County Council Testimony Oct 15, 2019

RE: GET-11(19) Tommy Russo V. County of Maui
GET-11(28) Employment of Special Counsel by County Council

Summitted by Nicholas James Drance
Representing The Maui Miracle.org

GET-11(19) Tommy Russo V. County of Maui

I appreciate Corporation Counsel's correspondence regarding resolution of this matter and trust that a right and fair settlement will be agreed upon and executed. Corporation Counsel has unfairly managed this case and so many others, for years. It should tell you something about the number of cases Maui County is involved in that it loses and continues to appeal even when reprimanded by the Judges.
We all know Tommy. We know that he is an honest man and a professional journalist. Some of you may not agree with his views but that has no bearing whatsoever, in settling this case which never should have been necessary in the first place.

For years, Corporation Counsel has sought to break this good man. It's shameful and an embarrassment to all of us. Please ensure that Tommy Russo receives the respect he deserves and that his tireless dedication toward serving the people of his island is honored and reflected in the settlement.

GET-11(28) Employment of Special Counsel by County Council

I ask each Council Member on this Committee to support the proposed Resolution introduced by Council Chair King..and do so unanimously for several reasons.

1. The integrity of the Legislative Authority granted yourselves as members of the Maui County Council must be assured. It must not be diminished by the kind of precedent this resolution proposes to address.
2. As indicated in my own complaint to Bradley Tamm at ODC, Corporation Counsel views their job as simply fighting any litigation the County is challenged with, typically with little or no effort made to reach a fair settlement. I hope the settlement terms discussed in Executive Session regarding GET-11(19) are offered in good faith and if so, I appreciate that.

In many cases, litigation is brought against the County because the County has refused to address an issue that has merit. Corporation Council has often fought the lower courts to the point where we now have two concurrent appeals before the highest courts of the state and

RECEIVED AT GET MEETING ON 10/15/19

the nation. Two cases simultaneously! **The Timeshare case is a great example; raising tax rates 40% in one year?** On top of that, while the current case was in the courts, Corporation Counsel sought to force the Plaintiff's into submission by going back 6 or more years and retroactively re-assessing their property values. On the advice of Corporation Council and I believe, the current Chair of the Budget Committee, the County then demanded the resulting back taxes be paid at once. Luckily the County held that $10,000,000 in escrow, probably because someone knew we'd lose...and we did. Corporation Council has been reprimanded by both Judges in both Timeshare cases. In this one, the judge referred to the County's actions as "weaponized taxation".

In the case referred to in this resolution, Sandy Baz and Scott Teruya pretty much begged the Judge for an affirmative ruling because the settlement in the hundreds of millions of dollars could be financially devasting to the County, including reducing our Bond Rating. The Judge said their pleading was *"not relevant to the case"* and *"It's not relevant that the County has a can of worms"*. How dare they and Corporation Counsel humiliate the people of Maui in this way. It's beyond unprofessional. It's adolescent, like a schoolboy begging his teacher for a passing grade so he avoids the consequences of a bad report card at home.

Judge Cahill in the lower court implored both sides to settle and Plaintiffs protested in utter frustration to the Judge that not only has the County refused to negotiate, they have refused to even respond. Council minutes from December 2, 2013 indicate terms were discussed in Executive Session but apparently, without result now 6 years later. Do we have an official total of how much we've spent in legal fees on this case?

There is a trend toward a combative stance that is the opposite of the Aloha Spirit Statue.

That's the first nightmare aspect of Corporation Counsels actions.

The second one is their disregard for the interests of the taxpayers of Maui.

The third is the audacity of self-righteous arrogance demonstrated by Corporation Counsel.

In effect, often times, Corporation Counsel doesn't even represent you, the Mayor or the interest of the people but rather, other Law Firms who make millions fighting our loosing battles. In these cases, their power usurps everyone's power. They are bleeding the taxpayers. The millions in legal fees we've paid could have bought acres of land for County sponsored affordable housing or fixed the Injection Well in Lahaina.

Speaking of self-righteous arrogance... in my lengthy conversation with the Department Director supplying you with numbers for the Injection Well case, his thinly disguised disdain for me personally, because I disagreed with him, was as offensive as his unprofessional disregard for objectivity. He reiterated several times, that **his facts and figures came "from his people" and that opposing points of view were irrelevant,** regardless of their source. He laughed when I mentioned the name of one of the **only credentialed Qualified Environmental Professionals on the island**. An engineer can qualify to become an environmental professional but an Engineering Degree by itself does not qualify them to speak authoritatively on this subject.

This individual laughed at a person with those credentials. Laughed at Bruce Anderson, Ph.D., Director of Health, Hawaii State Department of Health who wants this issue to simply go away because that's the best solution for all parties? What gives a person the right to contradict them?

What gives you the right?

Because people sit in a chair in this building? No. **You** give them the right....and you enable what is probably a good honest man to do it. How? By blindly following and not simply asking questions. **You have a professional obligation to ask questions!**

With regard to this dreadful ugly litigation with the Hawaii Wildlife fund, I say, you are working for the two individuals driving this case. Well Ohana, you don't work for them and either do I. Nor do the people of Maui or the people of the United States of America.

An **objective** analysis of the facts should not be considered outside the requirements of professional conduct by anyone, including everyone in this room. Anyone in this building who is incapable of putting subjective feelings aside in service to professional standards of conduct should not be allowed the honor of being a public servant of the people of Maui County.

www.TheMauiMiracle.org is dedicated to the long-term preservation of Maui's Cultural, Environmental and Economic Sustainability.

Office of Disciplinary Counsel

Complaint Form

[ODC form 1 (4/12/2019)]

Note: this complaint must be submitted on paper and signed, in ink, by the complainant. ODC does not accept on line submissions.

ODC use only:
Date Rcvd: _____
Case No.: _____
Clerk: _____

If you need more space, please attach additional pages. **Please only provide copies – not originals – of your documents.**

Date of this complaint: 10/08/2019

Your Name: Nicholas James Drance
Your Mailing Address: 2144 S. Kihei Rd. D204
City: Kihie, State: HI, Zip Code: 96753

Your telephone numbers:
preferred: 808-727-0224
alternate:

Who are you complaining against? (up to two attorneys if all in the same firm.)

	Attorney #1	*Attorney #2*
Attorney Name:	Moana Lutey	
Law firm name (if any):	Maui Corporation Council	
Firm or Office Address:	200 S. High St. 3rd Flr	
Tele. No.:	808-270-7740	

NOTE: If the attorneys work in separate firms, you must file separate complaints.

(*optional*) Size of the law firm complained about:

○ 1 attorney	◉ 2-10 attorneys	○ 11+ attorneys	○ Government Agency	○ Unknown

Have you or a member of your family complained about the attorney(s) previously?
○ Yes [approximate date of prior complaint:]
◉ No

Did you employ the attorney(s)?
○ Yes [date of hire: , amount paid: $]
◉ No [briefly explain your connection with this attorney(s): Maui Resident]

If your complaint is about a legal proceeding, provide:
Title of the case: Ocean Resort Timeshare Owners Assoc. v County of Maui
Name of court or agency: Hawaii State Supreme Court
Case number: SCAP 18-0000578
Approx. date filed: 04/05/2019
Your role in the suit: Defendant
[*e.g., Plaintiff, Defendant, other*]

What did you hire or want the attorney to do?

I want Corporation Counsel to make a good faith settlement negotiation based on the repeated pleas of Maui County executives to the lower court judge that they cannot afford to suffer the dire financial consequences of this case

Your complaint against this attorney: State **what the attorney did or failed to do** which is the basis of your complaint. State the facts as you understand them. Do not include opinions or arguments.

Plaintiff has more than once complained to the lower court judge that Maui County is unwilling to negotiate of even respond to their requests to do so.
Attachments of Court Minutes illustrate this.

☑ Additional pages? (Do not send original documents! Documents will not be returned.)

Identify any witness (provide name and contact info.) who might back up your complaint:

Witness 1:
Witness 2:
Witness 3:

Your signature: _____ (sign in ink - must be signed).

Date signed: _____

Mail to: Office of Disciplinary Counsel
Complaint Processing Dept.
201 Merchant Street, Suite 1600
Honolulu, Hawaii 96813

Bradley R. Tamm, Esq.
Chief Disciplinary Counsel
Office of Disciplinary Counsel
201 Merchant St. Suite 1600
Honolulu, HI 96813
RE: ODC 19-0493

October 8, 2019

RE: Ocean Resort Villas Vacation Owners Timeshare case -Hawaii Supreme Court 2018-scap-18-0000578

Aloha Mr. Tamm,

I have reduced my official complaint to a single issue. I do object to the items indicated in my original complaint but believe this is the best direction right now. Corporation Council has refused to make a good faith attempt at settlement in this case, particularly objectionable when the consequences are so high. It's not possible to overcome subjective bias under these circumstances.

Maui County Corporation Counsel (Defendant) retained McCorriston, Miller, Mukai and MacKinnon for representation. My complaint is not about them but rather Maui County Corporation Counsel's directives, currently represented by Moana Lutey, Esq. as a continuation of the actions demonstrated in Civil No: 13-1-0848(2) Ocean Resort Villas Vacation Owners Association vs. County of Maui.

Court minutes indicate that Peter T. Cahill, Second Circuit Judge implored the parties to settle, to no avail. In response, Plaintiff, indicated that he made repeated attempts at settlement and not only was the effort not accepted, it was not even been acknowledged by Maui County Corporation Counsel.

Other pages from court minutes, illustrate repeated pleas by Maui County executives for an affirmative finding, given the severity of the consequences they might suffer, done presumably, at the behest of Corporation Counsel. The absence of a bona-fide, in good faith attempt to settle is made even worse by this unprofessional plea for leniency. Further, the findings of the lower court appear to be accurate as far as I can tell. This case does not look good for us. I fear the potential financial consequences to Maui County. The people of Maui are now subjected to an inordinate amount of risk we would never take in our everyday lives.

Mahalo nui,

Nicholas James Drance
808-727-0224

www.TheMauiMiracle.org is dedicated to the Official Maui County Vision Statement and Core Principles.

Because you're not talking about just these two timeshares. Now we're talking -- as Mr. Bilberry said, now we got a third building out there, plus all the others out there. And that's a critical issue here.

And also, it also means that the parties can sit down and now think about and talk about resolving this before anything official is done and put on the record. And I understand, people believe only their side is right. But there's a pretty big risk here, probably several hundred million dollars. And the risks are huge.

So, all right. If you would prepare that. We will strike the Monday trial, then.

MS. CATALDO: Your Honor, may I just -- so I understand.

THE COURT: Yes.

MS. CATALDO: Thirty days, drafts of findings of fact conclusions of law to the Court and to counsel? And then --

THE COURT: Proposed. Both sides can submit simultaneous proposed findings of fact, conclusions of law.

Let's make it Friday, February 9th. So it's a little bit more than a month.

MR. BILBERRY: Your Honor, I'll just be submitting objections. I think we've made our position clear previously that it's not the prerogative of the Court to do findings of fact and conclusions of law on a dispositive motion under Rule

speedily terminate the litigation, I don't know why the appellate court wouldn't consider the additional language addressing the no just cause for delay and to avoid injustice or potential irreparable harm.

THE COURT: Sure. And let me tell you my thing from a practical side. And that's why the two declarations of -- let me just put this on here.

The declarations of Mr. Baz and Mr. Teruya, I'm not considering those for purpose of summary judgment because they came after the fact. And, frankly, I don't think they provide relevant information. It's not relevant that the County has a can of worms.

MR. BILBERRY: And, Your Honor, they were submitted for purposes of the certification.

THE COURT: And that's the way I read them and that's the way I'm accepting it, but they were put in the same thing. I want to make that clear.

My thing is this, though, Mr. Bilberry. We just talk this out. I enter this judgment, okay. I grant the appeal, because I think that's what the right thing to do is and the legal thing to do. And now there's a judgment.

Someone can take that judgment and go to the bonds people and go to this, and it's going to be in the newspaper -- I'm not saying this won't be in the newspaper. But this isn't final. People can say, look, it's on appeal, it's not a final

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Complaint about the conduct of Maui County Corporation Counsel Moana Lutey

Brought by:
Nicholas James Drance
The Maui Miracle.org
October 8, 2019

RE:

• Resolution 19-112 which refers to Recommendation Adoption of resolution to authorize settlement of Hawaii Wildlife Fund, et al. v. County of Maui, Civil 12-00198 SOM BMK U.S Supreme Court Case 18-260.

• Ocean resort Villas Vacation Owners Timeshare case -Hawaii Supreme Court 2018-scap-18-0000578

Maui County finds itself simultaneously, in litigation, on Appeal, to *both* the Supreme Court of the United States as well as the Supreme Court of the State of Hawaii. That rare scenario indicates an unwillingness of Corp. Counsel to negotiate settlement as well other issues explained below.
My assertion is that Maui County Corporation Council neither represents the interests of the County Council, the Mayor's office or the people of Maui County. I further assert that their actions intentionally occur for their own self-interests, based upon inconsistent and subjective criteria. As such, I believe Corporation Counsel violates professional standards as well as their duty to all entities.

Corporation Counsel exists within the context of Elected Public Servants and as such, is beholden to support the interests of the public (taxpayers) as well. That makes any violation of ethics or professional standards that much more egregious.

Submitted to:

Maui County Council's GET Committee for breach of representation by Corp Counsel, a dereliction of duty.

Board of Ethics - These issues warrant an investigation and a response

Office of Disciplinary Counsel - These issues relate to a violation of professional standards.

Complaints:

1. **The unwillingness of Corp. Counsel to settle or even negotiate, as standard operating procedure.**

   Maui County has a fiduciary responsibility to attempt good-faith negotiation. Voters have a right to expect that the County will do everything in its power to negotiate whether or not a fair settlement agreement is expected or anticipated. A refusal to negotiate goes against the responsibility Corp. Counsel has to taxpayers. It also violates State Statute * **[§5-7.5] "Aloha Spirit".** Corp. Counsels actions appear unprofessional.

2. **The opportunity to engage in meaningful Settlement negotiation seems to be ignored by Corporation Counsel.**

   A. In the current Injection Well litigation, Plaintiffs have made what appears to be a generous, in-good-faith Settlement offer.

      1. They have offered to forgo a $1,000,000 cost to the taxpayers.
      2. They ask only to be reimbursed for $100,000 in out of pocket expenses.
      3. They ask only that Maui County take steps to ameliorate the problem in a reasonable and practical way. ** see comment below

   B. In the current Timeshare Resort owner's litigation, Maui County in refuses to discuss settlement. Given the dire financial consequences the County may face, that is inappropriate.

      1. According to Court minutes Plaintiffs have literally complained, in obvious frustration to the Judge, that Maui County refuses to not only negotiate but even respond to their offers to do so.

      2. Judge Cahill has clearly and repeatedly urged both parties to settle.

      3. The financial risks are so great in this litigation, that both Sandy Baz and Mr. Teruya have both pleaded to the judge that the County faces possible dire financial consequences in the event of an adverse ruling. To humiliate themselves and the people of Maui by imploring the Judge to take pity on us rather than base his opinion on points of law is unprofessional.

3.Corporation Counsel appears to ignore the potential financial risk to taxpayers

Extreme financial risk is cited by Corp. Counsel in the Injection Well case but not in the Timeshare Resort Case where the risk is actually documented by the Judge. The injection Well case jeapodizes our tourism revenue. Corporation Council's position in both cases, is based on a subjective rationalization formulated to justify a stance rather than point of law. Great risk, largely disputed in expert testimony, is cited as fact in the Injection Well case.

The judge in the Timeshare suit actually documented great risk but that did not affect Corporation Counsels position. Opposite positions are taken regarding risk, *simultaneously.*

The negative national publicity that would result from a win in the Injection Well case would do irreparable harm to our tourist revenue base.

Tourists don't want to swim in contaminated water. Headlines in Trip Advisor, news media and the internet in general, could have devastating financial effects. Corporation Council is gambling with taxpayer money.

4.Financial risk to the County is deliberately exaggerated and misstated.

Much of Corp. Council's contentions that Plaintiff's requirements in the Injection Well case necessitate further costs and consequences are a matter of conjecture that has been refuted in expert testimony countless times. In addition, those consequences are extreme, unrealistic and wholly unprecedented worst-case scenarios on a scale never seen before. For example, if Hawaii should be fined $371,000,000 a day as stated, then the entire nation would face billions of dollars in fines, each day. It's impossible and numbers like these doesn't even make common sense. Corporation Counsel should be reprimanded for even presenting such fantasy scenarios. It's like saying that winning a case that allows the county to continue polluting our swimming and drinking water is beneficial to maintaining tourist revenue. Neither make sense.

5. **Corporation Counsel's position violates County Charter with regard to efficiency and improvement of service as well as abolishing activities that do not support County policy.** The Executive Branch is in violation of this section of the County Charter as well.

County Charter Section 3-9 Declaration of Policy.
It is declared to be the policy of the county to promote **economy, efficiency, and improved service** in the transaction of the public business in the **legislative** and executive branches of the county by:

Item 1. Limiting expenditures, the lowest amount consistent with the efficient performance of essential services, activities and functions.

Item 4. Abolishing services, **activities** and functions not necessary to the **efficient** conduct of government.

The continuation of litigation in both cases does not promote *economy* in terms of continued litigation expenses incurred in what anyone would consider risky litigation. Again, the Judge in the Timeshare case strenuously requested that both parties settle to avoid huge financial consequences. In the Injection Well case, near term economy (or lack thereof) was cited without regard to the long-term consequences related to unhealthy drinking and swimming water. The greatest financial risk in this case is the potentially huge loss in tourist revenue if we win, made worse by the publicity that comes with a Judgement by the Supreme Court of the United States. Economy is not limited to near or long term.

The basis of the Plaintiff's actions relates to *efficiency* in the Injection well suit. Current methods do not meet the standards of efficiency based on numerous facts brought to light through testimony. Current methods of wastewater are inefficient (lacking, not effective) based on reputable scientific evidence. To argue the point is tantamount to splitting hairs. The definition of "*essential*" and "*efficient*" may be considered arguable points. However, anything related to defining those words with regard to jeopardizing Maui County's primary revenue source (visitors enjoying safe beaches to swim in, snorkeling to view marine life) is an inarguable position. Maui County must protect our primary revenue source and Corporation Counsel is responsible to guide the County in accomplishing this, regardless of whether they side with the Mayor on the Council. The issue supersedes and conflict that may be present.

If there is significant question about the long- and short-term financial cost to the County, Government, including Corporation Council must recognize the possibility that expert testimony about technical issues of water contamination are correct. The consequences to our tourism revenue is ignored by an unwillingness to negotiate settlement as well. Corporation Counsel is giving risky, bad advice.

6. **Corporation Council contends that Resolution 19-112 requires the Mayor's approval.**

In this general area, the Charter specifically states only two areas where Council's actions **require the Mayors approval**; Ordinances and Laws, which are consistently distinguished from Resolutions in the Charter.

County Charter Article 2 Powers of the County. Section 2.2. Exercise of Powers. "All powers of the county shall be *carried into execution* as provided by this charter, or, *if the charter makes no provisions, as provided by ordinance or resolution of the county council."*

County Charter Article 4
What does and does not require the Mayor's signature and how Resolutions are distinguished from Ordinances and Bills with regard to that.

Section 4-3. Submission of Bills to the Mayor. Item 1. "Every bill which has passed the council shall be presented to the Mayor for mayor's approval. No mention is made of resolutions."

Power to establish the composition of Resolutions

Article 4, Section 4-4. Form of Bills, Ordinances and Resolutions.
"The council may by its own rules, provide for the form and content of bills, ordinances and resolutions".

County Council has the express right to create and approve Resolution 19-112

7. **Corporation Counsel violated Section 8 – 2.3 of the County Charter and professional standards required of all legal counsel.** Corporation Counsel is required to represent the County Council in an unbiased manner.

Charter Section 8-2.3,
Item 2 (Corporation Council shall" "Be the chief legal advisor and legal represent of the County of Maui; of the council, the mayor, all departments..."

Corporation Council must represent *both* council and mayor, without prejudice.
Item 3. "Represent the county *in all legal proceedings*"

Once the County Council enacts a resolution, Corporation Counsel must execute it.

Corporation Counsel did not represent County Council as required by Charter. No support for County Council was mentioned in any respect during the Council meeting. The memo submitted to Chair Mike Molina by Corporation Council indicated that the County Council did not have the authority to enact Resolution 19-112.

In addition, advising County Council <u>the day before</u> a final hearing of the Resolution after months of deliberation is either inept or unethical. It's unprofessional in any case. Did they just figure this out at the last minute? During the final hearing, both sides of the legal

issue at hand were not discussed by Corporation Council when required. These unprofessional actions appear to violate the fundamental requirements of the American Bar Association.

8. State Statute * [§5-7.5] is taken for granted and viewed as an esoteric nicety, but it is law.

This law requires good faith settlement negotiations and unbiased legal advice, neither of which are present.

*** [§5-7.5] "Aloha Spirit".** (a) "Aloha Spirit" is the coordination of mind and heart within each person. It brings each person to the self. Each person must think and emote good feelings to others. In the contemplation and presence of the life force, "Aloha", the following unuhi laula loa may be used:

"**A**kahai", meaning kindness to be expressed with tenderness;

"**L**okahi", meaning unity, to be expressed with harmony;

"**O**luolu", meaning agreeable, to be expressed with pleasantness;

"**H**aahaa", meaning humility, to be expressed with modesty;

"**A**honui", meaning patience, to be expressed with perseverance.

These are traits of character that express the charm, warmth and sincerity of Hawaii's people. It was the working philosophy of native Hawaiians and was presented as a gift to the people of Hawaii. "Aloha" is more than a word of greeting or farewell or a salutation. "Aloha" means mutual regard and affection and extends warmth in caring with no obligation in return. "Aloha" is the essence of relationships in which each person is important to every other person for collective existence. "Aloha" means to hear what is not said, to see what cannot be seen and to know the unknowable.

(b) In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people, the legislature, governor, lieutenant governor, executive officers of each department, the chief justice, associate justices, and judges of the appellate, circuit, and district courts may contemplate and reside with the life force and **give consideration to the "Aloha Spirit"**. [L 1986, c 202, §1]