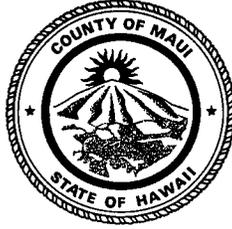


ALAN M. ARAKAWA  
Mayor



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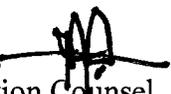
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October 28, 2015

**TO:** Donald S. Guzman, Chair,  
Committee of the Whole

**FROM:** Brian A. Bilberry,   
Deputy Corporation Counsel

**SUBJECT:** Communication with Office of Disciplinary Counsel regarding Potential for  
Conflicts of Interests

This memorandum addresses questions received by e-Mail to this office, dated 2015-10-15 and 2015-09-30 from the Office of Council Services regarding concurrent representation of the County of Maui and county officials named additionally as "individual" Defendants in litigation. As the case in issue was referred back to the Committee of the Whole by the Council on October 16, 2015, this Memorandum is respectfully addressed to you as Chair.

**I. POTENTIAL FOR CONCURRENT CONFLICTS OF INTERESTS**

On October 15, 2015, the following questions were received:

1) "When the head of a government legal department (who has unilateral hiring and firing authority) has been sued individually for punitive and other damages in a case in which the government has also been sued, is the legal department ethically prohibited from representing the government, thus necessitating the employment of special counsel?"

2) "Alternatively, if the legal department is not precluded from representing the government, must an ethics wall be created to screen the head of the department, who has been sued individually for punitive and other damages in the case, from employees in the department working on the case, as it pertains to the case?"

We were requested to contact the Office of Disciplinary Counsel (“ODC”) to seek an independent written legal opinion. On October 15, 2015, I contacted the ODC and requested a call back through the ODC voice messaging system. On October 16, 2015 a staff attorney with the ODC returned my call, at which time I read the questions presented to this office verbatim to the staff attorney, and discussed in more detail the circumstances of current pending litigation. The ODC staff attorney first confirmed that the ODC no longer issues formal opinions, written or otherwise. The staff attorney further advised that the ODC could only refer attorneys to the Hawai’i Rules of Professional Conduct.

In this instance, the rules referenced were primarily Rules 1.7(a), (b)(4) and (c) and 1.8(f). Rule 1.8(f) involves a lawyer's acceptance of compensation for the representation from someone other than the client, but has some relevance to issues raised and related to representation of the County of Maui by the Department of Corporation Counsel. Rule 1.8(f) is discussed further below.

This office previously concluded there would be a conflict of interest in the representation by the Department of Corporation Counsel of the County of Maui and its officials, concurrent with representation of those same officials to the extent they are identified “individually” as Defendants. Rule 1.7(a) of the Hawai’i Rules of Professional Conduct specifically provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

Where the head of a county government legal department has been sued “individually,” along with other county officials sued in an “individual” capacity, a concurrent conflict of interest exists as between the “individuals” exposed to punitive and/or other damages for conduct outside of their official duties, and the County and its officials. The underlying concern of the questions presented, as best we can determine, would be that those officials sued “individually,” including the head of the County's legal department, require independent legal counsel to protect against possible disclosure of confidential or privileged information, which the County and any one or more of its officials could potentially use adversely to those “individuals” in litigation.<sup>1</sup>

After consultation with the ODC staff attorney, it remains the opinion of myself and this office that the Department of the Corporation may represent the County of Maui and its officials in a suit where the head of the County of Maui’s legal department has concurrently been sued

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<sup>1</sup> We have been provided with a 1993 ODC opinion which notes that “‘wherever the claims asserted could subject the individual defendant to personal liability for which indemnification is unavailable,’ conflicts of interest would arise.” Citing Petition for Review of Opinion 552, 102 N.J. 194, 507 A.2d 223 (1986); Sherrod v. Berry, 589 F. Supp. 433 (N.D. Ill. 1984); and Death v. Salem, 111 A.D.2d 778, 490 N.Y.S.2d 526 (1985).

“individually” for punitive and other damages, *so long as Special Counsel is retained to represent the head of the legal department as purportedly sued in his or her “individual” capacity.* With this independent representation in place, any alleged potential or concurrent conflict precluding the Department of Corporation of Counsel from representing the County is removed.

As long as the retention of Special Counsel is in place for any and all “individually” sued Defendants, we reaffirm our conclusion as provided by HRPC Rule 1.7(a) that - **1)** the representation of the head of the County’s legal department in his official capacity by the Department of Corporation Counsel will not be directly adverse to another client (in this instance the County and/or any of the county officials as between themselves), and **2)** there is no significant risk that the representation of the head of the County’s legal department will be limited by or limit the Department of Corporation Counsel’s responsibilities to the County and its officials as between themselves. This is because **1)** the defenses raised by the County and its officials are in this instance consistent and unitary, and **2)** the risk of divergent damages exposure as between the County, its officials, and the “individually” sued Defendants, which potentially limits the Department of Corporation of Counsel's representation of the County and its officials, will be removed with the retention of Special Counsel for the “individually” sued Defendants.

As to Rule 1.7, the ODC staff attorney also corroborated that the keystone to representation where there may be potential or concurrent conflicts is *disclosure to, consultation with, and consent of the client(s).* See HRPC Rule 1.7(b)(4). Rule 1.7(c) specifically provides:

(c) When representation of multiple clients in a single matter is contemplated, the consultation shall include explanation of the implications of the common representations, including both the advantages and the risks involved.

As to the Department of Corporation Counsel’s representation of the County and its officials, as noted above, all conflicts in the current context are effectively removed with the retention of Special Counsel.

As to the representation by Special Counsel of multiple Defendants sued "individually," so long as the circumstances of the representation are disclosed to, explained, and consent given by all of the “individual” Defendants, Special Counsel may proceed with the representation. In sum, as long as Special Counsel obtains the informed consent of all “individual” Defendants, there is no legal or ethical prohibition against the representation of the multiple “individual” Defendants by Special Counsel. Once Special Counsel is in place for the “individually” identified Defendants, there is no longer any potential conflict prohibiting the Department of Corporation Counsel from representation of the County of Maui and its officials, and no necessity for the retention of additional Special Counsel to represent the County of Maui and any of its officials.<sup>2</sup>

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<sup>2</sup> I have also previously advised in this context that any unrelated concurrent representation by Special Counsel which may be adverse or potentially adverse to the County would likewise not preclude Special Counsel's representation of the individuals, or the Department of Corporation Counsel from representation of the County Defendants. In neither case is the representation of one client directly adverse to another client, nor are there

As to the second question above, we understand the question as - whether the head of the County legal department, sued both “officially” and “individually” in the circumstances described, must be screened off from the attorneys in the Department of Corporation Counsel representing the County and its officials (to include the head of the legal department). The ODC staff attorney confessed some perplexity as to the central and interesting paradox in the question, particularly as to how any such screening should or could apply to the person “individually” as distinguished from the same person in their “official” capacity. In sum, the Hawai’i Rules of Professional Conduct would prohibit such screening of the person, to the extent he or she is a client and represented by the Department of Corporation Counsel in his or her official capacity. HRPC Rule 1.4 [*Communication*] specifically provides, not exclusively:

(a) A lawyer shall:

- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information;

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

In conclusion, the duty of the lawyer to keep the client informed in all matters related to the representation, as with the attorney-client privilege, must be kept inviolate. The answer to the question no. 2 above, is therefore “no.”

As noted herein, the underlying concerns as we can best understand them are addressed by the retention of Special Counsel to represent the head of the legal department in his "individual" capacity, as well as any and all County officials to the extent they are concurrently sued “individually.” Since the officials would be represented by independent legal counsel in their “individual” capacity, there is no risk this office could inadvertently or intentionally become conflicted and compromised in its representation of the County and its officials, by becoming privy to disclosures of information solely pertinent to the representation of the “individuals” and their potential exposure to punitive damages.

## **II. Appointment of Special Counsel**

On September 30, 2015, the following question was received:

“Does the Council have the ability to dictate that special counsel will represent the County in the case?”

In the context above, we understand this question to ask whether the Maui County Council may itself conclude a legal conflict of interest exists that would prohibit representation

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any risks that the representation of one or more "individually" sued Defendants by Special Counsel and/or representation of the County and its officials by the Department of Corporation would be limited by responsibilities to another client.

by the Department of Corporation Counsel, constituting a real necessity for the employment of Special Counsel.

Article 3, Section 3-6 [*Powers of the Council*] of the Charter of the County of Maui does specifically authorize the Maui County Council:

6. [T]o retain or employ, by a vote two-thirds of its entire membership, special counsel for any special matter *presenting a real necessity* for such employment. Any such employment shall specify the compensation, if any, to be paid for said services. (Emphasis added).

While the Council clearly has the authority to decide on the financial obligation incurred by hiring of Special Counsel, the question remains - whether the Council may by itself make the legal determination whether there is a “special matter presenting a real necessity for such employment.” The Charter is silent as to whether the Council may itself make a legal determination as to whether a potential or concurrent conflict of interest presents a “real necessity,” thereby warranting authorization of Special Counsel.

On the other hand, Article 8, Chapter 2, Section 8-2.3 of the Charter provides, “[t]he corporation counsel shall: . . . 2. Be the chief legal advisor and legal representative of the County of Maui; of the council, the mayor, all departments, and all boards and commissions; and all officers and employees in matters relating to their official duties[;] 3. Represent the county in all legal proceedings[;], and 4. Perform such other duties and functions as may be incident to the department or required by law.”

On this basis, the Charter should be understood to authorize the Council to retain or employ special counsel for any matter which the Department of Corporation Counsel may determine presents a concurrent conflict, and which would preclude representation of the County and its officials by the Department of Corporation Counsel. We do not view the matter outlined above as such a case. Nor do we believe there would exist “a real necessity” for such Special Counsel for the County and its officials under these circumstances.

With the retention of Special Counsel for the “individually” sued Defendants, not only will there be no concurrent conflict precluding representation by this office for the reasons stated above, we can conceive of no personal interest which would limit the responsibilities of any attorney in this office from the representation of the County and its officials, to include the head of the County’s legal department, as the attorneys in this office are charged to do by Charter. I may confidently state this conclusion was not disputed or disagreed with during my discussions with the ODC.

### **III. The Attorney-Client Relationship**

Finally, while not submitted to this office in writing, one other potential issue has been raised which warrants attention under these circumstances – The maintenance of client confidences as between the Maui County Council, and County and its officials as

litigation Defendants in the circumstances described in question nos. 1 and 2, above. As noted above, HRPC Rule 1.8(f) speaks directly to circumstances where compensation of the lawyer is from a source other than the client, in this instance the County on behalf of its officials, specifically providing: “(f) A lawyer shall not accept compensation for representing a client from one other than client unless: (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.”

Rule 1.6 expresses the inviolable duty imposed on any lawyer, to maintain client confidentiality, and very carefully delineates the circumstances under which a lawyer may or shall disclose those privileged communications. Rule 1.4, quoted above, clearly also requires prompt disclosure of information related to the representation to the client(s).

Read *in pari materia* HRPC Rule 1.8 and 1.4 clearly contemplate the client as the individual on whose behalf the lawyer is receiving compensation for the representation. While the Maui County Council is the agent authorizing payment for services on behalf of the client County and its officials, since neither the Council or any of its individual members have been sued in the circumstances described, we would not view the Maui County Council or its individual members in the strict sense as the “client” contemplated by HRPC rules in this context.

Notwithstanding, Rule 1.6(a) does contemplate circumstances where “the disclosure [of confidential attorney-client information] is impliedly authorized in order to carry out the representation” of the client. Read *in pari materia* with Rule 1.8(f), Rule 1.6 would clearly contemplates that to the extent the authority rests with the Council by Charter and the Maui County Code for the funding of litigation defense and settlement authority on behalf of the County and its officials, the Council is by implication a body to whom disclosure of confidential information is authorized to the extent necessary to carry out the representation. That being said, there is no provision in the HRPC of which we are aware that protects communications made in furtherance of the representation from disclosure to the client, which disclosure is otherwise required by Rule 1.4 of the HRPC.

\* \* \* \* \*

We appreciate the opportunity to address your questions, provide our analysis, and hopefully shed light for all parties concerned on these complex aspects of legal practice. As is often the case with situations involving multiple representations, no blanket rule exists. Rather, these issues routinely require analysis on a case-by-case basis.

APPROVED FOR TRANSMITTAL

  
Edward Kushi