The Judiciary, State of Hawaii

Testimony to the Twenty-Fourth State Legislature, 2008 Session
Senate Committee on Judiciary and Labor
The Honorable Brian T. Taniguchi, Chair
The Honorable Clayton Hee, Vice Chair

Friday, February 22, 2008, 10:00 a.m.
State Capitol, Conference Room 016

by
Thomas R. Keller
Administrative Director of the Courts

Bill No. and Title: Senate Bill No. 3200, S. D. 1, Relating to Attorneys.

Purpose: Allows a department to retain an attorney if the attorney general declares a conflict of interest.

Judiciary's Position:

The Judiciary testifies in support of Senate Bill No. 3200, S.D. 1.

Under current law, the attorney general, through the deputy attorneys general within the Department of the Attorney General, must provide counsel and representation to state departments, as set forth in Hawaii Revised Statutes (HRS) Section 28-1 (1993) (the attorney general shall appear for the State in all courts of record, and in all criminal or civil cases in which the State may be a party) and HRS Section 28-4 (the attorney general shall, without charge, at all times when called upon, give advice and counsel to the heads of departments . . . in all matters connected with their public duties, and otherwise aid and assist them in every way requisite to enable them to perform their duties faithfully).

Hawaii Revised Statutes Section 28-83 permits the attorney general to decline representation to state departments for reasons subjectively deemed by the attorney general to be "good and sufficient." As currently written, this option to decline is solely within the discretion of the attorney general and the "client" department has no voice in the decision. The statute fails to specify, what, if any, duties must still be fulfilled by the Department of the Attorney General if the attorney general unilaterally declines to represent in a situation where a conflict between

departments with adverse interests comes into play. This gap creates the risk of compromising department officials' actions who may fear that a mistake on their part could result in time-consuming and financially devastating legal action, with no legal counsel assigned to protect the departments' interests.

Public officials, department heads and employees are called upon to exercise discretion and critical decisions on a daily basis. These public servants must have the freedom and independence to act, within the bounds of the law, with assurance that they will be provided immediate legal counsel when needed. We simply cannot risk them becoming fearful about making and implementing decisions necessary to carry out the duties of their offices and enforcing the law, if they cannot be assured that sound advice and good representation is available to them when needed. This is consistent with the Hawaii Supreme Court ruling that:

> When the official policies of a particular state officer or instrumentality are called into question in civil litigation, that officer or instrumentality is entitled to the same access to the courts and zealous and adequate representation by counsel to vindicate the public interest, as is the private citizen to vindicate his or her personal rights. The Legislature has designated the Attorney General as the legal representative of state officers and instrumentalities sued in their official capacities. In the absence of other statutory or constitutional provision to the contrary, she is their sole legal representative in the courts and they are her clients. *Chun v. Board of Trustees of Employees' Retirement System of the State of Hawaii*, 87 Hawaii 152, 172, 952 P.2d 1215 (1998). (Citation omitted.)

There are at least three situations where conflicts may arise in the practice of law by the attorney general for which the attorney general may then determine that he will decline to represent a client agency. First, conflicts can exist between the clients' expressed interests and the attorney general's view of society's interest in the administration of justice. In such a situation, the Hawaii Supreme Court notes that, "The Attorney General is not authorized in such circumstances to place herself in the position of a litigant so as to represent her concept of the public interest, but she must defer to the decisions of the [department] whom she represents concerning the merits and the conduct of the litigation and advocate zealously those determinations in court." *Chun v. Board of Trustees of Employees' Retirement System of the State of Hawaii*, 87 Hawaii 174-75 (quotations omitted.)

Second, a conflict can exist when the interests of one client may impair the independent professional judgment of the attorney general with regard to another client. This may occur when a department takes a position adverse to another department's interests. For instance, in a water rights case, the Department of Agriculture may take a policy position contrary to that of the Department of Land and Natural Resources, or the Department of Education may take a position contrary to that of the Department of Human Services with regard to legally required services to children.

Third, a conflict can exist when an attorney general's own interests may impair his exercise of independent professional judgment on behalf of a client. An example of this might be where the attorney general advocates a particular position to the Department of Education, knowing that that position may have direct impact upon the services to be provided the attorney general's own child.

The present statute permits designated departments to retain counsel other than the attorney general but does not specify what happens if two departments develop a legal dispute involving adverse interests, and both look to the attorney general for advice and representation. Can the attorney general simply select which department it will represent and leave the abandoned department to fend as best it can to secure and pay for legal counsel?

What happens if two or more departments find themselves in a situation where they are likely to take legal action against one another? Is the attorney general required to set up ethical screens within its own offices to ensure that each department is provided adequate representation? Is the attorney general allowed to decline to represent either department without further responsibility? If independent counsel is required, who makes that determination? And, again, in such situations, should departments simply be left to their own devices to retain and fund that counsel?

One situation this bill seeks to address involves cases where the attorney general represents two or more departments who develop positions potentially adverse to one another. Under the comments to Rule 1.10, Hawaii Rules of Professional Conduct, it is noted that "Separate units of a government agency, such as the office of attorney general, may undertake concurrent representation that would otherwise offend Rule 1.10(a) so long as no prejudice is suffered by any of the clients."

In a situation where two or more departments have taken positions adverse to one another, the Department of the Attorney General could provide representation using appropriate ethical screens. The Hawaii Supreme Court has long held that separate units of a government agency, such as the Department of Attorney General, may undertake concurrent representation that would otherwise offend the provisions of the Hawaii Rules of Professional Conduct, so long as no prejudice is suffered by any of his clients. That is clearly a prerogative when two or more departments develop interests adverse to each other. *State v. Klattenhoff*, 71 Haw. 598, 801 P.2d 548 (1990).

Thus, if it is acceptable to the adverse departments, the attorney general can have one division "walled off" from another division by assigning independent legal counsel and representation to each of the parties' involved. If the attorney general cannot implement effective ethical screens, however, the attorney general may determine that either one, or both, departments is free to retain independent counsel. In that situation, however, the attorney

general should be counted on to use its expertise of the process, and resources to provide independent counsel (through procurement laws) for each department it does not represent itself.

Under the present law, departments may be permitted to retain their own counsel. From a practical point of view, however, that is not necessarily feasible. For instance, the department, unlike the Department of the Attorney General, may not have any budget to retain an attorney and cover litigation expenses. Moreover, departments may not necessarily have the expertise to evaluate counsel. This responsibility is best left to the department best equipped to provide the funding and the expertise to assist in the area of providing counsel – the Department of the Attorney General.

At previous hearings, the administrative director of the courts was asked if there was a specific situation that generated this bill. Although the Judiciary is not the sponsor of this bill, we support this bill, in large part, based on a recent experience involving our futile attempt to secure counsel from the Department of the Attorney General. This experience, we believe, underscores the need for a bill to ensure that when the senate president, speaker of the house, or chief justice believe their respective departments need legal representation by the Department of the Attorney General, they should count upon being provided that representation. If there is a conflict involved, the Department of the Attorney General should ensure that informed discussion takes place and that adequate ethical screens are in place. If this is not viable, representation should be available by private counsel. Because of the potential immediacy of the need in such situations, the attorney general should be responsible for retaining and funding private counsel.

Because the attorney general has openly discussed a situation that involves precisely the concerns we expect this bill to address, we are providing, through attached testimony, a synopsis of an event that underscores the need for this bill.

Thank you for the opportunity to provide comments on Senate Bill No. 3200, S.D.1.

Attachment to Judiciary Testimony Supporting Senate Bill No. 3200, S.D. 1

The Judiciary supports this bill, as it would ensure that the Judiciary and the legislature do not find themselves in a situation similar to that which occurred recently.

In August 2007, the Judiciary and the Judicial Selection Commission (JSC) found themselves in a dispute concerning the hiring of an administrative assistant for the JSC. Because the JSC is administratively attached to the Judiciary by virtue of a constitutional provision, the Judiciary understood that the responsibility for the recruitment of this civil service position fell upon the Judiciary. The position of the administrative assistant does not fall under any of the categories specified by the legislature as eligible for exempt status.

By letter dated August 22, 2007, the Judiciary asked the JSC chair to nominate a member of the JSC to serve on the hiring panel for the administrative assistant. The JSC asked that an additional JSC representative be on the hiring panel. At around this time, the Judiciary was seeking advice and counsel on matters relating to the hiring of the administrative assistant from a deputy attorney general assigned to provide advice and counsel to the Judiciary.

It also became clear that the JSC was also seeking legal advice from the Department of the Attorney General on the hiring of the administrative assistant. Advised by the Department of the Attorney General, the JSC chair understood that the JSC could control the hiring process if the administrative assistant position was exempted from civil service. The Judiciary agreed with this assessment, but made clear that, in its view, only the Legislature, through appropriate statutory amendment, could provide for exemption of the administrative assistant position. (*See* Hawaii Revised Statutes Section 76-16(b), specifying which state positions are exempted from civil service.)

Acting on advice from the attorney general, the JSC adopted a new Rule of the Commission on September 29, 2007. This rule exempted the administrative assistant from collective bargaining and civil service. Based on this rule, demand was made to the Judiciary to "now cease any efforts to appoint an administrative assistant for the Commission, as it is now legally clear that that power unquestionably rests with the Commission itself." (Letter from JSC vice-chair, September 29, 2007.) The Judiciary did not agree that the JSC had the authority to promulgate a rule that essentially superseded a legislative statue, and continued with the recruitment process.

On October 2, 2007, the attorney general made clear to the Judiciary that this matter could result in litigation and that the Department of the Attorney General may be prohibited by Rule 11 from providing representation to the Judiciary. This position came as a great surprise to the Judiciary. The attorney general, asked to reconsider his position on providing representation to the Judiciary, responded:

> . . . I have concluded that the attorneys of this Department are precluded from providing [representation to the Judiciary in this matter.] As you know, I earlier concluded and advised the Judicial Selection Commission that the State Constitution authorizes the Commission to adopt rules with the force and effect of law, to establish and exempt its staff positions, including its administrative assistant position, from the civil service. I also concluded and advised the Commission that after it adopted such a rule, its staff positions would not be subject to the provisions of Haw. Rev. Stat. ch. 76 . . . .
>
> Under these circumstances, I do not believe that deputy attorneys general can properly serve as legal counsel to the Judiciary on any matters related to the Judiciary's efforts to recruit to fill the Commission's administrative assistant position. Accordingly, I must respectfully decline to assign a deputy attorney general to the Judiciary for that purpose.
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> (Letter to Thomas R. Keller, Administrative Director of the Courts, from Mark J. Bennett, Attorney General, October 5, 2007).

On October 15, 2007, the Judiciary selected a person for the position of administrative assistant to the JSC. This person's qualifications are impeccable and the JSC was informed of her selection.

On November 2, 2007, the Department of the Attorney General issued Opinion No. 07-03, opining that the JSC's rule exempting the administrative assistant position from civil service is valid and that it forecloses the Judiciary from selecting and appointing a person to fill the administrative assistant position. Moreover, it opined that the rule "would be enforceable by a civil action brought by the Attorney General . . . in the state circuit court to enjoin the violation of the rule . . ."

On November 5, 2007, the JSC informed the Judiciary that they would not retain the person selected for the position of administrative assistant, "nor will we allow her access to any JSC files." The Judiciary was told to explain to the person selected that the "she may not begin work for the JSC on December 1, 2007 or at any other time." (Letter from JSC Chair, November 5, 2007.)

The Judiciary believed strongly that neither the attorney general's constitutional interpretation nor its JSC rule were sufficient to preempt the Legislature's authority. Because of the possibility of litigation, the attorney general was asked to provide legal counsel to the Judiciary. On November 20, 2007, the attorney general explained that the Judiciary was free to retain its own counsel pursuant to HRS 28-8.3, but that:

> Among the reasons I have declined to appoint a deputy attorney general to advise and represent the Judiciary regarding this matter are because I believe the advice we provided the JSC in Atty. Gen. Op. 07-03 is correct, because I have personally represented the Commission in this matter, and because I anticipate

> that the importance of the issues addressed and the extent of the impasse between the Judiciary and the Commission would require my personal participation in the Legislature and/or the courts if these differences cannot otherwise be ironed out. Under these circumstances, I believe all deputy attorneys general would likely be prohibited from representing the Judiciary . . .
>
> When the Attorney General believes that it is in the public interest for him or her to personally advance a particular position in a matter, all of his or her deputies are likely conflicted from representing any other state official or agency in that matter, particularly if they would or could be taking a contrary position.
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> (Letter from Attorney General, November 20, 2007)

Because, again, legal action by the attorney general against the Judiciary was a distinct possibility and because the Judiciary wished to consult with counsel on how best to proceed with this matter, the Judiciary again asked the attorney general to continue providing legal representation through a deputy attorney or by retaining an attorney to serve by special contract and paid through the Department of the Attorney General. (Letter to Attorney General, November 27, 2007). The attorney general made clear that the Judiciary could retain its own counsel by contract, but that the Judiciary would be responsible for negotiating and paying for that contract. (Letter by Deputy Attorney General, November 29, 2007).

Thus, even though the Judiciary had received early advice on this matter from the deputy attorney general assigned to the Judiciary, the attorney general had jettisoned one client in favor of the JSC, and threatened to take adverse legal position against its former client. As a result of the Department of the Attorney General and the JSC's action, a qualified and lawfully selected civil servant has thus far been denied employment.

This bill seeks to ensure that when the heads of either the legislative or judicial branch of government seek legal counsel from the Department of the Attorney General, the attorney general must provide such legal counsel. If there is a legitimate conflict that calls into question whether the attorney general can provide such legal representation, either the attorney general can endeavor to establish adequate ethical screens within his office or, if that is not viable, ensure that private counsel is retained by assisting with the procurement process and financing that legal representation.

We would hope that this situation would not happen with any great frequency. But, if and when it does happen, it is imperative that the Legislature and the Judiciary not be placed in a position where there respective legal needs are not met.

TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:
S.B. NO. 3200, S.D. 1, RELATING TO GOVERNMENTAL RETENTION OF ATTORNEYS.

BEFORE THE:
SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Friday, February 22, 2008 **TIME:** 10:00 AM
LOCATION: State Capitol Room 016
Deliver to: , Room 219, 1 copies

TESTIFIER(S): WRITTEN TESTIMONY ONLY. (For more information, call Charleen M. Aina, Deputy Attorney General, at 586-1286.)

Chair Taniguchi and Members of the Committee:

The Attorney General opposes the passage of this bill.

This bill forces the Attorney General to represent a state department, board, commission, agency, bureau, or officer of the State, including the Legislature and the Judiciary, irrespective of whether the department or officer is authorized by section 28-8.3, Hawaii Revised Statutes, to contract for legal services directly. In other words, it forces the Attorney General to represent someone who already has the statutory right to hire its own lawyer without consulting the Attorney General. In addition, the Attorney General could be forced to act contrary to the Rules of Professional Conduct and take a position directly adverse to a position the Attorney General previously took while representing the State, another department or officer of the State, or the "public interest," or is currently asserting in the very same litigation. It could also lock the Attorney General to that position in the future, and preclude him or her from presenting a different position for the State or in the "public interest," or from representing another department or officer of the State that wished to take a position different from that position in future litigation.

The alternative provision of the bill requires the Attorney General to actually retain, and apparently pay for, private counsel for a department or officer that the Attorney General is precluded by a conflict from representing when the department or officer does not waive the conflict even though the conflict would limit the Attorney General's ability to negotiate the scope of work and other terms of the retention contract, and supervise the delivery of services under the contract. This effectively puts the budget of the Department of the Attorney General at the mercy of another department or agency.

The bill also leaves departments without separate authority to employ or retain an attorney, with no means of retaining one, when the Attorney General declines to represent them for reasons other than a conflict. This is because the bill's approach is to essentially repeal an existing provision - for no apparent reason - instead of just leaving that provision alone, and adding a new section to the existing statute, if such a new section is really necessary.

The changes this bill makes clearly implicate concerns rooted in the doctrine of separation of power. The changes unquestionably diminish the force of the Rules of Professional Conduct, and undermine the Judiciary's authority under article VI, section 7 of the State Constitution to adopt rules governing the practice of law by doing so. They also seriously qualify the discretion that is inherent in the statutes and the common law that the Legislature and the State Constitution require the Attorney General, as the State's chief legal officer, to execute and enforce.

If the objective of this bill is to provide independent counsel for state departments and officers outside the Executive Branch when the Attorney General is barred by a conflict from advising or representing them, this bill is unnecessary, as the Judiciary and the Legislature already have the independent authority to retain attorneys without the consent of the Attorney General. If for some

reason the Legislature wishes to give Executive Branch departments or officers the authority to hire attorneys when the Attorney General has a conflict, and is not satisfied with the current provision that already allows any Executive Department to hire its own attorneys if the Attorney General and the Governor agree, then the bill should be revised to provide them with both express authority, and the funds with which to do so. This cannot and should not be accomplished by any means that limits, compromises, or even implicates the Attorney General's duty and ability to represent and protect the interests of the State, and the "public interest." The Attorney General's role should be limited to declaring a conflict.

To serve effectively as the State's chief legal officer, the Attorney General must be able to independently determine when he or she is permitted under the Rules of Professional Conduct to represent a department or officer of the State, and when, even without a conflict, it is in the State's or the public's interest to decline to employ or retain an attorney for a state department or officer.

At the same time, departments and officers without separate authority to employ or retain an attorney should not be limited only to those instances when a conflict precludes the Attorney General from representing them, in which to contract for the services of a private attorney. The existing provisions of section 28-8.3(a)(22) should thus be retained for that purpose.