subject: Fwd: berkeley CNTY GOP Resolution

-- On Fri, 2/28/14, Amy Kovach <call.kovach@yahoo.com> wrote:

> From: Amy Kovach <call.kovach@yahoo.com>
> Subject: Fwd: berkeley CNTY GOP Resolution
> To: "Jerry Theos" <jerry@uricchio.com>, "Robert Martin"
> <Robert@uricchio.com>
> Date: Friday, February 28, 2014, 4:38 PM Jerry, disregard last email.
> Berkeley GOP resolution to AG is attached on this string.
>
> Amy KovachSent from my
> iPhone
> Begin forwarded
> message:
>
> From: Rodney Thompson <rthompson121@gmail.com>
> Date: February 28, 2014, 3:36:11 PM
> EST
> To: call.kovach@yahoo.com
> Subject: Fwd: berkeley CNTY GOP
> Resolution
>
>
>

> Sent
> from my iPad
> Begin forwarded
> message:
>
> From: Doug Cooper <cooperd@mc-mc.com>
> Date: May 3, 2013 12:11:56 PM EDT
> To: Kathy Mahoney <kmahoney@childs-halligan.net>, Rodney Thompson
> <rthompson121@gmail.com>, Kent Murray <rmurray1@comcast.net>, Kathy
> Schwalbe <kathy.schwalbe@gmail.com>
> Subject: Fwd: berkeley CNTY GOP
> Resolution
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> FYI
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> Doug Cooper
> Mc-Mc Coastal
> Sent from my iPad
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> Begin forwarded message:
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> From: "Phillip Obie " <pcoble@hotmail.com>
>
> Date: May 3, 2013, 12:01:53 PM EDT
>
> To: "Doug Cooper Cel " <cooperd@mc-mc.com>
>
> Subject: Fw: berkeley CNTY GOP Resolution
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>
> Doug- did not know if you have seen this- I just got it.
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>
> Will we as a Board get an update on all that is going
> on, I am completely out of the loop, or is this all just

> political noise?

>

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> Phillip

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>

> Sent via BlackBerry from T-Mobile

>

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>

> -----Original Message-----

>

> From: Barbara Bates <barbara_bates@comcast.net>

>

> Date: Fri, 3 May 2013 03:10:32

>

> To: <barbara_bates@comcast.net>

>

> Subject: FW: berkeley CNTY GOP Resolution - school

> district

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> From: Bill Bates [mailto:bill_bates@comcast.net]

>

>

> Sent: Thursday, May 02, 2013 10:40 PM

>

> To: bates, barbara

>

> Subject: berkeley CNTY GOP Resolution - school

> district

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>

>
> To Goose Creek 9-12,
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>
> I apologize, I should have had the resolution in front
> of me before talking specifics. Much thanks to Jeff Reuer
> for correcting me. The enclosed is a copy of the
> resolution. bb

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> PPlease Remember to Recycle

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RESOLUTION

A RESOLUTION ENCOURAGING ALAN WILSON, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, TO FULLY INVESTIGATE AND PROSECUTE ANY OFFENDERS OF SC STATE LAW IN THE BERKELEY COUNTY SCHOOL DISTRICT VOTE YES BOND REFERENDUM CAMPAIGN.

WHEREAS, ethics in government is and should be a cornerstone of the Republican Party; and

WHEREAS, SC Code 8-13-1346(A) states that "a person may not use or authorize the use of public funds, property, or time to influence the outcome of an election"; and

WHEREAS, SC Code 8-13-765 provides that "no person may use government personnel, equipment, materials, or an office building in an election campaign"; and

WHEREAS, the State Law Enforcement Division has confirmed that it is investigating personnel in the Berkeley County School District for violations of the above laws during the Vote Yes Bond Referendum Campaign; and

WHEREAS, the Attorney General is the Chief Prosecuting Officer for the State, and is responsible for the prosecution of all criminal matters within the South Carolina judicial system; and

WHEREAS, a governmental agency and its personnel should always abide by all laws, especially as stewards of our tax dollars; and

WHEREAS, our children deserve examples of law-abiding leaders and fiscal stewardship, especially in the school district.

NOW THEREFORE, BE IT RESOLVED, to the extent the State Law Enforcement Division finds any violation of the above statutes by any person in the Berkeley County School District, the Berkeley County Republican Party, by and through its Executive Committee, encourages the Honorable Alan Wilson, Attorney General of the State of South Carolina, to fully prosecute those offenders to the fullest extent of the law.

ADOPTED in a meeting duly assembled this 29TH day of April 2013.

BERKELEY COUNTY REPUBLICAN PARTY EXECUTIVE COMMITTEE

Terry Hardesty
Chairman

Zonda Powell
Secretary

Nancy Bloodgood

From: Nancy Bloodgood
Sent: Monday, September 28, 2015 2:41 PM
To: call.kovach@yahoo.com
Subject: Complaint
Attachments: Complaint.docx

Amy and Chris, Please review and then I'll send to Jerry

Nancy Bloodgood

From: Nancy Bloodgood
Sent: Monday, September 28, 2015 4:19 PM
To: Amanda Kramer
Subject: RE: Voice message from 8437373396 to 8439720313

yes

Nancy Bloodgood, Partner
Foster Law Firm, LLC
895 Island Park Drive
Charleston, S.C. 29492
office: 843-972-0313
fax: 1-888-519-0934
nbloodgood@fosterfoster.com

From: Amanda Kramer
Sent: Monday, September 28, 2015 2:11 PM
To: Nancy Bloodgood
Subject: FW: Voice message from 8437373396 to 8439720313

This vm is from Amy Kovach... have you been able to talk to her yet?
Amanda

From: tel: 8437373396 [<mailto:non-mail-user@voip.deltacom.net>]
Sent: Monday, September 28, 2015 1:08 PM
To: Foster Law Firm
Subject: Fwd: Voice message from 8437373396 to 8439720313

The attached message was recently left in your voicemail account for 8439720313. We are sending you this email because you have asked for your messages to be forwarded to this address.

The original message is still in your account.