

COUNCIL OF THE COUNTY OF MAUI
COMMITTEE OF THE WHOLE

March 6, 2009

**Committee
Report No.**

09-7

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Committee of the Whole, having met on February 19, 2009, makes reference to County Communication No. 09-14, from Michael J. Molina, Chair of your Committee, regarding litigation matters submitted by the Department of the Corporation Counsel.

By correspondence dated January 30, 2009, the Department of the Corporation Counsel requested consideration of a proposed resolution entitled "AUTHORIZING THE RETENTION OF SPECIAL COUNSEL TO ADVISE THE MAUI COUNTY BOARD OF ETHICS ON COMPLAINT NO. 09-1 AND RELATED MATTERS". The purpose of the proposed resolution is to authorize the employment of an attorney from the Office of the Corporation Counsel, County of Hawaii, as special counsel to represent the Maui County Board of Ethics on Complaint No. 09-1 and related matters, for a total compensation of \$1,000.

Your Committee notes that Complaint No. 09-1 alleges that Councilmember Wayne Nishiki violated the Revised Charter of the County of Maui (1983), as amended.

Your Committee further notes that Section 8-2.3(2), Revised Charter of the County of Maui (1983), as amended, states that 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 duties."

Your Committee further notes that the Hawaii Rules of Professional Conduct (HRPC), Rule 1.7(a), prohibits a lawyer from representing a client if the representation of that client will be directly adverse to another client.

Your Committee recognizes the existence of a conflict of interest under the HRPC because Complaint No. 09-1 has been filed with the Board of Ethics against Councilmember Nishiki. As a result of the conflict of interest, the Department of the

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Corporation Council is prohibited by the HRPC from continuing as the legal representative for the Board of Ethics.

Councilmember Nishiki requested your Committee's permission to abstain from voting on the matter based on Rule 8(C), Rules of the Council. Your Committee notes that Rule 8(C) allows a voting member of a committee to abstain from voting in certain circumstances only when approved by a majority of the voting members of the Committee. Your Committee voted to approve Councilmember Nishiki's request to abstain from voting pursuant to Rule 8(C), Rules of the Council.

Based on the recommendation of the Department of the Corporation Counsel, your Committee voted 7-0 to recommend adoption of the proposed resolution. Committee Chair Molina, Vice-Chair Mateo, and members Baisa, Johnson, Kaho'ohalahala, Pontanilla, and Victorino voted "aye". Committee members Nishiki and Medeiros were excused.

Your Committee notes that resolutions authorizing employment of special counsel must be adopted by a two-thirds vote of the Council, pursuant to Section 3-6.6 of the Revised Charter of the County of Maui (1983), as amended.

Your Committee of the Whole **RECOMMENDS** the following:

1. That Resolution No. _____, attached hereto, entitled "AUTHORIZING THE RETENTION OF SPECIAL COUNSEL TO ADVISE THE MAUI COUNTY BOARD OF ETHICS ON COMPLAINT NO. 09-1 AND RELATED MATTERS" be **ADOPTED**; and
2. That correspondence dated January 30, 2009, attached hereto, be **FILED**.

Adoption of this report is respectfully requested.



MICHAEL J. MOLINA, Chair

Resolution

No. _____

AUTHORIZING THE RETENTION OF SPECIAL COUNSEL TO ADVISE THE MAUI COUNTY BOARD OF ETHICS ON COMPLAINT NO. 09-1 AND RELATED MATTERS

WHEREAS, the County Council alone is authorized to hire and retain special or outside attorneys upon a resolution passed by two-thirds vote; and

WHEREAS, the Council finds that there is a necessity and a public purpose for retaining the services of an attorney from the Office of the Corporation Counsel, County of Hawaii, as special counsel to advise the Maui County Board of Ethics on Complaint No. 09-1 alleging violations of the Revised Charter of the County of Maui, (1983), as amended, by Councilmember Wayne Nishiki, and related matters, due to a conflict of interest that precludes the Department of the Corporation Counsel, County of Maui, from continuing to advise the Board on such matters; and

WHEREAS, the Department of the Corporation Counsel, consistent with the Code of Professional Conduct, shall provide necessary support services in this matter and take all possible steps to minimize costs; and

WHEREAS, Special Counsel's conduct in this matter shall reflect the understanding that the County of Maui is a public entity that has obligations, concerns, and interests that may extend beyond those of a similarly situated private litigant; now, therefore,

Resolution No. _____

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

1. That the Council hereby authorizes the retention of an attorney or attorneys from the Office of the Corporation Counsel, County of Hawaii, as special counsel to advise the Maui County Board of Ethics on Complaint No. 09-1 and related matters; and

2. That total compensable costs shall not exceed \$1,000.00; and

3. That total compensable costs shall include: (1) fees for copies necessarily obtained for use in the case; (2) fees for computerized legal research; (3) telephone calls; (4) facsimile charges; and (5) necessary air and ground transportation to attend meetings; and

4. That certified copies of this resolution be transmitted to the Mayor, the Corporation Counsel of the County of Maui, the Corporation Counsel for the County of Hawaii, and the Maui County Board of Ethics.

APPROVED AS TO FORM
AND LEGALITY:


ADRIANNE N. HEELY
Deputy Corporation Counsel
County of Maui

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

OFFICE OF THE
COUNTY COUNSEL
RECEIVED
09 JAN 30 10:46

January 30, 2009

MEMORANDUM

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

F R O M: Adrienne N. Heely, Deputy Corporation Counsel

SUBJECT: SPECIAL COUNSEL AUTHORIZATION (COW-1)
PROPOSED RESOLUTION: AUTHORIZING THE RETENTION OF SPECIAL
COUNSEL TO ADVISE THE MAUI COUNTY BOARD OF ETHICS ON
COMPLAINT NO. 09-1 AND RELATED MATTERS

Our Department respectfully requests that the attached proposed resolution be placed on the next Committee of the Whole regular session agenda.

The reasons for such request include but are not limited to the following:

1. On January 6, 2009 a complaint ("Complaint No. 09-1") was filed with the Maui County Board of Ethics against a council member.¹
2. The Revised Charter of the County of Maui, (1983), as amended, provides that Corporation Counsel shall 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.²

¹ Although Complaint No. 09-1 is currently listed on the Board of Ethics' executive session agenda, we don't anticipate the Committee of the Whole going into executive session to discuss the proposed resolution because the resolution only involves the authorization of special counsel and not the contents of Complaint No. 09-1.

² See, Chapter 2, Department of the Corporation Counsel, Section 8-2.3(2).

Michael J. Molina, Chair
Committee of the Whole
January 30, 2009
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3. Accordingly, the Department of the Corporation Counsel is tasked among other things with being the legal advisor to the Maui County Council and the Maui County Board of Ethics.
4. The Hawaii Rules of Professional Conduct ("HRPC") provide guidance to lawyers regarding conflicts of interest.
5. Specifically, HRPC Rule 1.7(a) states that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client.
6. The fact that Complaint No. 09-1 has been filed with the Board of Ethics against a council member creates a conflict of interest under the HRPC.
7. At the Maui County Board of Ethics' January 14, 2009 meeting, our office recommended to the Board of Ethics that they request Council approval for special counsel to advise them on Complaint No. 09-1 and related matters, and the Board of Ethics approved a motion to do the same.³
8. Complaint No. 09-1 and related matters are being held in abeyance until special counsel is present to advise the Board of Ethics.

We appreciate your scheduling this matter on the next Committee of the Whole regular session agenda. I will be present to answer any relating questions that the Committee may have.

Should you have any questions or require additional information, please feel free to contact me.

ANH:keu
Enclosure
cc: Brian T. Moto, Corporation Counsel

³ See, County Council v. Thompson, 84 Hawai'i 105, 929 P.2d 3355 (1996) (Holding that the council is expressly charged by the charter with the power to retain special counsel, a power that is carefully restricted by the necessity of a two-thirds majority vote. Further explaining that the corporation counsel is free to determine that outside counsel was necessary due to the potential conflict of interest.)

Resolution

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WHEREAS, the Council finds that there is a necessity and a public purpose for retaining the services of an attorney from the Office of the Corporation Counsel, County of Hawaii, as special counsel to advise the Maui County Board of Ethics on Complaint No. 09-1 alleging violations of the Revised Charter of the County of Maui, (1983), as amended, by Councilmember Wayne Nishiki, and related matters, due to a conflict of interest that precludes the Department of the Corporation Counsel, County of Maui, from continuing to advise the Board on such matters; and

WHEREAS, the Department of the Corporation Counsel, consistent with the Code of Professional Conduct, shall provide necessary support services in this matter and take all possible steps to minimize costs; and

WHEREAS, Special Counsel's conduct in this matter shall reflect the understanding that the County of Maui is a public entity that has obligations, concerns, and interests that may extend beyond those of a similarly situated private litigant; now, therefore,

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4. That certified copies of this resolution be transmitted to the Mayor, the Corporation Counsel of the County of Maui, the Corporation Counsel for the County of Hawaii, and the Maui County Board of Ethics.

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AND LEGALITY:


ADRIANNE N. HEELY
Deputy Corporation Counsel
County of Maui