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**2009-2010
HAWAI‘I COUNTY
CHARTER COMMISSION**

To: Chair Edmund Haitzuka and
Members of the Hawai‘i County Charter Commission

From: Levi K. Hookano, Commission Attorney

Date: February 11, 2010

Re: CA-14: Legislative Auditor and Independent Legal Counsel

Chair Haitzuka and Members of the Hawai‘i County Charter Commission,

This memo is in response to a request by the charter commission (“commission”) to examine CA-14, relating to the legislative auditor.

Issues Presented

1. Whether there are any conflicts with the Hawai‘i Rules of Professional Conduct (“HRPC”) which governs attorneys licensed in Hawai‘i and CA-14.
2. Whether any amendments will need to be made to CA-14 so that it is consistent with other charter provisions.

Brief Answer

1. There is likely no conflict with CA-14 and the HRPC because there is a “savings clause” in HRPC rule 1.9 relating to former clients. This allows a former client to consent to any conflict of interest where the attorney represents an adverse party in the same or substantially similar matter. Thus a conflict may be waived by a former client. This presupposes, however, that any attorney retained by the former client advises that it is prudent to waive such conflict.
2. Yes, it is recommended that amendments be made to CA-14. It is recommended that provisions be inserted to provide a check and balance for the authority and method of selection of any attorney hired by the legislative auditor. Such checks and balances can be found in section 6-5.5 of the charter as it relates to the hiring of special counsel. Also,

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the provisions in state law as it relates to the state auditor may provide some guidance to the commission on this matter.

Facts

During the January 21, 2010 meeting of the commission there was discussion of what “independent legal counsel” means and how it would impact the operation of the county and county finances. Corporation counsel, Lincoln Ashida, submitted testimony relating to CA-14 outlining his concern that there may be an issue with conflicts of interest, especially regarding former clients. Mr. Ashida also stated that under the current process, the legislative auditor may seek special counsel by demonstrating a real necessity and approval by the county council pursuant to charter section 6-5.5.¹

When this matter was debated during the meeting, legislative auditor Colleen Schrandt stated that the purpose of CA-14 “was for a very specific and limited situation,” and that “this request was only for a situation where possibly [the auditor] would be actually auditing the council or corporation counsel and it might be inappropriate to follow the procedures set out currently to request hiring of a special counsel.”² Deputy corporation counsel, Kathy Garson, also provided comment that in the HRPC, “a former client can consent that [corporation counsel] represent another person in the same or substantially related matter.”³

A request for research into the issue of conflicts and whether other portions of the charter or CA-14 may need to be amended to accomplish the goals of CA-14 was made.

Discussion

There is Likely No Conflict with the Hawai‘i Rules of Professional Conduct and CA-14 because a Former Client May Consent to a Conflict of Interest

In Mr. Ashida’s communication to the commission, he cites rule 1.9 of the HRPC, relating to conflicts of interest with a former client. Essentially, a lawyer may not represent another person in the same or substantially related matter where that person’s interests are materially adverse to the former client, unless the former client consents after consultation. Essentially, in the event the legislative auditor hires independent legal counsel, the corporation counsel may still represent an adverse party if the legislative auditor consents to the conflict of interest. The option to waive a conflict by a former client would not result in the need for corporation counsel to hire special counsel for all parties whose interests may be adverse to the legislative auditor.

The above scenario is based on the *assumption* that the legislative auditor waives the conflict and any attorney retained by the auditor advises that it is prudent to do so. During the course of the discussion of CA-14 at the January 21, 2010 meeting Mr. Ashida and Ms. Schrandt recognized that currently the corporation counsel and the legislative auditor enjoy a collegial

¹ See Draft Minutes of the Hawai‘i County Charter Commission, January 21, 2010.

² *Id.*

³ *Id.*

working relationship. This commission, however, must look beyond that and whether the implications of CA-14 will hold true beyond the current administration, current department heads, and current legislative auditor. This may be accomplished by clarifying what “independent legal counsel” means.

There must be Clarification of what “Independent Legal Counsel” Means and a Checks-and-Balance Provision should be Included with CA-14

The wording of CA-14 must be clarified because it simply states that the legislative auditor has the “authority to retain independent legal counsel.” It is unclear whether this creates a permanent legal position to represent the legislative auditor on a full time basis or whether this is meant to be an attorney hired on a temporary basis. If CA-14 is interpreted in the former manner, then the charter must also be amended to exempt corporation counsel from representing the legislative auditor. During the discussion at the January meeting, it appears clear that this was not meant to be the interpretation of this proposed amendment.

Much of the discussion focused on the interpretation that “independent legal counsel” is meant to be a method for the auditor to hire an attorney without having to go to the county council for approval in the same manner other county entities must do so to hire “special counsel.”⁴ This would be an attorney hired on a temporary basis. Under this interpretation, a checks and balances provision should be included in CA-14.

Under the current charter, 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.”⁵ In the event that outside counsel is required, special counsel may be hired. When retained, special counsel essentially takes the place of or works in conjunction with the corporation counsel. In looking at the legislative history of section 6-5.5 of the charter, it was approved by the 1968 charter commission when county attorney Yoshito Tanaka explained that it is necessary where the county attorney has been disqualified or where specialized knowledge and skill are necessary.⁶ To hire special counsel, the county council has to authorize it by a two-thirds vote of its entire membership and it must be for a “real necessity.”⁷ These safeguards exist so that the client, the county, knows the scope of representation by special counsel and how much is going to be paid.

This type of checks and balances should be included in the legislative auditor’s authority to retain independent legal counsel. Under the current language, it is unclear the type of authority an attorney hired by the legislative auditor will have. For example, will this attorney have the authority to file a lawsuit on behalf of the legislative auditor; may this attorney appear before boards and commissions on behalf of the legislative auditor; or may this attorney negotiate on behalf of the legislative auditor during any proceedings? These are questions that

⁴ *See Id.*

⁵ Haw. County Charter, Section 6-5.3, (2008).

⁶ Minutes of Charter Commission, p. 24 (1967).

⁷ *Id.* at Section 6-5.5.

should be answered before any attorney is hired to act on behalf of the county or any of its agencies.

The State Auditor is Authorized to Hire an Attorney, who is Designated as a Deputy Attorney General, and this may Serve as a Model for the Legislative Auditor

For the commission's information, the state auditor is authorized to hire their own attorney. Hawai'i Revised Statutes ("HRS"), § 28-8.3(a), specifically states that "[n]o department of the State other than the attorney general may employ or retain any attorney, by contract or otherwise, for the purpose of representing the State or the department in any litigation, rendering legal counsel to the department, or drafting legal documents for the department." That section then continues with a number of exceptions to that provision, one of which permits the state auditor to retain an attorney on staff. That attorney, however, has the title of a deputy attorney general.⁸ This type of organization may provide a template for the legislative auditor if she feels that there are situations where she cannot go to corporation counsel for legal consultation and does not want to go through the process for special counsel. Any *temporary* attorney hired by the state auditor is specifically required by the HRS to comply with HRS § 103D, which is the state public procurement code.

Conclusion

Regarding conflicts of interest, the HRPC allows for consent by a former client. This presupposes, however, that relationships are completely amicable and any attorney retained by the former client advises their client to consent. This must be considered by the commission. Additionally, the language in CA-14 should be amended to be clear as to the scope of authority of any independent legal counsel retained by the legislative auditor so to avoid the potential conflicts and also to provide procedural safeguards in the method of selection of any attorney retained by the legislative auditor.

If you have any questions regarding this matter, please do not hesitate to contact me.



Levi K. Hookano
Commission Attorney

Cc: Karen Eoff, Commission Secretary
Lincoln Ashida, Corporation Counsel
Katherine Garson, Assistant Corporation Counsel
Colleen Schrandt, Legislative Auditor

⁸ Haw. Rev. Stat. § 28-8.3(c).