

POLICY ON LEGAL REPRESENTATION OF MULTIPLE CLIENTS

INTRODUCTION: In providing the Charter-required legal representation and advice to the Board of County Commissioners, Constitutional Officers, and more than 60 boards, commissions, and authorities, as well as officials and employees of County government, the County Attorney's Office frequently faces requests to handle legal matters involving multiple clients in a single transaction, lawsuit, or other legal matter. Legal representation of multiple clients is governed by the Florida Bar Rules of Professional Conduct, and is impacted by various statutes, such as Chapter 111, Florida Statutes and Section 768.28, Florida Statutes; County policies, such as Resolution No. 06-83 (Guidelines for Reimbursement of Attorneys' Fees and Costs); and the County's Risk Management Self Insurance Program ("Risk Program"). Based on these guiding authorities, and the discussion of the Rules of Professional Conduct herein, the following policy is intended to guide the County Attorney's Office in representing multiple clients. Future updates of this policy may be necessary as the applicable Rules of Professional Conduct are modified or clarified or where circumstances warrant their amendment.

Specifically not covered by this policy are circumstances involving certain administrative or quasi-judicial boards where the County Attorney's Office represents both the board and staff appearing before the board. Such circumstances do occur and are the subject of case law which addresses due process considerations in these matters. These situations, which are the subject of case law interpreting due process considerations in these matters, have been addressed by the County Attorney's Office Client Information Screening Policy, which is found at Appendix "RR" of the Office Manual.

DISCUSSION: Representation of multiple clients and conflicts of interest for attorneys are governed by the Rules of Professional Conduct. These Rules address the following dual representation conflicts of interest concerns: (i) among current clients (4-1.7); (ii) prohibited transactions involving a lawyer and client (4-1.8); (iii) conflicts involving former clients (4-1.9); (iv) imputation of conflicts of interest (4-1.10); and (v) conflicts of interest for former and current government officers and employees (4-1.11).

The purpose of these standards of professional conduct is to establish standards in situations where the lawyer's representation of another "will be directly adverse" to the client's interest (without the client's consent). The prohibition on conflicts of interest is based on the duty of loyalty to a client, and duty to preserve client confidences.

The facts and circumstances of each legal matter determine when the representation will be "directly adverse." The Florida Supreme Court has stated that a lawyer represents "conflicting interests" when it becomes the lawyer's duty to contend that which his/her duty to another client would require the lawyer to oppose. (*The Florida Bar v. Moore*, 194 So. 2d 264 [Fla. 1966]). The comment to Rule 4-1.7 provides examples of where simultaneous representation of parties in litigation may constitute a conflict, including a substantial discrepancy in the parties' testimony, incompatibility in positions in relation to the opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

When representation of multiple clients is undertaken in a single legal matter, Rule 4-1.7(c) requires, first, an "explanation" of the common representation, including the implications of the common representation and the advantages and risks involved, and second, if the clients'

interests are or become adverse to each other, each affected client must give “informed consent” of the dual representation, confirmed in writing. For many years, it was the general practice of the County Attorney’s Office to satisfy the first requirement of this Rule by providing a written explanation to the Chair through a “conflict” letter (which is a misnomer), and receiving acknowledgment of the dual representation from the Chair. In most instances, this explanation was not included on a Commission agenda for approval, or circulated to the remaining Commission members. As to the second requirement relating to informed consent, when an actual conflict of interest existed between clients, it has been the general practice of the County Attorney’s Office to not represent clients with adverse interests, so no “informed consent” was generally necessary under the Rules of Professional Conduct.

The Rules of Professional Conduct also regulate conflicts of interest involving former clients. This issue most often arises with Outside Counsel. Rule 4-1.9 prohibits a lawyer who has formerly represented a client in a matter from representing another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client, unless the former client gives informed consent. Also, the lawyer may not use information relating to the representation of the current client to the disadvantage of the former client. In certain instances, Outside Counsel is retained to represent the County in a legal matter involving a former client, where the legal matter is unrelated to the legal matter that the lawyer represented the former client on. In this instance, the Rules of Professional Conduct do not require informed consent.

POLICIES: Based on these considerations, circumstances involving dual representation of multiple County Attorney’s Office clients will be governed by the following policies and notification should be provided as set out herein, unless a different approach is approved by the Board of County Commissioners at a board meeting on a case-by-case basis or the Rules of Professional Conduct dictate otherwise:

I. Client Legal Representation:

- A. The County Attorney’s Office will not represent officials, officers, or employees in their individual or personal capacities in matters which do not involve the performance of official duties that serve a public purpose, or when the officials, officers, or employees are not acting in the course and scope of their governmental employment. The County Attorney’s Office will provide further review and/or notification as appropriate when the County Attorney’s Office is aware that officials, employees, or their immediate family (spouse, children, parents or siblings) are involved in individual legal matters which also involve the County.
- B. As to legal matters, including litigation, involving multiple current clients of the County Attorney’s Office:
 - 1. If the legal matter involves the County and/or an official and/or a Board, Commission, or Agency of the County, the County Attorney’s Office may represent all clients as long as the representation of one client will not be directly adverse to another client. The County Attorney’s Office will make

an initial determination that there are no conflicts of interests at the commencement of legal representation, and provide written notification to each client in substantially the form attached as "Exhibit A." If the interests of the clients become adverse during the course of legal representation, the County Attorney's Office will withdraw from representing all parties, except as provided in subsection B.4 herein, or as may have been consented to at the commencement of legal representation.

2. If the legal matter involves a claim or lawsuit for alleged state torts, civil rights, or other matters covered under Pinellas County's Risk Management Self-Insurance Program, the County Attorney's Office may represent both the County and an individual named as a defendant if the individual's action arose out of the performance of official duties that serve a public purpose or while acting in the course and scope of that individual's governmental employment. The County Attorney's Office will make an initial determination that there are no conflicts of interests at the commencement of legal representation, and provide written notification to each client in substantially the form attached as Exhibit A. If the interests of the clients become adverse during the course of legal representation, the County Attorney's Office will withdraw from representing all parties, except as provided in subsection B.4 herein, or as may have been consented to at the commencement of legal representation.
 3. If the legal matter involves the County, as well as a County officer, official, or employee (in his/her official capacity), and either the representation of one client is adverse to the other client, or the County officer, official or employee is represented by other counsel in the matter from the outset, the County Attorney's Office will represent the interests of the County. Outside Counsel will be secured for the officer, official or employee when appropriate, in accordance with other County policies, except as provided in subsection B.4 herein. Notification of the County Attorney's Office representation of the County will be provided to the officer, official or employee.
 4. If the clients consent to the dual representation, after notification and approval as required herein and in accordance with the Rules of Professional Contact, and the representation is not prohibited by law, does not involve the assertion of a position adverse to another client, and the lawyer reasonably believes that the lawyer will be able to provide competent and diligent legal representation to each affected client, the County Attorney's Office may represent multiple clients whose interests may become adverse. The written consent will be in substantially the form attached as "Exhibit B."
- C. Outside Counsel that represents a client before the County Commission, any Department of the County, or any dependent special district of the County, in a pending matter may not simultaneously represent the County in any matter, even when the matters are unrelated, if such representation would require notice to the County by such Outside Counsel under the Rules of Professional Conduct of The Florida Bar, unless consent is given by the County Commission at a board meeting, in accordance with the Rules of Professional Conduct.

D. The County will continue the practice of disqualifying Outside Counsel from representing the County when Outside Counsel has represented a former client in the same or a substantially related legal matter.

II. Notification/Approval: When the County Attorney's Office represents multiple clients in a single legal matter, as authorized by this policy, the written explanation of the dual representation will be provided to all parties involved in the legal matter, which, if appropriate, may be provided as a "blanket" or continuing notification. To the extent possible in litigation matters, the written explanation will be included when notice of the lawsuit is provided. If a pleading, hearing, or other legal matter must be addressed before the notification can be scheduled on a Commission agenda, the written notification will be delivered to the Chair, with copies to each County Commissioner, and scheduled on a Commission agenda as soon as permissible. If the County Commission directs that the County Attorney not undertake the multiple legal representation, the County Attorney's Office will withdraw from the representation as soon as Outside Counsel can be retained in the matter. The Risk Program will not be treated as a separate client for the purpose of this notification, and no notification will be required for the on-going "general counsel" legal representation provided to multiple County Attorney's Office clients. The standard form of the written explanation that will be used is attached as "Exhibit A," which will be modified or otherwise adapted as may be appropriate under the circumstances.

Legal representation when there is a conflict of interest (the clients' interests are adverse) can only be undertaken if written consent is granted by the parties as provided in the Rules of Professional Conduct. If the legal matter involves the County Commission, its departments, agencies, boards or commissions, the request for written consent will be presented for consideration at a Commission meeting prior to commencement of the legal representation.

Attachments (2)

EXHIBIT A

(Date)

The Honorable _____
315 Court Street
Clearwater, FL 33756

The Honorable _____
Address
Clearwater, FL _____

RE: Representation Advisory

Dear _____ and _____:

As a result of _____, the Office of the County Attorney has undertaken the representation of the following parties: _____.

I am advising you via this letter of the scope of the representation undertaken for these parties and the results of my review of any known or anticipated conflicts in this multiple representation. This Advisory is published in accordance with the policies entitled, "Legal Representation of Multiple Clients," published on March 18, 2008, a copy of which is attached to this Advisory.

First, the Office of County Attorney has not, and will not, represent any of these parties in a personal or private capacity whatsoever.

Second, the nature of the controversy involving the current multiple representation is: _____.

Third, our conflicts review has not revealed any apparent or reasonably foreseeable conflicts between the named parties that would warrant separate representation. Moreover, we are unaware of any private, personal interests of the named parties that would generate a conflict of interest, or what would appear to be a conflict of interest.

Fourth, mutual legal representation involves certain benefits and risks. In this instance, mutual representation reduces expenses and would likely facilitate resolution of this matter. Other benefits may include: _____ . The risks associated with mutual representation always include the possibility that a direct, adverse conflict might later arise. In that instance, a complete withdrawal of the County Attorney from representation of all parties may be required by law, regardless of the consent of the affected parties, although should a conflict later develop, it is the practice of the Office of the County Attorney to secure the consent of all parties to continue its representation of the County, and other parties will be required to secure outside counsel. Other apparent risks include: _____ .

If you have any questions with regards to this matter, please do not hesitate to call. In turn, I will also address any such reported concerns and inquiries at the next Board meeting.

Sincerely,

Jewel White
County Attorney

Acknowledgment of receipt of explanation of multiple clients and consent to represent the (TBD) as described in this correspondence

(Client, Title)

Date: _____

EXHIBIT B

(Date)

The Honorable _____
315 Court Street
Clearwater, FL 33756

The Honorable _____
Address _____
Clearwater, FL _____

RE: Conflict of Interest Advisory – Conflict Waiver Request

Dear _____ and _____:

As a result of _____, the Office of the County Attorney has undertaken the representation of the following parties: _____.

I am advising you via this letter the representation undertaken for these parties involves an actual or potential conflict of interest. Despite that conflict, it is my opinion that no direct adverse representation of the respective parties will occur in this matter. Furthermore, it is my opinion that no substantial risk exists that the mutual representation of the parties would be materially limited as a result of the mutual representation of the parties. I am, therefore, requesting that each client consent to the mutual representation in this matter. The law requires such consent be expressed either in writing or clearly stated on the record during a hearing.

First, the nature of the controversy is _____.

Second, the nature of the actual or potential conflict of interest is _____.

Third, this representation arises solely from activities involving public responsibilities or activities that occurred within the scope and course of government employment. No party will be represented in his/her personal or private capacity whatsoever.

Fourth, our conflicts review has not revealed any actual, or reasonably foreseeable, substantial risk that any party's representation will be diminished as a result of the conflict or potential conflict identified in this matter. We are unaware of any private, personal interests of the identified parties that would generate any direct, adverse conflict of interest in these multiple representations, or that the appearance of any direct, adverse conflict of interest would occur, especially in light of these public disclosures.

Fifth, mutual legal representation involves certain benefits and risks. In this instance, mutual representation reduces expenses and would likely facilitate resolution of this matter. Other benefits may include: _____. The risks associated with mutual representation always include the possibility that a direct, adverse conflict might later arise. In that instance, a complete withdrawal of the Office of the County Attorney from representation of all parties may be required by law, regardless of the consent of the affected parties. Nevertheless, to the fullest extent permitted by law, the parties to this multiple representation will be required to agree that should a conflict of interest actually develop in this matter so as to preclude the Office of the County Attorney from continuing its representation of all parties, the individuals or entities who must be separately represented from the Board of County Commissioners or any other entity of the County will secure outside counsel and will not object to the

Office of the County Attorney's continuing to represent other parties in this matter. Other apparent risks include: _____.

If you have any questions with regards to this matter, please do not hesitate to call. In turn, I will also address any such reported concerns and inquiries at the next Board meeting.

Sincerely,

Jewel White
County Attorney

Acknowledgment of receipt of explanation of multiple clients and consent to represent the (TBD) as described in this correspondence

(Client, Title)

Date: _____