

CHARMAINE TAVARES  
Mayor



BRIAN T. MOTO  
Corporation Counsel

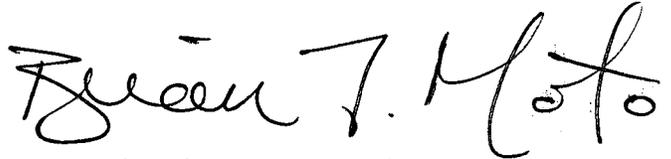
DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI  
200 SOUTH HIGH STREET  
WAILUKU, MAUI, HAWAII 96793

TELEPHONE: (808) 270-7741

FACSIMILE: (808) 270-7152

May 28, 2010

MEMO TO: Jo Anne Johnson  
Council Member

FROM: Brian T. Moto  
Corporation Counsel 

SUBJECT: Legal Counsel for the Council (PAF 02-075)

A. Introduction.

The purpose of this memorandum is to respond to your memorandum, dated April 15, 2010, requesting that a draft resolution entitled, "Proposing an Amendment to the Revised Charter of the County of Maui (1983), As Amended, Relating to Attorneys Within the Office of Council Services", be approved as to form and legality. A copy of the draft resolution is attached hereto as Exhibit "A".

The draft resolution proposes amendments to three sections of the Charter: (1) Section 3-6, pertaining to powers of Council; (2) Section 3-7, pertaining to the Office of Council Services; and (3) Section 8-2.2, pertaining to Corporation Counsel. However, shortly after the submission of your April 15, 2010 memorandum to our Department, the proposed amendment to Section 3-6 of the Charter was made the subject of a separate draft resolution, which this Department approved as to form and legality.<sup>1</sup> Therefore, this memorandum discusses legal issues associated with the proposed amendments to Sections 3-7 and 8-2.2 only.

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<sup>1</sup> Memorandum to Jo Anne Johnson, Council Member, from Brian T. Moto, Corporation Counsel (April 16, 2010) (transmitting resolution entitled, "Proposing an Amendment to the Revised Charter of the County of Maui (1983), as Amended, Relating to Representation of the Council in Legal Disputes with the Executive Branch").

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B. Conclusion.

For the reasons discussed herein, I cannot approve as to form and legality the draft resolution as it pertains to the proposed amendments to Sections 3-7 and 8-2.2 of the Charter (the "Charter amendments").

Although it is difficult to identify and analyze all legal implications of the Charter amendments, certain consequences and issues can be anticipated. This memorandum discusses some of the more important issues associated with the Charter amendments.

C. Current roles and responsibilities of legislative attorneys, the Office of Council Services, the director of council services, and Corporation Counsel under the Charter.

The Charter amendments raise many issues relating to the role, qualifications, and responsibilities of legislative attorneys, the Office of Council Services and its director, and Corporation Counsel. If adopted, the Charter amendments would fundamentally alter these roles and responsibilities.

To understand these issues, it is necessary to review the current roles and responsibilities of legislative attorneys, the Office of Council Services and its director, and the Corporation Counsel, under the Charter and Maui County Code.

1. Legislative attorneys.

The Charter currently makes no mention of the position of "legislative attorney". Chapter 2.08, Maui County Code, pertaining to the Office of Council Services, references the position of legislative attorney only once, in Section 2.08.060, pertaining to salaries and pay plan.

Section 2.08.040(B), Maui County Code, defines "staff" of the Office of Council Services to include legislative attorneys.<sup>2</sup> As staff, legislative attorneys "serve under the director of council services and ... [are] subject to a pay plan established by ordinance, as well as the general authority of the chair of the

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<sup>2</sup> § 2.08.040(B), Maui County Code, states:

A council services staff is established. "Staff" includes all personnel in the office of council services, excluding the director and legislative aides.

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council as chief administrative officer of the legislative branch."<sup>3</sup>

Based on information and belief, legislative attorneys have not, and do not currently, perform legal services that constitute the practice of law. Legislative attorneys have not, and do not currently: render formal legal opinions; approve written contracts as to form and legality; approve bills for ordinances as to form and legality; appear before courts of law or administrative agencies on behalf of a client; or prepare and file pleadings with courts of law or other adjudicatory bodies.

Despite their position titles, legislative attorneys have not in past, and do not currently, serve as "legal advisors to and legal representatives of the council and its members".<sup>4</sup> The Office of Council Services is not a law firm or law department as such terms are defined or used in the Hawaii Rules of Professional Conduct ("HRPC"), as adopted by the Supreme Court of Hawaii.<sup>5</sup>

Inasmuch as legislative attorneys do not advise or represent clients, or otherwise engage in the practice of law, legislative attorneys do not form attorney-client relationships with Council members and others. Accordingly, their interactions with County officers and employees are not governed by, or subject to, those Hawaii Rules of Professional Conduct generally applicable to attorney-client relationships.<sup>6</sup>

Further, communications between legislative attorneys and

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<sup>3</sup> § 2.08.050, Maui County Code.

<sup>4</sup> Exhibit "A", at 2.

<sup>5</sup> See HRPC, definition of "Firm" or "law firm" ("Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization."); see also HRPC Rule 1.10, comment [1] ("For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in ... the legal department of a corporation or other organization .... [2] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client.").

<sup>6</sup> See HRPC Rules 1.1 - 1.17.

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other County officers and employees are generally not protected from disclosure under the attorney-client privilege (except for communications with lawyers from the Department of the Corporation Counsel, or with special counsel retained by the County, that are made for the purpose of facilitating the rendition of professional legal services).<sup>7</sup> Documents and things prepared by legislative attorneys are generally not protected from discovery as attorney work product.<sup>8</sup>

2. The Office of Council Services and its director.

Section 3-7 of the Charter provides for an Office of Council Services, but does not specify its duties other than to authorize the Council to create such positions in the Office "as it deems necessary to assist it in the exercise of its legislative power."<sup>9</sup>

Section 2.08.040(A), Maui County Code, provides that the director of council services "shall be the administrative head of the office of council services and shall supervise all members of the staff to provide the necessary assistance of all members of the council in the performance of their legislative duties which includes stenographical, research and other assistance to the members of the council, individually and collectively, and any other duties that may be assigned to the director by the chairman of the council."

Neither the Charter nor the Maui County Code currently specify any qualifications for the position of director of council services, and there is no requirement that the director be an attorney licensed to practice and in good standing before the courts of Hawaii.<sup>10</sup>

3. Corporation Counsel.

The position and department of the Corporation Counsel are established by Charter.<sup>11</sup> Section 8-2.2 of the Charter requires

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<sup>7</sup> See Rule 503, Hawaii Rules of Evidence.

<sup>8</sup> See Rule 26(b)(4), Hawaii Rules of Civil Procedure.

<sup>9</sup> § 3-7, Charter.

<sup>10</sup> The 2009-2010 Directory of the Hawaii State Bar Association lists the current director of council services as an "inactive" member of the Hawaii bar.

<sup>11</sup> § 8-2.1, Charter.

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that the Corporation Counsel "be an attorney licensed to practice and in good standing before the Supreme Court of the State and ... have engaged in the practice of law for at least three years."

Section 8-2.3 of the Charter, pertaining to powers, duties, and functions of the Corporation Counsel, states:

The corporation counsel shall:

1. Appoint such deputy corporation counsel and necessary staff as shall be authorized by the council. Deputy corporation counsel shall be exempt from civil service and shall serve at the pleasure of the corporation counsel.
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 of all officers and employees in matters relating to their official duties.
3. Represent the county in all legal proceedings.
4. Perform such other duties and functions as may be incident to the department or required by law.

D. Issues and consequences associated with the Charter amendments.

This section of the memorandum discusses legal, ethical and practical issues and other matters raised by the Charter amendments.

1. Establishment of a permanent corps of attorneys within the legislative branch to provide legal advice and legal representation would be without precedent in Hawaii.

To our knowledge, no county in Hawaii has attorneys permanently employed within its legislative branch who are authorized and charged with serving "as legal advisors to and legal representatives of" a council and its members. Rather, all of the counties currently provide for a department of the corporation counsel or county attorney whose duties include serving as "chief legal advisor and legal representative" of the county council and county agencies in matters relating to their official powers and duties.<sup>12</sup> All four county charters currently provide that the

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<sup>12</sup> See § 5-203, Revised Charter of Honolulu (2000 ed., 2003 supp.); § 6-5.3, Charter of the County of Hawaii (2008 ed.); §

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corporation counsel (or county attorney in the case of Kauai) represent the county in legal proceedings.<sup>13</sup>

Under Section 26-7, Hawaii Revised Statutes, the Attorney General administers and renders "state legal services, including furnishing of written legal opinions to the governor, legislature, and such state departments and officers as the governor may direct", and "represent[s] the State in all civil actions in which the State is a party".

Pursuant to Chapter 23G, Hawaii Revised Statutes, the Office of the Legislative Reference Bureau supports the State Legislature by providing "comprehensive research and reference service on legislative problems for the legislature", and by conducting "impartial research, including legal research, as may be necessary for the enactment of substantive legislation, upon request by the legislature, legislative committees, or legislators, or on its own initiative."<sup>14</sup> The Office of the Legislative Reference Bureau also drafts, or aids in drafting, "bills, resolutions, memorials, and amendments thereto, including committee reports, for the legislature, legislative committees, and legislators when requested", and serves, upon request, "in an advisory capacity to the legislature and its committees on all matters within its competencies and responsibilities."<sup>15</sup> However, the director and staff of the Office of the Legislative Reference Bureau are not authorized to act as "legal advisors" or "legal representatives".

2. By designating legislative attorneys as legal advisors and legal representatives, the Charter amendments would conflict with existing Charter provisions regarding the role and responsibilities of the Corporation Counsel.

The Charter amendments would authorize and direct the attorneys within the Office of Council Services to serve as legal advisors and legal representatives of the Council and its members. However, the Charter amendments would not change other existing Charter provisions, such as Section 8-2.3(2), which states, in part, that the Corporation Counsel is to be the "chief legal advisor and legal representative of the County of Maui; of the

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8.04, Charter of the County of Kauai (2009 ed.).

<sup>13</sup> *Id.*

<sup>14</sup> § 23G-3(1), (2), Hawaii Revised Statutes.

<sup>15</sup> § 23G-3(7), (9), Hawaii Revised Statutes.

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council,..."

It is not clear whether, or how, the Charter amendments could be reconciled with existing Section 8-2.3(2) regarding the duties and functions of Corporation Counsel. Corporation Counsel and the legislative attorneys could not both be chief legal counsel for the Council at the same time, and the Charter amendments do not provide any guidance as to how duties and responsibilities would be allocated or assigned between the two sets of lawyers.

Under the Charter amendments, it is unclear what role or services would be expected of the Corporation Counsel by the Council. Corporation Counsel has traditionally performed duties such as: attending meetings of the Council and its committees; providing oral and written legal advice to the Council, Council members, and staff of the Office of Council Services; drafting, reviewing, and approving as to form and legality, bills for ordinances and certain resolutions; reviewing Council rules; and representing the Council and Council members in litigation. If legislative attorneys are designated as "legal advisors to and legal representatives of the council and its members", some or all of these duties could presumably be undertaken by the legislative attorneys, though the Charter amendments are silent as to who would decide such issues, and how and when.

3. The Charter amendments would make it difficult, if not impossible, to hold any particular officer or office within the County accountable for the overall provision of legal services and legal advice.

Under the Charter amendments, legislative attorneys would remain employees of the Office of Council Services. Legislative attorneys would not be appointed by the Corporation Counsel, and their assignments and work product would not be overseen by the Corporation Counsel. Corporation Counsel would have little or no input as to the timing, quality, or substance of legal services performed by legislative attorneys. Therefore, Corporation Counsel would not be accountable for their acts, opinions, or omissions, even though the Charter would still describe the Corporation Counsel as the County's "chief legal advisor and legal representative".

Further, legislative attorneys would not be accountable to any officers or agencies of the executive branch for the timing, quality, or substance of legal opinions or legal services performed on behalf of the Council and Council members. Indeed, legislative attorneys would not have attorney-client relationships with anyone other than the Council and Council members.

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4. It is unclear under the Charter amendments whether legislative attorneys would owe a duty of loyalty solely to the Council and Council members, or whether they would also owe a duty of loyalty to the County of Maui as a whole.

In general, a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.<sup>16</sup> However, when the client is a governmental organization:

defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult.... Although in some circumstances the client may be a specific agency, it is generally the government as a whole.<sup>17</sup>

A lawyer representing an organization may also represent any of its officers or other constituents, subject, however, to HRPC Rule 1.7, pertaining to conflict of interest.<sup>18</sup>

HRPC Rule 1.13(f) states, in part:

If a government lawyer knows that an officer, employee or other person associated with the government is engaged in action, intends to act or refuses to act in a matter related to the lawyer's representation that is a violation of a legal obligation to the government or the public, or a violation of law which reasonably might be imputed to the government, the lawyer shall proceed as is reasonably necessary **in the best interest of the government or the public.** (Emphasis added.)

The Charter recognizes that Corporation Counsel owes duties to the County government as a whole when it states: "The corporation counsel shall ... [b]e 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 of all officers and employees in matters relating to their official

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<sup>16</sup> HRPC Rule 1.13(a).

<sup>17</sup> HRPC Rule 1.13, comment [7].

<sup>18</sup> HRPC Rule 1.13(e).

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duties."<sup>19</sup> (Emphasis added.)

In contrast, the Charter amendments would describe legislative attorneys as "legal advisors to and legal representatives of the council and its members", but omit any reference to the interests of the County of Maui as a whole. It is unclear, therefore, whether legislative attorneys would owe their professional duties solely or primarily to the Council and Council members, or whether such duties would also be owed to the County of Maui as a whole.

Issues relating to a lawyer's duties are likely to arise anytime a lawyer has an organization for a client. A comment to HRPC Rule 1.13 states:

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.<sup>20</sup>

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<sup>19</sup> § 8-2.3(2), Charter; see 2001-2002 Maui County Charter Commission, Revised Final Report, at 9-10 ("The Commission proposes to clarify the role of the Corporation Counsel to recognize the broad responsibility of this office to represent the County in a variety of situations (1) by changing the present language of 8-2(3)(b) ... to a broader formulation.... This change would make it clear that the Corporation Counsel is responsible for representing the County of Maui in all respects, and does not solely represent the Mayor. With this change, it would be clear that the Corporation Counsel represents the Council and the boards and commissions as well as the executive branch of the County.").

<sup>20</sup> HRPC Rule 1.13, comment [8].

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5. The Charter amendments would likely result in situations in which legislative attorneys and Corporation Counsel issued opinions that varied from each other in scope, detail, facts, legal analysis, and conclusions.

If the Charter amendments were adopted, there would exist within the County of Maui two law departments or offices: Corporation Counsel and the legislative attorneys. Both would be charged with providing legal advice and legal representation when necessary and appropriate. As discussed above, neither law department would supervise or report to the other.

Under such an arrangement, it is very likely that the legislative attorneys and Corporation Counsel would, on occasion, provide oral and written legal advice that differed from the advice rendered by the other in scope, tone, detail, factual assumptions, legal analysis, and conclusions. Even in the best of circumstances, and even assuming a degree of cooperation between the law offices, differences in legal advice and legal opinions would be inevitable given that the offices would have different lawyers, supervisors, clients, sources of information, experience, levels of involvement, timing of involvement, and client goals and interests. It is not at all clear how such differences would be reconciled, if at all.

6. Legislative attorneys would likely confront, and have to resolve in some manner, issues relating to conflict of interest.

HRPC Rule 1.7, pertaining to conflict of interest, states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client 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 interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall

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include explanation of the implications of the common representation and the advantages and risks involved.

As "legal advisors" and "legal representatives" of the Council and Council members, legislative attorneys would be subject to HRPC Rule 1.7 and its provisions regarding conflict of interest. Such conflicts may arise given that the Council consists of nine elected officials whose individual goals and interests do not always coincide with each other or with the Council as a whole.

For example, a legislative attorney would have to decline representation of a Council member (or the Council) if the legislative attorney believed that such representation would be directly adverse to another Council member. A legislative attorney would also have to decline representation of a Council member (or the Council) where such representation would be materially limited by the attorney's responsibilities to another client or to a third person, or by the attorney's own interests. Even if the legislative attorney reasonably believed that such representation would not adversely affect client interests, the legislative attorney would have to inform clients of the possible conflict and obtain their consent to the representation.

Comment [1] to HRPC Rule 1.7 states that lawyers "should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest."

7. Legislative attorneys would likely confront, and have to resolve in some manner, issues relating to confidentiality of information.

HRPC Rule 1.6(a), pertaining to confidentiality of information, states, in part:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation....<sup>21</sup>

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<sup>21</sup> Paragraphs (b) and (c) of HRPC Rule 1.6 set forth exceptions to the rule of confidentiality. Paragraph (b) requires a lawyer to reveal information "which clearly establishes a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used, to the extent reasonably necessary

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As "legal advisors" and "legal representatives" of the Council and Council members, legislative attorneys would be subject to HRPC Rule 1.6(a) and its provisions regarding confidentiality of information. The rule of confidentiality is designed to facilitate "the full development of facts essential to proper representation of the client" and to encourage people "to seek early legal assistance."<sup>22</sup>

Comment [6] to HRPC Rule 1.6 states:

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

In serving as "legal advisors" and "legal representatives", legislative attorneys would have to determine how to maintain the confidentiality of information obtained in the course of representing clients and the extent to which, if any, such confidential information could be shared with other clients. Depending on the circumstances, observance of ethical obligations relating to the confidentiality of client information could require a legislative attorney to limit, decline, or withdraw from representation of a client.

8. Confidential communications between legislative attorneys, acting as "legal advisors" and "legal representatives", and Council members and the Council, would be protected from disclosure.

Confidential communications between legislative attorneys and Council members and the Council, for the purpose of facilitating the rendition of professional legal services, would generally be protected from disclosure in judicial and other proceedings under

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to rectify the consequences of such act, where the act has resulted in substantial injury to the financial interests or property of another". Among other things, paragraph (c) allows a lawyer to reveal information relating to representation of a client to the extent reasonably necessary "to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good."

<sup>22</sup> HRPC Rule 1.6, comment [2].

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the attorney-client privilege.<sup>23</sup>

Documents and things prepared by legislative attorneys in anticipation of litigation or for trial would generally be protected from discovery as attorney work product, unless the party seeking discovery had "substantial need of the materials in the preparation of the party's case" and the party "is unable without undue hardship to obtain the substantial equivalent of the materials by other means."<sup>24</sup> Even where discovery of such materials were allowed, a court would be required to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of the attorney concerning the litigation.<sup>25</sup>

Pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, when consulting with legislative attorneys on questions and issues pertaining to the Council's powers, duties, privileges, immunities, and liabilities, the Council would be able to convene in executive session.

Among the issues legislative attorneys, and their clients on the Council, would encounter is whether, and how, the attorney-client privilege could be waived. In particular, there could be occasions when one client desires to waive the privilege and another client does not.<sup>26</sup>

9. Under HRPC Rule 7.5, the name or designation of the Office of Council Services and its legislative attorneys would have to change.

The Office of Council Services would have to change its name, or undergo reorganization, or both, so that lawyers practicing law within the legislative branch would not violate HRPC Rule 7.5, pertaining to law firm names and letterheads. In summary, HRPC Rule 7.5 prohibits lawyers from practicing under a name that is misleading as to the identity, responsibility, or status of those

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<sup>23</sup> See Rule 503, Hawaii Rules of Evidence.

<sup>24</sup> See Rule 26(b)(4), Hawaii Rules of Civil Procedure.

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., Rule 503(d)(6), Hawaii Rules of Evidence ("There is no privilege under this rule:... As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients....").

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practicing thereunder.<sup>27</sup>

The current designation of the office ("Office of Council Services"), unlike designations such as "Department of the Corporation Counsel" or "Office of the County Attorney", would not clearly indicate to those within the County government, or to members of the public, that legislative attorneys were acting as "legal advisors to and legal representatives of the council and its members." Moreover, the current designation of the office would not clearly indicate the title of the actively registered Hawaii attorney in charge of the office's legal practice.<sup>28</sup>

Because the Office of Council Services has historically not performed services that constitute the practice of law, and given that legislative attorneys have heretofore not practiced as legal advisors and representatives, continued use of the designation "Office of Council Services" after adoption of the Charter amendments could be misleading, at least with regard to the responsibilities and role of the legislative attorneys employed therein.

10. Legislative attorneys acting as "legal advisors" and "legal representatives" must be supervised, if at all, by an attorney admitted to practice and in good standing in Hawaii; therefore, the Charter amendments would require changes in the role and qualifications of the director of council services.

The position of director of council services would have to be re-described, or qualifications would have to be established for the position, to ensure that the director of council services would not violate prohibitions against the unauthorized practice of law.

Under the Charter amendments, legislative attorneys would be authorized to serve as "legal advisors to and legal representatives of the council and its members, along with the department of the corporation counsel." However, the legislative attorneys would remain under the supervision and management of the director of council services, which is a position that, unlike the position of

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<sup>27</sup> See also HRPC Rule 7.5, comment [2] ("Where none of the names in a firm name reflects the name of an actively registered Hawai'i attorney, the firm must have at least one actively-registered Hawai'i attorney as a supervisor, manager, partner, or shareholder. This will assure proper supervision of and accountability for legal services furnished by the firm in Hawai'i.").

<sup>28</sup> *Id.*

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Corporation Counsel, need not be occupied by "an attorney licensed to practice and in good standing before the Supreme Court of the State".<sup>29</sup>

As manager of the Office of Council Services, the director of council services would presumably exercise oversight and control over subordinate legislative attorneys. This is likely to entail making decisions regarding the representation of clients and the substance and form of opinions and legal advice rendered. If the director of council services were not a member of the Hawaii bar in good standing, this could be deemed unauthorized practice of law under Hawaii statutes,<sup>30</sup> and implicate legislative attorneys in violations of HRPC Rule 5.5(b), which prohibits lawyers from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law".<sup>31</sup>

11. The Charter amendments would require changes in the role and responsibilities of the supervising legislative analyst.

It is my understanding that the supervising legislative analyst has traditionally assisted the director of council services

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<sup>29</sup> § 8-2.2, Charter.

<sup>30</sup> See § 605-14, HRS ("It shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or to offer to engage in the practice of law, or to do or attempt to do or offer to do any act constituting the practice of law, except and to the extent that the person, firm, or association is licensed or authorized so to do by an appropriate court, agency, or office or by a statute of the State or of the United States."); see also § 605-2, HRS ("Except as provided by the rules of court, no person shall be allowed to practice in any court of the State unless that person has been duly licensed so to do by the supreme court; provided that nothing in this chapter shall prevent any person, plaintiff, defendant, or accused, from appearing in person before any court, and there prosecuting or defending that person's, plaintiff's, defendant's, or accused's own cause, without the aid of legal counsel....").

<sup>31</sup> See also HRPC Rule 5.4(d) ("Except as otherwise permitted by the Rules of the Supreme Court of the State of Hawai'i, a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: ... (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.").

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in supervising the assignment and work of legislative attorneys and other employees within the Office of Council Services. Like the position of director of council services, there is no requirement that the supervising legislative analyst be a member of the Hawaii bar in good standing.<sup>32</sup>

If the Charter amendments were adopted and the supervising legislative analyst continued to supervise the legislative attorneys, the supervising legislative analyst would likely violate the prohibition against the unauthorized practice of law. To avoid such risk, the responsibilities of the supervising legislative analyst would have to be revised, or the minimum qualifications of the position re-described to require that the supervising legislative analyst be an attorney admitted to practice and in good standing before the courts of Hawaii.

12. The supervisor of legislative attorneys would have to fulfill additional responsibilities imposed by HRPC Rules 5.1 and 5.3.

HRPC Rule 5.1 imposes certain duties on a lawyer charged with the direct supervision of subordinate lawyers. Assuming that the director of council services served as the supervisory lawyer, the director would be required to make reasonable efforts to ensure that subordinate legislative attorneys conform to the rules of professional conduct.

Under HRPC Rule 5.3, pertaining to responsibilities regarding nonlawyer assistants, the director would also be required to make reasonable efforts to ensure that the conduct of any nonlawyer assistants is compatible with the professional obligations of the lawyers.

13. Communications concerning a legislative attorney's services would be subject to HRPC Rules 7.1 and 7.5.

HRPC Rule 7.1, pertaining to communications concerning a lawyer's services, and HRPC Rule 7.5, pertaining to firm name and letterhead, prohibit a lawyer from making a false or misleading communication about the lawyer or the lawyer's services. In accordance with these Rules, legislative attorneys would have to use an appropriate letterhead and professional designation when communicating with others to prevent others from being misled as to the capacity, role, or responsibility of the legislative attorney.

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<sup>32</sup> Based on information and belief, the current supervising legislative analyst is not a lawyer.

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14. Legislative attorney communications with persons represented by legal counsel would be subject to HRPC Rule 4.2.

HRPC Rule 4.2, pertaining to communications by a lawyer with a person represented by counsel, prohibits a lawyer, when representing a client, from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer, unless the lawyer obtains the consent of the other lawyer, or is authorized by law to do so.

Depending on the facts and circumstances, legislative attorneys would have to consider HRPC Rule 4.2 not only when communicating with private individuals and organizations represented by legal counsel, but also when communicating with executive branch officers or agencies represented by Corporation Counsel.

15. Because the Council and Council members would be represented persons, Corporation Counsel's communications with the Council and Council members would also be subject to HRPC Rule 4.2.

Because the Council and Council members would be represented and advised by legislative attorneys, HRPC Rule 4.2 would limit Corporation Counsel's ability to communicate directly with the Council and individual Council members. Corporation Counsel would have to obtain the consent of the legislative attorneys before communicating with the Council and Council members, unless otherwise authorized by law to engage in such communications.

16. Legislative attorney dealings with unrepresented persons would be subject to HRPC Rule 4.3.

Under HRPC Rule 4.3, pertaining to dealings with unrepresented persons, a legislative attorney, when dealing on behalf of a client with any person who is not represented by legal counsel, could not state or imply that the legislative attorney is disinterested, but would be required to make reasonable efforts to correct any misunderstanding that the unrepresented person may have regarding the legislative attorney's role in the matter.

Legislative attorneys would also be prohibited from giving advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such a person were, or had a reasonable possibility of being, in conflict with

MEMO TO: Jo Anne Johnson  
Council Member  
DATE: May 28, 2010  
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the interests of the legislative attorney's client.<sup>33</sup>

17. A legislative attorney acting as an advocate in non-adjudicative proceedings would be subject to HRPC Rule 3.9.

Under HRPC Rule 3.9, pertaining to advocacy in non-adjudicative proceedings, a legislative attorney representing a client before an administrative or legislative body in a non-adjudicative proceeding would be required to disclose that the appearance is in a representative capacity, and conform to other rules of professional conduct governing such appearances.

BTM:lak  
Attachment: Exhibit "A"

cc: Webpage  
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<sup>33</sup> HRPC Rule 4.3(b).

# Resolution

No. \_\_\_\_\_

PROPOSING AN AMENDMENT TO THE REVISED  
CHARTER OF THE COUNTY OF MAUI (1983), AS  
AMENDED, RELATING TO ATTORNEYS WITHIN  
THE OFFICE OF COUNCIL SERVICES

BE IT RESOLVED by the Council of the County of Maui:

1. That, pursuant to Section 14-1(1), Revised Charter of the County of Maui (1983), as amended ("Charter"), it hereby proposes that Section 3-6 of the Charter, pertaining to powers of Council, be amended to read as follows:

**"Section 3-6. Powers of Council.** The council shall be the legislative body of the county. Without limitation of the foregoing grant or of other powers given it by this charter, the council shall have the power:

1. To legislate taxes, rates, fees, assessments and special assessments and to borrow money, subject to the limitations provided by law and this charter.

2. To legislate appropriations for county purposes subject to the limitations provided by this charter.

3. To conduct investigations of (a) the operation of any department or function of the county and (b) any subject upon which the council may legislate.

4. To fix the salaries of such employees and officers as may be necessary.

5. To require periodic and special reports from all county departments concerning their functions and operations. Such reports shall be requested and submitted by and through the mayor.

6. To retain or employ, by a vote of 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.

7. To authorize, by a vote of two-thirds of its entire membership, attorneys within the office of council services to represent the Council in court litigation where the dispute is with the executive branch and where the corporation counsel may represent the mayor or

EXHIBIT "A"

**Resolution No. \_\_\_\_\_**

officers of the executive branch. In the event that attorneys within the office of council services are so authorized, those staff attorneys shall be deemed "special counsel."

2. That, pursuant to Section 14-1(1) of the Charter, it hereby proposes that Section 3-7 of the Charter, pertaining to the Office of Council Services, be amended to read as follows:

**"Section 3-7. Office of Council Services.** There shall be an office of council services. The council may create such positions in the office of council services as it deems necessary to assist it in the exercise of its legislative power. The salaries of such positions shall be fixed by ordinance. Persons appointed to such positions by the council shall be exempt from civil service. The attorneys within the office of council services shall serve as legal advisors to and legal representatives of the council and its members, along with the department of the corporation counsel."

3. That, pursuant to Section 14-1(1) of the Charter, it hereby proposes that Section 8-2.2 of the Charter, pertaining to the Corporation Counsel, be amended to read as follows:

**"Section 8-2.2. Corporation Counsel.** The corporation counsel shall be appointed by the mayor with the approval of the council and may be removed by the mayor with the approval of the council. The corporation counsel shall be an attorney licensed to practice and in good standing before the Supreme Court of the State and shall have engaged in the practice of law for at least three years. With respect to the council, the attorneys within the office of council services shall also serve as legal advisors to and legal representatives of the council and its members."

4. That new material is underscored;

5. That, pursuant to Section 14-2(1) of the Charter, this Resolution be submitted to the voters of the County of Maui at the next general election;

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6. That the County Clerk prepare the necessary ballot for presentation to the voters at the 2010 General Election;

7. That the ballot question relating to the amendment be set forth as follows:

Should the Charter be changed to allow attorneys within the Office of Council Services to serve as legal advisors to and legal representatives of the Council and its members, along with the Department of the Corporation Counsel?

8. That, upon approval of the majority of the voters as indicated by the number of votes cast, and upon official certification of such result, the amendment proposed herein shall take effect; and

9. That certified copies of this Resolution be transmitted to the Mayor and the Corporation Counsel.

APPROVED AS TO FORM AND LEGALITY

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Department of the Corporation Counsel  
County of Maui

paf:dmr:02-075m