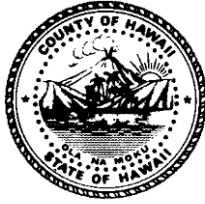


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January 7, 2010

Sent via email to KEoff@co.hawaii.hi.us; no hard copy will follow

Honorable Edmund W. K. Haitsuka
Chair, Hawai'i County Charter Commission
75-5706 Hanama Pl., Ste. 109
Kailua-Kona, HI 96740

Dear Chairman Haitsuka and Members of the Charter Commission:

**RE: CA-14 Legislative Auditor
Authority to "retain independent legal counsel"**

The Charter Commission is considering a proposed amendment to our Charter that would effectively remove the present language authorizing the Legislative Auditor to retain special counsel, in favor of a provision authorizing the Legislative Auditor to "retain independent legal counsel." The Office of the Corporation Counsel supports the present leadership of the Office of the Legislative Auditor in adopting this amendment, and respectfully recommends the Charter Commission make further amendments to the Charter to make clear the Legislative Auditor is not represented by the Corporation Counsel.

The current Charter provision

Article VI, Chapter 5, Section 6-5.3 of the Hawai'i County Charter 2000 (2008 Edition) (hereinafter "Charter") provides as follows:

The corporation counsel shall be the chief legal advisor and legal representative of all county agencies, the council and all officers and employees in matters related to their official powers and duties. The corporation counsel shall represent the county in all civil legal proceedings and shall perform all other services incident to the office as may be required by law. The corporation counsel shall, however, be prohibited from representing any elected officer in impeachment proceedings.

Article III, Section 3-18 of the Charter provides in pertinent part that "for purposes of carrying out any audit," the legislative auditor "may retain special

counsel, in the manner authorized by the council, to represent the auditor in implementing these powers.”

Article VI, Chapter 5, Section 6-5.5 of the Charter provides as follows:

The council may, by two-thirds vote of its entire membership, authorize the employment of special counsel for any special matter presenting a real necessity for such employment. Any such authorizing shall specify the compensation, if any, to be paid for said services.

Under the language of the Charter as presently written, the Legislative Auditor is rightfully granted the authority to hire special counsel where the criteria found in Section 6.5-5 of the Charter is met; where there is a real necessity for the employment, where the compensation is specified up front, and where the Council approves the hiring by a two-thirds vote of its entire membership.

What constitutes “a real necessity” for special counsel?

Historically there are two instances where there has been a demonstrated need for the hiring of special counsel: (1) Where specialized legal expertise is necessary, or (2) where there is a conflict of interest in the Corporation Counsel providing legal service.

With respect to the need for specialized legal expertise, in recent years this has been limited to the hiring of bond counsel. This is because bond financing is a *highly* specialized legal field; larger law firms dedicate attorneys who practice exclusively in this area of finance. For a relatively small law office like the Corporation Counsel, it is not practical or efficient to have an attorney dedicated to this area of practice (and not practice in other areas), nor could the County afford to keep such an attorney on staff.¹

With respect to conflicts of interest, we are guided by Rules 1.7 through 1.10 of the Hawai'i Rules of Professional Conduct (hereinafter “HRPC”). Generally speaking, attorneys are not allowed to represent a client “if the

¹ The most recent hiring of special counsel was in November 2009 where the County hired D. Scott MacKinnon of McCorriston Miller Mukai and MacKinnon at a (discounted) rate of \$350 per hour, to assist in bond matters related to the construction of the roadway related to the *Hokuli'a* development in Kona. Mr. MacKinnon was hired after the selection procedure found in Chapter 103D of the Hawai'i Revised Statutes was followed. The County is obliged to pay the reasonable and prevailing rate charged by private counsel. Since Mr. MacKinnon was hired to assist our attorneys (and not replace them), the County will utilize his services on an “as needed” basis, in the event legal issues related to the present bonds arise. Utilizing special counsel in this way also ensures the County will not be responsible for any malpractice committed by private counsel. The County could not afford to keep on staff an attorney dedicated to this type of work, since the typical hourly “rate” for corporation counsel attorneys is about \$50.

representation of that client will be directly adverse to another client,” or “if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interest.” (Rule 1.7, Hawai‘i Rules of Professional Conduct, with exceptions omitted throughout).

Often our attorneys easily recognize where conflicts arise or exist. However in more complex situations, our attorneys seek the assistance of the Hawai‘i Supreme Court’s Office of the Disciplinary Counsel.

What are some examples where there was a conflict of interest?

Perhaps the most widely reported case in our County where there was a need for the hiring of special counsel was the litigation in *William Silva v. County of Hawai‘i*, often referred to as the police promotions controversy. In that case, an attorney from the Office of the Corporation Counsel had previously represented former Police Chief Guy Paul in a legal matter *not* related to the promotions controversy.

After the *Silva* lawsuit was filed, the Hawai‘i Supreme Court’s Office of the Disciplinary Counsel² concluded there was a conflict of interest in the representation of *any* of the named defendants in the lawsuit, which included the County and many of its former and current officers. The Disciplinary Counsel concluded that pursuant to Rule 1.10 of the HRPC³, *all* lawyers in the Corporation Counsel’s office were disqualified from providing legal service in this case. The reason for this disqualification was that former Chief Paul was released from liability by the plaintiffs, and effectively became a plaintiff witness whose interests were inconsistent with those of the defendants, including the County.

The total special counsel fees paid by the County in that case exceeded \$4 million. The litigation of the case occurred prior to the entry of our present Corporation Counsel administration. However a review of the records and files of this case reveal our predecessors in office had no option but to hire special counsel due to the conflict of interest and position taken by the Disciplinary Counsel, and thereby acted appropriately.

More recently, the Corporation Counsel was required to pursue the hiring of special counsel when Councilwoman Brenda Ford filed suit against the Hawai‘i

² The Office of the Disciplinary Counsel governs attorney conduct in Hawai‘i.

³ Rule 1.10(a), HRPC provides that “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7, 1.8(c), 1.9 or 2.2.”

County Council, alleging a violation of Hawai'i's Sunshine Law.⁴ Prior to the filing of that lawsuit, Ms. Ford participated with her colleagues in attorney-client privileged discussions with Corporation Counsel lawyers in the related *West Hawai'i Today v. County Council of the County of Hawai'i* lawsuit. When these facts were revealed to the Disciplinary Counsel, they concluded a conflict of interest existed, since Ms. Ford was a "former client" as defined by Rule 1.9, HRPC. Based on this determination, and based on the unwillingness of the plaintiff to dismiss this lawsuit, we began the process of hiring special counsel.

Ms. Ford's lawsuit was ultimately dismissed. However the County incurred attorney fees and costs related to the Chapter 103D, Hawai'i Revised Statutes, as amended, procurement of professional services. At present there remains an unpaid and outstanding balance of \$1,200 owed the County for these fees and costs.

How much do we spend on special counsel today?

The recent years have seen a dramatic decrease in special counsel expense. The following represents special counsel payments made since fiscal year 1999-2000 (our present office administration took office in December 2000):

Fiscal Year	Special Counsel fees paid (in dollars)
1999-2000	1,586,746
2000-2001	468,863
2001-2002	340,679
2002-2003	116,888
2003-2004	59,583
2004-2005	27,443
2005-2006	81,569
2006-2007	12,039
2007-2008	2,283
2008-2009	51,449
2009-2010	1,445 YTD

This will change dramatically if the Charter Commission does not exempt the Corporation Counsel from representing the Legislative Auditor. Virtually every time the Legislative Auditor opts to "retain independent legal counsel," the Corporation Counsel will be in conflict and will be required to hire special counsel to represent any and all County departments, agencies, officers and employees who have a legal interest inconsistent with the Legislative Auditor. This is

⁴ Chapter 92, Hawai'i Revised Statutes, as amended.

because per the Hawai'i Rules of Professional Conduct, the Legislative Auditor would be considered a "former client" of the Corporation Counsel.

The Legislative Auditor is a "former client" as defined by Rule 1.9, Hawai'i Rules of Professional Conduct

Under the mandate of our Charter as presently written, the Corporation Counsel represents the Legislative Auditor. The aforementioned Article VI, Chapter 5, Section 6-5.3 of our Charter makes clear the Corporation Counsel is "the chief legal advisor and legal representative of all county agencies, the council and all officers and employees in matters related to their official powers and duties."

Under the Charter as presently written, the Legislative Auditor may "retain special counsel, in the manner authorized by the council, to represent the auditor in implementing" its powers.⁵ This presupposes there will be a "real necessity" for the hiring of special counsel. This would occur in situations where a private attorney with highly specialized expertise is needed, or where the Corporation Counsel has an existing conflict of interest. The request is presented to the Council, with the compensation to be paid special counsel specified up front. The Council may then by two-thirds vote of its entire membership approve the hiring if it deems it necessary.

The advent of the proposed language in CA-14 would further expand the authority of the Legislative Auditor to "retain independent legal counsel," without approval by the Council, and without any demonstration of a "real necessity."

Since the Charter as presently written requires the Corporation Counsel to represent the Legislative Auditor, there is no question the Legislative Auditor is a County client. If the Legislative Auditor for whatever reason opts under the newly proposed language to "retain independent legal counsel" (without a showing of a "real necessity"), the Legislative Auditor now becomes a "former client" as defined by Rule 1.9, HRPC. This rule mandates that "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."

By way of example, what this means is this:

1. The Legislative Auditor opts to "retain independent legal counsel."

⁵ Article III, Section 3-18, Hawai'i County Charter.

2. The Corporation Counsel clearly no longer represents the Legislative Auditor.
3. Moreover, the Corporation Counsel is prohibited from representing *any* party who has a position adverse to the Legislative Auditor.
4. This means the Corporation Counsel *would be required* to hire special counsel to represent *any and all* parties (County officers, employees, departments, agencies, boards/commissions, etc.) whose interests may be adverse to the Legislative Auditor.

This would mean extraordinary negative unintended financial consequences for the Corporation Counsel and the County. This would return the Corporation Counsel to the days of “runaway special counsel fees,” ultimately burdening our taxpayers.

The Corporation Counsel should not represent the Legislative Auditor

If the Charter Commission is committed to amend the Charter and authorize the Legislative Auditor to “retain independent legal counsel,” without any determination of a real necessity, it is requested the Charter be amended to make clear the Corporation Counsel does not represent the Legislative Auditor at all. This will then allow the Corporation Counsel to ethically represent all County officers, employees, departments, agencies, boards and commissions whose position may be legally adverse to the Legislative Auditor.

If this change is not made, there will be a tremendous financial burden placed on our taxpayers since the County will need to hire special counsel for not only the County but all officers and employees who have a position legally adverse to the Legislative Auditor. As history teaches us, this may result in the payment of millions of dollars in private legal fees and costs. All of this may be avoided by allowing the Legislative Auditor to have private (or separate) legal counsel apart from the Corporation Counsel, as is the desire of the present Legislative Auditor administration.

Conclusion

The Corporation Counsel supports the present leadership of the Office of the Legislative Auditor in their desire to “retain independent legal counsel” without restriction. We do not question their genuine desire for complete independence. However the Charter Commission should be aware of the unintended consequences of this requested action, and how this action financially impacts other County departments and the County’s finances.

Honorable Edmund W. K. Haitzuka
January 7, 2009
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Thank you for allowing us the opportunity to provide this input. Please contact me if you require further information or documentation.

Very truly yours,

LINCOLN S. T. ASHIDA
Corporation Counsel