

ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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**Advisory Opinion No. 2010-1**

**I. Summary**

The city's ethics laws do not automatically bar city attorneys from providing pro bono legal services. City attorneys providing pro bono legal services, however, must comply with the city's standards of conduct.

**II. Background**

On September 29, 2009, the Honolulu Ethics Commission received a request for advice from the Department of the Corporation Counsel, regarding the provision of pro bono legal services by its attorneys. Specifically, the Corporation Counsel requested a formal advisory opinion from the Commission as to "whether or not the Deputies Corporation Counsel may provide pro bono legal services in our community and, if so, what restrictions there are, if any, on their pro bono services."

In Hawai'i lawyers are not mandated to perform pro bono work, but the Hawai'i Rules of Professional Conduct (HRPC) encourage lawyers to provide free or reduced fee legal services to individuals and organizations in our community whose access to legal services may be limited.<sup>1</sup>

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<sup>1</sup> Rule 6.1 of the Hawai'i Rules of Professional Conduct provides:

**PRO BONO SERVICE.**

A lawyer should aspire to provide at least fifty hours of pro bono services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide at least twenty-five hours of legal services without fee or expectation of fee to:
  - (1) persons of limited means or
  - (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

The aspirational goals of the HRPC present certain challenges for city attorneys, because their status as city employees and concomitant obligations under the ethics laws impose restrictions that non-government lawyers typically do not face in providing pro bono legal services.<sup>2</sup> Notwithstanding these restrictions, it is possible for city attorneys to provide certain types of pro bono services that are consistent with their obligations under the ethics laws.

### **III. Question Presented**

May city attorneys provide pro bono legal services?

### **IV. Analysis**

#### **A. Use of City Resources for Pro Bono Work**

##### **1. The general prohibition against the use of city resources for non-city purposes**

Attorneys spend time and, often, other resources when providing pro bono legal services. For example, an attorney who volunteers to staff a neighborhood legal clinic may devote several hours of his/her time providing legal advice to individuals and may do some follow-up work such as writing a letter or making a telephone call. Similarly, an attorney who serves on a bar committee relating to the delivery of legal services to charitable organizations may spend time and office resources drafting a report for the committee.

The ability of city attorneys to make these time commitments and to use other resources is constrained by the city's ethics laws, which prohibit city employees from using city resources for non-city purposes. In particular, Revised Charter of Honolulu (RCH) § 11-104 provides:

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- (b) provide any additional services through:
    - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
    - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
    - (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means. Where, in a given year, the lawyer experiences personal or employment circumstances that make it unduly difficult or impossible to provide services which qualify as pro bono activity, the lawyer may substitute such a financial contribution for direct pro bono legal services.

<sup>2</sup> In order to help address the challenges government attorneys face in performing pro bono work, the Hawai'i Access to Justice Commission has recently adopted the *Model Policy for Government Attorneys Performing Pro Bono Work*. The Hawai'i State Bar Association has endorsed the model policy.

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

This provision mandates that public resources can be used only for city, as opposed to personal or non-city, purposes. Advisory Opinion No. 2001-1. A non-city use is defined as “a use not within the scope or duties expressly or implicitly associated with the position of the city officer or employee whose conduct is in question.” Advisory Opinion No. 2005-4.

Pro bono activities, as defined in HRPC Rule 6.1, fall outside the scope of a city attorney’s official job duties and therefore would be deemed to have a non-city purpose. As a result, city attorneys are generally prohibited from spending any city time or other city resources on pro bono activities.

## **2. The project with a community-wide benefit exception**

The Ethics Commission has recognized an exception to the general prohibition against the use of city resources for non-city purposes that allows a few designating officials to commit city resources to support activities that have a community-wide benefit, notwithstanding the fact that the activities basically remain private.

In particular, the “project with a community-wide benefit” exception allows the city to support – through the allocation of public resources – (1) non-profit or charitable organizations that (2) engage in certain activities (3) that provide benefits to a broad segment of the community. As the Commission has stated in its *Guidelines on the Use of City Resources*:

The "project with a community-wide benefit" exception recognizes that there are non-profit and charitable organizations that sometimes rely on government support. When the Mayor or Council Chair (or the department head in the case of the Police Department, Department of the Prosecuting Attorney or Fire Department) officially designates a particular non-profit or charity event or project as having a community-wide benefit, city resources may be used, with appropriate approval, to support these groups. The Food Bank, Aloha United Way and March of Dimes are a few of the charities that have been designated as offering projects with a community-wide benefit in the past.

Ordinarily, city resources could not be used to support the activities of these organizations – even if they promoted the public good – because they are not city-related. Under the exception, however, the activities are effectively deemed as having a public or city purpose, as long as they provide a sufficiently broad – *i.e.*, “community-wide” – benefit to the public. *See* Hawaii State Ethics Commission Advisory Opinion No. 245 (The state program for the solicitation of funds for Aloha United Way did not violate the state’s fair and equal treatment provision because the organization had broad-based community support and the participation by state employees “rested on this support and had been made ‘public business’ by the State.

Therefore, the use of state time, facilities, and equipment on behalf of this organization was not prohibited by the ethics law.”).

While we have recognized the exception in limited instances in the past, we caution that we view it as a narrow one that should be invoked sparingly and only in instances that clearly meet the exception’s intended purpose of supporting only activities of non-profit or charitable organizations that provide truly community-wide benefits.

In order to provide some assurance that a designated activity meets the basic purpose of the exception, the designating official should verify that the activity is by or on behalf of a non-profit or charitable organization, and the official should be prepared to provide an explanation of how the activity provides a community-wide benefit, including the scope of the anticipated benefits. In instances in which there is more than one organization that is in a position to provide the community-wide benefit, the designating official should also be prepared to explain why one organization was selected over other similarly situated organizations.

We also caution that the “project with a community-wide benefit” exception is an exception only to RCH § 11-104’s prohibition against the use of city resources for non-city purposes. It is not a blanket exception to the ethics laws in general. In other words, even if a project or event satisfied the basic requirements of the exception, all of the other ethics laws that apply to city officers and employees (such as, for instance, the conflicts of interest prohibitions that are set forth in RCH § 11-102) still apply. Thus, for example, if the prosecuting attorney were to designate an activity sponsored by a charitable organization that her husband was the executive director of, this would likely violate the ethics laws’ conflict of interest provisions. Or if a mayor designated the project of an organization that had endorsed him in his re-election campaign, this might violate the city’s fair and equal treatment policy. Similarly, coercive participation in certain activities could violate the ethics laws, including the fair and equal treatment policy. For instance, a supervisor would likely violate the fair and equal treatment policy if he/she put pressure on subordinates to contribute to a charity’s fundraising activity or conditioned a promotion based on an employee’s voluntary participation in a designated activity.

### **3. Summary**

RCH § 11-104 generally prohibits city attorneys from using city resources in connection with pro bono activities. The prohibition does not apply, however, if the pro bono services are provided to a non-profit or charitable organization that has been officially designated as providing a community-wide benefit and if the specific use of city resources is approved by the attorney’s appointing authority (*e.g.*, the corporation counsel in the case of deputies). Thus, for instance, were the mayor to officially designate a non-profit organization that sponsors a free legal clinic as having a community-wide benefit, corporation counsel attorneys could staff the legal clinic on city time and could use city resources (*e.g.*, telephones, computers, copiers, email) with the approval of the corporation counsel in connection with their pro bono work.

## **B. Conflicts of Interest**

In addition to the prohibition against the use of city resources for non-city purposes, there are several other ethics laws that a city attorney providing *pro bono* legal services must be aware of and comply with.

### **1. Conflicts with Obligations to City**

RCH § 11-102(c) is a conflict of interest provision that prohibits city officers and employees from

Engag[ing] in any business transaction or activity or hav[ing] a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties.

Similarly, RCH § 11-101 provides:

Elected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct, to the end that the public may justifiably have trust and confidence in the integrity of government. They, as agents of public purpose, shall hold their offices or positions for the benefit of the public, shall recognize that the public interest is their primary concern, and shall faithfully discharge the duties of their offices regardless of personal considerations.

In general, these provisions prohibit a city officer or employee from engaging in activities or having personal interests or relationships that would tend to interfere with his/her judgment in carrying out his/her official responsibilities. Advisory Opinion No. 2008-1. With respect to the provision of pro bono legal services, the provisions would clearly prohibit a deputy corporation counsel from representing or providing legal advice to an individual or organization whose interests conflicted with the city's interests. For instance, a deputy corporation counsel would be prohibited from providing assistance to an individual in an appeal of the denial of city-provided benefits or in a lawsuit involving alleged police misconduct.

### **2. Appearances before City Agencies**

RCH § 11-102(e) prohibits city officers and employees from “represent[ing] private interests in any action or proceeding against the interests of the city or appear[ing] in behalf of private interests before any agency, except as otherwise provided by law.” This provision has two primary purposes. The first clause is similar to the conflicts of interest prohibitions in RCH §§ 11-102(c) and 11-101, noted above. Like those provisions, it prohibits a city attorney from representing a person or organization whose interests were in conflict with those of the city, at least when the representation was in “an action or proceeding”.

The second clause of RCH § 11-102(e) prohibits city officers and employees from appearing before city agencies in behalf of private interests. The basic purpose of this provision is to prevent city officers or employees from receiving, or even appearing to receive, favorable treatment from their city colleagues. *See* Advisory Opinion No. 2004-3 (“Traditionally, this law has been applied to ban city officers and employees from requesting discretionary permits or otherwise appearing before city agencies on behalf of others because of the potential that special treatment may be sought by or afforded to someone who works within the government.”).

The Commission has interpreted what constitutes an appearance before a city agency relatively expansively:

To "appear" includes acting as an agent for or otherwise representing any other person or business in any formal or informal proceeding. To "appear" also includes making any oral or written communications, including letters or telephone calls, to any City agency or personnel with the intent to influence on behalf of any other person or business.

Advisory Opinion No. 299.

Thus, RCH 11-102(e) prohibits city officers and employees from formally representing others before city agencies, as well as from making somewhat more informal “intra-city” contacts on behalf of others. With respect to city attorneys providing pro bono legal services, this would mean, for instance, that they could not make any appearance before a city agency on behalf of any pro bono client, even if the “appearance” amounted to a simple phone call to a fellow city employee.

### **3. Confidential Information**

RCH § 11-102(b) prohibits city officers and employees from “disclos[ing] confidential information gained by reason of such person's office or position or use such information for the personal gain or benefit of anyone.” *See* Advisory Opinion No. 215 (RCH § 11-102(b) establishes “a blanket prohibition against the disclosure of confidential information for any reason.”). Thus, a deputy corporation counsel is barred from using his/her access to confidential city information in connection with his/her pro bono work. For instance, he/she could not access non-public criminal or personnel records, even if such information would be useful to a pro bono client.

## **V. Summary and Conclusion**

Although the city’s ethics laws impose certain limitations on the ability of city attorneys to provide pro bono legal services, these limitations do not pose absolute bars to pro bono work. One significant limitation on the provision of pro bono legal services by city attorneys is the prohibition against the use of city resources for non-city purposes. The appropriate application of the project with a community-wide benefit exception can remove this limitation.

The ethics laws impose other general conflict of interest constraints on city attorneys who want to provide pro bono legal services (*e.g.*, prohibiting them from appearing before city agencies, using confidential information, and representing individuals whose interests conflict with the city's). These constraints, however, do not apply to pro bono work across the board and can be addressed on a case-by-case basis.

As always, the Ethics Commission and its staff are available to provide guidance to the corporation counsel with respect to whether particular pro bono work is consistent with the city's ethics laws.

DATED: March 3, 2010.

/S/  
SUSAN S. HEITZMAN, Vice Chairperson  
Honolulu Ethics Commission