



MEMORANDUM

Pima County Attorney's Office
Civil Division

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CONFIDENTIAL

To: County Elected Officials
County Administrator and Deputy Administrators
County Department Directors and Managers

From: Thomas Weaver, Chief Civil Deputy County Attorney
Regina Nassen, Chief Ethics Counsel

Date: November 16, 2015

Subject: County Legal Representation

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This memorandum addresses the role of the Civil Division of the Pima County Attorney's Office ("PCAO") within Pima County government. You may remember receiving and reading earlier versions of this memo distributed in 2009 and 2012. Because our understanding of our duties continues to evolve in light of changes to ethics rules, issuance of new ethics decisions and guidance, and new circumstances, and because some of you are new to your role as a representative of Pima County, we are sending this revised memorandum to you. We wish to be very clear about our unique role in Pima County Government so we can avoid misunderstandings like those that were so costly to Maricopa County just a few years ago.

1. The unique role of the government lawyer.

PCAO is essentially the County's in-house law firm. Its mission is to serve the public with integrity by providing the highest quality legal services in order to foster ethical, effective and efficient government. But the County Attorney is also the chief criminal prosecutor representing the State of Arizona within the geographic area of Pima County (A.R.S. § 11-532), and has various other duties, such as enforcing the State's open meeting law (A.R.S. § 38-431.06) and elections laws (A.R.S. § 16-1021). There are even statutes that require the County Attorney to bring an action against the county's board of supervisors to recover payments made from the county treasury, pursuant to an order of the board, without legal authority (A.R.S. § 11-641); sue the county assessor to recover taxes on property that the assessor negligently fails to assess (A.R.S. § 11-543); investigate the county assessor or treasurer at the request of the board of supervisors (A.R.S. § 11-

664); and bring an action against the county sheriff to obtain funds in his possession that should be paid to the county (A.R.S. § 11-451). Satisfying these various, and sometimes competing, duties can create unique challenges for our office.

2. Who is the client?

PCAO at all times represents Pima County, which is our primary client in civil legal matters. We also advise and represent certain taxing districts, such as the Pima County Free Library District and the Regional Flood Control District, the governing boards of which are the Pima County Board of Supervisors. And we may from time to time represent school districts or fire districts within the County when they ask us to do so, provided it does not create a conflict with our representation of the County.

Because the County is an organization that can act only through individuals, PCAO provides legal advice to, and receives direction on legal matters from, the County's elected and appointed officials. That does not mean, however, that these individuals are themselves "clients" of our office, and it is extremely important to remember this. *Generally, when we are rendering advice to these individuals, we are doing so as the County's lawyer, not the individual's lawyer.* This is the case even when the advice concerns the individual's own duties (for example, regarding whether the individual has a conflict of interest that must be declared), and even when the individual is an elected official.

Sometimes one or more County employees or elected officials are named as defendants in a lawsuit. For example, statutes require that the Treasurer be named as a defendant in tax-lien-foreclosure cases. If the County has a judgment lien against the property that is the subject of the foreclosure (for example, for an unpaid fine), then the plaintiff in such an action will also name "Pima County" as a defendant. Or someone might sue the County in contract, and name the individual members of the Board of Supervisors as well as "Pima County." So long as the employee or official is named in his official capacity, and faces no personal liability in the case, we still consider the actual client in these cases to be *the County* and we do not consider the individual employee or elected official to be a separate client. (If a dispute develops among the named officials regarding who has authority to speak for the County and give our office policy direction with respect to the lawsuit, we deal with that as discussed under Section 6, below.)

In some lawsuits, however—including certain tort lawsuits—the named employee or official *does* face personal liability. For example, an inmate of the Adult Detention Center might file a claim or bring a lawsuit against a corrections officer individually, as well as the Sheriff and Pima County, alleging that the officer used excessive force and injured the inmate. In those cases—assuming the County is obligated to defend and indemnify the individual, and we determine that we are ethically able to provide that defense—that individual is a separate client of our office, along with Pima County and any other named County employees and officials. How this joint representation works is described in Section 7 below.

Because the identity of the client has such a profound impact on how our duties of confidentiality and loyalty are applied, and on whether in any particular instance we have a conflict between different clients, it is important that our office and the individuals we advise have a mutual understanding of who the client is in each instance. If you ever find yourself confused about this, please seek clarification from the deputy county attorney with whom you are working or from the Chief Civil Deputy.

3. The Attorney-Client Privilege.

What communications are protected?

A communication will not necessarily be protected by the attorney-client privilege just because a lawyer is involved in the discussion or, in the case of a memorandum or e-mail, just because a lawyer is “cc’ed” on the communication.

To fall within the privilege, a communication must, first, be between a lawyer and the lawyer’s “client.” In the case of the County, that means a communication between a County representative and the County Attorney, a deputy county attorney, or a private lawyer serving as outside counsel under contract.

The communication must also be made confidentially and for the purpose of obtaining legal advice. If outside parties (such as County consultants) are privy to the communication, it is probably not privileged. If a communication was privileged and then it is shared with an outside party, the privileged status is likely lost. Even a privileged communication that is shared with too many people within the client organization (the County) may lose its privileged status.

The point is: if you communicate with a lawyer in our office and intend that communication to be privileged, do not share that communication (written or oral) with any non-County person; also, make an effort to limit the number of County personnel with whom you share the information, on a “need to know” basis. It is also a good practice to keep any documents requesting legal advice, or containing legal advice from the County’s lawyers, separate from your other documents in your files and clearly label them “Confidential; Attorney-Client Privilege.”

Who controls the privilege?

It is important to understand that, although our communications may be and often are privileged, it is normally the *County* and not the communicating individual who is our “client” and thus holds or “owns” the privilege. The privilege can be asserted, or waived, only by the board or official who has authority to act for the County with respect to the matter at issue. That is most often (though not always) the Board of Supervisors. So please keep in mind that we will share “confidential” communications with other County staff members or officials when we conclude that such disclosure is in the best interests of the County.

As noted, however, PCAO does sometimes provide representation to a County representative in the representative’s individual capacity, in which case we would owe a duty of confidentiality to that individual, *as well as* to the County as a whole; the effect of such joint representation on issues of confidentiality is discussed further in Section 7 below. If you ever have a concern about how the duty of confidentiality will apply to a particular communication, or are confused about whether you are an individual “client” of PCAO, please seek clarification from your assigned deputy county attorney or the Chief Civil Deputy.

4. What are our respective roles?

The County, as client, sets policies and goals; PCAO determines legal strategy and gives advice regarding legal considerations and consequences. What happens when issues arise regarding who can act for “the County” in a particular matter is discussed in Section 6 below. When a contract or other legal instrument is being drafted and negotiated, it is up to the County to decide what the substantive terms of the agreement should be. For example, what duties each party has; how much

money, if any, is changing hands; and when the various duties must be performed, and to what standard. It is PCAO's role to assist by helping draft the document (normally by reviewing a draft created by a County representative) to ensure that it accurately reflects the County's intent, as articulated by the appropriate County representative. PCAO will advise County representatives with respect to the legal risks and possible consequences of a particular decision and course of action, and will work with them to develop a legally permissible way of achieving the County's policy goals.

It is the County's responsibility to determine, as a policy matter, what course of action to take after considering PCAO's legal advice as well as other non-legal risks and benefits associated with available alternatives. PCAO will not, however, sign off on a contract that contains a provision that is clearly illegal or clearly exceeds the County's authority. PCAO is legally and ethically prohibited from doing so.

In the context of litigation, the County sets the goals and determines the County's position on the dispute. The County will also decide whether to settle the matter, or proceed to trial or hearing. For example, the County will decide, taking into account PCAO's advice, whether to advance, accept, or reject a settlement offer or whether to appeal an unfavorable decision by a lower court. The *process* of litigation, however, is generally PCAO's province. In consultation with the County, PCAO will determine what legal arguments to make, what motions to file and when to file them, as well as whether to grant professional courtesies, such as time extensions, to opposing counsel. (Please note that, under the ethical rules that apply to lawyers, we are required, in most instances, to extend professional courtesies to opposing counsel, unless doing so would prejudice the County.)

Which individuals or bodies are authorized to make the above decisions on behalf of "the County" can vary depending on the circumstances, as discussed in Section 6, below. And there are circumstances in which we represent individual clients in addition to the County; how this works is discussed in Section 7.

5. Communication; expectations.

Obviously, to make this relationship work, there must be full and candid communication between County representatives and PCAO lawyers. We cannot advise you fully and accurately without a thorough understanding of the facts and circumstances surrounding the matter with respect to which you are seeking our legal advice.

In the litigation context, it is imperative that the individual clients (if any) and all representatives of the organizational client (the County) be absolutely candid with the assigned lawyer and cooperate with all requests for information or documents and with any requests that certain electronic documentation be preserved. If you have a question concerning whether certain information should be disclosed, or documents preserved for possible disclosure later, you must not make the decision to withhold information yourself but must consult with the assigned lawyer who will inform you of the legal requirements you must follow.

It is also important that we be consulted in a timely manner so that we have time to do the work, including any necessary legal research and analysis. We are unable to provide "on-the-spot" analysis of complicated issues or provide an overnight turnaround for the review of a contract, resolution, or ordinance. PCAO's general commitment is to review routine proposed ordinances, such as traffic ordinances, within three business days and to review proposed contracts and more complex ordinances within five business days. In a litigation context, we will try to keep key County

personnel informed about the status of the case and important developments. Note that there will be “quiet times” when nothing may be happening with a litigation matter, but that does not carry either a negative or a positive connotation about the case. If you have questions about the status of a pending case, please contact the assigned deputy county attorney, who will be happy to give you an update.

6. Who is authorized to evaluate this office’s legal advice and make a final policy decision on behalf of the County?

Vertical Authority; Chain of Command.

As noted, the County, as an organization, can act only through individuals. It is important that we have a mutual understanding of who has the authority to make a decision on behalf of the County with respect to a particular legal matter.

PCAO normally provides day-to-day advice on a fairly informal basis, often simply in the form of a verbal discussion or email exchange. Many times that informal discussion occurs between the assigned deputy county attorney and the County employee or official most familiar with the issues and related facts. That person, however, may not have the authority to make certain policy decisions on behalf of the County, and may need to refer a decision up the chain of command to a higher authority, who might be the Board of Supervisors or an individual elected official. If it is the Board of Supervisors, a public vote by a quorum may be required before legal action can be taken.

It is helpful if you inform the members of your staff what decisions are within the scope of their authority, so they know when to refer a matter up their chain of command. Your assigned deputy county attorney will normally assume that the staff person designated to work with that lawyer on a matter is the one who is authorized to make most of the decisions about it; if this is not the case, you may be called upon to clarify the staff member’s scope of authority.

Horizontal Authority; Different Elected Officials.

But what about a matter that is of interest to more than one elected official at the County? Unlike a private corporation, where the ultimate executive authority lies solely with its board of directors, the County’s executive authority is split. The board of supervisors is the primary executive body, with the broadest scope of authority to act for the County. It has the authority to “supervise the official conduct of all county officers ... charged with assessing, collecting, safekeeping, managing or disbursing the public revenues,” and to “direct and control the prosecution and defense of all actions to which the county is a party, and compromise them.” But each of the other elected officials has some independent authority to control how they fulfill the obligations of their office—including the County Attorney. And we are sometimes called upon to render advice, or provide representation, with respect to matters that impact more than one elected official’s office.

For example, suppose the County’s finance director (who reports to the Board of Supervisors) requests advice about what a particular statute requires. We might feel there are two possible interpretations, neither of which is clearly correct, although we feel one is more likely to be adopted by a court if the issue were ever litigated. The answer we give, however, has the potential to impact not only the finance department but the Treasurer’s office. Who decides how to proceed in such an instance?

As we have already stressed, our client is normally “Pima County” as a whole, and not the

individuals or groups who act for the County. And, as we have also explained, our role is to provide advice about available legal options and associated risks, and abide by the policy decision made by the client. In a situation like that described above, in which we are called upon to give advice that we realize will impact more than one elected official's office, we will consult internally, involving the lawyers who regularly advise each office. We will then give the same advice to both offices. In the hypothetical example, we would advise both offices that either interpretation of the statute is legally defensible, though one seems to be more likely to be enforceable in a court of law than the other. It is then up to the two offices to work together cooperatively and try to agree upon which approach to take. We will not advocate on behalf of one office against another.

If the two offices cannot reach consensus, the question then becomes which elected official or body has the ultimate authority to make that particular decision for the County. We can offer advice regarding which we think that is. And if the authority is clear, we will accept direction from that official or body. Unfortunately, however, the scope of an individual elected official's authority to act for the County is sometimes unclear, so we may not be able to come up with a definitive answer. If we cannot, we may—depending on all the facts and circumstances—be forced to treat the situation as a conflict between two clients, even though in fact we have only one client—Pima County—and the issue is really just who is authorized to act for the County. That may in turn require retention of outside counsel. We try very hard to work effectively with County officials to avoid such situations, which can be costly for the public.

7. What happens when PCAO has a conflict of interest?

What is a "conflict of interest"?

A lawyer has a conflict of interest when there is a significant risk that the lawyer's independent professional judgment in advising and recommending options to one client will be materially limited by the lawyer's duties to another client or to another person, or by the lawyer's own interests. As noted above, a mere disagreement between County officials usually does not create a conflict of interest for our office because, even when several officials are involved, there is normally still just one client: Pima County.

But we do sometimes have an individual client in addition to the County. For example, someone who is injured while incarcerated at the jail might sue a corrections officer, the Sheriff, and the County. Under the County Code, the County will normally indemnify and defend the corrections officer as well as the Sheriff in that situation, and it is most economical to use PCAO to defend all three so long as their interests are aligned—which they often are. If, however, the injury was, or may have been, caused by the corrections officer's failure to follow detention facility procedures, the County's interests may not be the same as the officer's, especially if the Sheriff wants to discipline the employee for those actions. In that event, the corrections officer on the one hand, and the Sheriff and the County on the other hand, would have conflicting interests.

Conflict Checking: Joint Representation.

If a claim is brought against you in your individual capacity based on actions taken in the course of your County duties, the County Risk Manager will determine whether you are entitled to be defended and indemnified by the County. If you are, then our office must complete a conflicts analysis to determine whether that defense can be provided by PCAO. When there is an actual conflict, as in the above example, PCAO will not represent you individually. If you are entitled to a

County-provided legal defense, and we cannot provide it, we will arrange for another lawyer (outside counsel) to represent you.

If, however, there is no actual conflict, then PCAO can jointly represent the County and you. If that is the case, we will explain to you, at that time, certain conditions and limitations on the scope of that representation, which are a result of our simultaneous representation of the County and the fact that the County is funding your defense. If you are not comfortable with those limitations, you can *refuse* to be represented by our Office—that is your right. But if you do so, you might have to hire your own lawyer, at your own expense.

If PCAO represents both you and the County with respect to a particular matter and a conflict develops after we undertake that representation, we may be forced to withdraw and not represent either party in connection with that matter.

8. What advice will PCAO not give?

Your assigned deputy county attorney will normally advise you only in your capacity as a representative of PCAO's primary client, which is the County. PCAO does not represent you personally and cannot advise you about personal legal matters. One area of particular concern is the area of employment and personnel matters. If you, personally, are the subject of an employment action such as a disciplinary action, *this is not a matter about which your assigned deputy county attorney can give you advice*. You can contact the County's Human Resources Department for assistance regarding Pima County personnel policies and procedures; if you feel you need legal advice, however, you must retain private counsel.

Remember also that the County Attorney represents the State as the criminal prosecutor and is authorized to enforce certain civil statutes (such as the open meeting law) that apply specifically to public officers and employees. Accordingly, your assigned deputy county attorney cannot advise or defend you in a criminal case, or certain types of civil enforcement actions, even if you believe that you took the acts that are the subject of the enforcement action in your capacity as a County employee or official. Communications with anyone in PCAO regarding a matter over which the County Attorney has enforcement authority also may not be confidential or privileged. Your assigned deputy county attorney also cannot discuss with you any criminal matter pending against you, a member of your family, or a friend.

9. Outside Counsel

PCAO endeavors to conserve County resources and taxpayer funds by handling in-house as many of the County's civil legal matters as possible. Nevertheless, on occasion, PCAO must hire outside counsel, either to comport with its ethical obligations when a conflict of interest exists, or because of workload or specialized-expertise issues. When hiring outside counsel, PCAO considers a variety of factors, including the outside lawyer's knowledge and experience in the particular area for which counsel is sought, standing with the State Bar, fee structure, and local presence. Generally, PCAO will consult with the County staff or officials involved in the matter regarding its recommendations for outside counsel. Only PCAO and the County Administrator, however, are authorized to select outside counsel.

Conclusion

We hope this information has given you a better understanding of the role our office plays in your day-to-day County business. Because our office works with many individuals within County government, it is crucial that we are all aware of exactly who is and is not a client, the scope of the legal representation being provided, and the ethical requirements PCAO lawyers must follow in fulfilling our duties. For further clarification of any of the matters discussed in this memorandum, feel free to approach your assigned deputy county attorney or contact the Chief Civil Deputy.

cc: County Elected Officials;
County Administrator and Deputy Administrators; and
County Department Directors and Managers