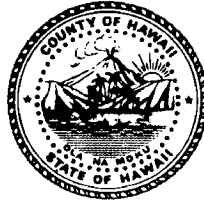


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August 11, 2003

MEMORANDUM

2003-3

TO: OFFICE OF THE MAYOR
HAWAII COUNTY COUNCIL
ALL DEPARTMENT HEADS
ALL BOARDS AND COMMISSIONS

FROM: LINCOLN S. T. ASHIDA *LSA*
Corporation Counsel

RE: **The Attorney-Client Privilege**

We thought it important to revisit our laws concerning the attorney-client privilege, in order to provide guidance to our County clients, and avoid potential liability for our County as well as personal liability for County officers and employees.

The Law

Hawaii Rule of Evidence 503 embraces the attorney-client privilege. The general rule is stated as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the lawyer or the lawyer's representative, or (2) between the lawyer and the lawyer's representative, or (3) by the client or the client's representative or the lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

The following discussion will assist in understanding the somewhat convoluted verbiage above.

1. What communications are covered by the privilege?

Only "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client" are covered by the privilege.

Our lawyers, in an abundance of caution, consider virtually all of our work-related communications with our clients as "confidential communications" as defined by the above rule. To this end, our lawyers mark these communications, "Privileged and Confidential Communication," or similar language in bold, conspicuous print at the top of these communications.

Note that "professional legal services to the client" means just that. The communication must be related to our work for the County in order for the privilege to apply. In other words, if you ask us, "Gee, I wanted to ask you about a personal matter I have, and get your advice....", such communications (i.e., what you tell us and what we may tell you) may not be covered by the privilege.

2. Who owns the privilege, and who may disclose the confidential communications?

Absent specific exceptions, the client and the client alone owns the privilege, and therefore, the client is the only one who may disclose these communications.

3. Are Corporation Counsel staff considered "lawyer representatives" for purposes of the privilege?

Yes. Our entire staff understands the sanctity of the privilege, and is trained in preventing unauthorized breaches of the attorney-client privilege.

4. What can happen if our department releases information concerning discussions we had with Corporation Counsel?

Although the general statement, "After discussing this matter with our lawyers, we have decided....", may not breach the attorney-client privilege, a statement such as the following will be regarded as compromising the privilege:

"Corporation Counsel has told us we need not issue the permit, because our County ordinance does not apply....."

In other words, merely stating that you have consulted with your attorney will *not* breach the privilege. However, stating *the reasons underlying our opinion* will.

Further, once the privilege is breached, it *cannot be reasserted*. Thus, all communications surrounding the previously privileged matter become fair game. In short, you cannot "unring the bell."

The advent and prevalent use of e-mail presents other issues of concern. Our clients often communicate with us via e-mail, and our attorneys often dispense advice or recommendations using this means. All e-mail communication should be regarded as privileged and confidential. Please guard against forwarding these e-mail messages (in part or in total) to any person outside of the County, as this would serve to compromise the attorney-client privilege.

5. *Can I be held personally liable in a lawsuit, where it is learned I did not follow the advice of the Corporation Counsel?*

Yes. In an **extreme** case, assume our office provided an opinion on a certain issue. The department head, as the chief policy maker, disagreed with the opinion, and decided to act in a contrary manner (as is their prerogative to do so).

In subsequent litigation directed against the County for alleged harm caused by the department head's decision, the aggrieved party will never know that the department head was advised not to take the selected course of action.

However, if there has been a breach of the privilege (e.g., a communication is found wherein the department indicates they have consulted with Corporation Counsel, and some of the otherwise privileged discussions are referenced), a court may be called upon to rule whether the privilege has been legally waived.

If a court finds the privilege no longer exists, all communications relevant to this issue may arguably be discoverable to the aggrieved party.

Assuming the aggrieved party learns of the earlier privileged communication, the aggrieved party may then seek punitive damages against the department head personally, arguing that he/she was placed on notice that the aggrieved act was illegal, and that the action was therefore done with malice.

Please note that this is an extreme example, intended to demonstrate what could happen in the "worst case scenario." Nonetheless, we thought it our responsibility to share with you what we believed was legally possible.

6. *Is it permissible to share a "confidential" opinion or other communication from the Corporation Counsel with another department, or the Council?*

Yes, on a need-to-know basis, and under confidential cover. We have historically taken the position that although our attorneys service individual departments, the County as a whole is considered the "client" for purposes of the privilege. This is necessary, due to the legal requirements imposed by our laws. As an example, if a department is involved in litigation, the department head will

be consulted regarding settlement. In turn, the Council must approve any monetary settlement in excess of \$1,500.

What is not acceptable is the reproduction, or other sharing (whether verbal or otherwise) of our opinions with the public, media, or any non-County entity. Even sharing our privileged communications with the State and Federal governments, when not authorized or mandated by law, may serve to compromise the privilege.

Recommendations

1. Department heads and department heads alone should determine if and when to release information protected by the attorney-client privilege, as they are the primary policy-makers for their respective departments. Prior to releasing any privileged material, you should contact our office and discuss the matter with your assigned attorney.

2. Department heads should advise their subordinate employees of the contents of this memorandum, and develop necessary safeguards to protect against intentional and/or inadvertent disclosure of privileged material. Our attorneys will provide the necessary in-service training for your personnel if you desire and so request. Some recommended procedures are:

- Segregating all communications received from Corporation Counsel and maintaining them in a separate confidential file.
- Alternatively, segregating all communications received from Corporation Counsel and maintaining them in a portion of your files marked confidential.
- These "communications" from Corporation Counsel include e-mail messages, as well as the notes of any verbal advice or representations made by our attorneys. E-mail messages should not be forwarded to any person outside of our County. Printed e-mail messages should be segregated and protected as confidential as any written, privileged communication.

3. The attorneys and staff of the Corporation Counsel zealously protect the attorney-client privilege. To this end, it is important for all department heads and their subordinate personnel to understand the candid, frank and complete sharing of information with representatives from our office is extremely critical for our attorneys to effectively and properly perform their duties.

We appreciate the opportunity to serve your legal needs. If you have any questions regarding this matter, please feel free to contact me, or your assigned attorney.