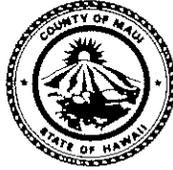


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September 14, 2010

MEMO TO: Michael J. Molina, Chair
Committee of the Whole

FROM: Moana M. Lutey, Deputy Corporation Counsel 

SUBJECT: Indemnification Authorization (COW-1(23); COW-1(30))

I. Introduction.

The purpose of this memorandum is to respond to your memorandum, dated August 25, 2010, requesting clarification and advice concerning the indemnification of County employees sued in their individual capacities for punitive damages.

Your memorandum referenced an opinion of the Office of Disciplinary Counsel ("ODC"), dated September 17, 1993, addressed to the Department of the Corporation Counsel, City and County of Honolulu ("1993 ODC opinion"), and Resolution No. 00-180, pertaining to the indemnification of an employee of the then Department of Public Works and Waste Management.

Because your August 25, 2010 memorandum, and the questions posed therein, arise out of Committee of the Whole deliberations on agenda items COW-1(23) (Wereb v. County of Maui) and COW-1(30) (Gardner v. Ah Loo), both of which pertain to civil suits against County police officers, this memorandum addresses the issue of indemnification in the context of civil suits against County police officers.

II. Analysis and discussion.

The Department of the Corporation Counsel is aware of the 1993 ODC opinion and its analysis of possible conflicts of interest in the context of facts submitted by the City and County of Honolulu.

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Although the 1993 ODC opinion is not binding on the County of Maui,¹ the Department of the Corporation Counsel acknowledges that where a plaintiff has sued a County employee in an individual capacity and seeks punitive damages, a conflict of interest may arise, and that, unless the County of Maui agrees to indemnify the employee, separate counsel may have to be engaged to represent the employee.

The 1993 ODC opinion did not, however, address the issue of the timing of indemnification, an issue which underlies the questions posed in your August 25, 2010 memorandum.

The 1993 ODC opinion did observe that facts and circumstances are important when analyzing issues of conflict of interest and concurrent representation, stating that "[t]he majority of courts which have considered a governmental law office's concurrent representation of the government and of public employees, and whether any conflicts of interest may arise therefrom, have rejected a per se disqualification rule in favor of case-by-case review."²

Consistent with this case-by-case approach, the Department of the Corporation Counsel has, with regard to civil cases filed against the County of Maui and individually named County police officers, sought indemnification when warranted and at the earliest practicable time. However, due to facts and circumstances typically encountered in such cases, and statutory requirements applicable in civil suits against police officers, it is often impracticable, and unnecessary, for the Department to seek indemnification of the police officer immediately after the filing of a lawsuit.

In particular, under court rules, the Department of the Corporation Counsel has only twenty days in which to file an answer to a complaint, and it has been the experience of Corporation Counsel attorneys that plaintiffs and plaintiffs' counsel are often unwilling to agree to extend this deadline. This means there is typically insufficient time to obtain indemnification of a police officer before Corporation Counsel attorneys are required to file an answer to the complaint.

¹ Only "formal written opinions" issued by the Disciplinary Board of the Hawaii Supreme Court are binding on all members of the bar. Such opinions are restricted to questions of broad interest and applicability to the bar. The Disciplinary Board does not issue formal opinions covering individual situations or circumstances. The 1993 ODC opinion is not included in the Disciplinary Board's list of formal written opinions currently in effect.

² 1993 ODC opinion, at 2.

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More importantly, in civil cases involving County police officers, internal investigation reports and police reports are provided to Corporation Counsel attorneys, who make a preliminary determination as to whether joint representation for purposes of filing an answer and for initial discovery or motion practice, would be permissible. Where no conflict of interest is identified, Corporation Counsel may file an answer and take other preliminary litigation steps on behalf of the named police officers and the County of Maui.

Further, under Section 52D-8, Hawaii Revised Statutes, whenever a police officer is sued in a civil action for acts done in the performance of the officer's duty as a police officer, the police officer is entitled to legal representation "by the corporation counsel or county attorney of the county in which the police officer is serving." Under Section 52D-9, Hawaii Revised Statutes, the determination of whether an act, for which a police officer is being sued, was done in the performance of the police officer's duty, so as to entitle the police officer to be represented by counsel provided by the county, is made by the county police commission.

Section 52D-9 requires the police commission, before making a determination, to consult with the corporation counsel or county attorney, "who may make a recommendation to the police commission with respect thereto if the county attorney or corporation counsel so desires." The determination made by the police commission is conclusive for purposes of Sections 52D-8 and 52D-9.

Because of the schedule of the Maui County Police Commission, which meets once a month, and the nature of the work involved in such matters, the Police Commission process described in Section 52D-9 may take weeks or even a few months to complete.

Therefore, in civil cases filed against County police officers for acts done in the performance of their duties, Corporation Counsel will typically provide legal representation for County police officers, at least during the early stages of litigation. Indemnification of the police officers is then sought before any adverse judgment could be taken against the police officers, which would typically be sometime before trial.

APPROVED FOR TRANSMITTAL:


BRIAN T. MOTO
Corporation Counsel

cc: Webpage