



Testimony to the Senate Committee on Tourism and Government Operations

Senator Clarence K. Nishihara, Chair
Senator Donna Mercado Kim, Vice Chair
Tuesday, February 5, 2008, 1:15 p.m.
State Capitol, Conference Room 229

By

Thomas R. Keller
Administrative Director of the Courts
The Judiciary, State of Hawai'i

Bill No. and Title: Senate Bill No. 3200, Relating to Governmental Retention of Attorneys.

Purpose: Specifies the responsibility of the attorney general when the attorney general cannot represent a department.

Judiciary's Position:

The Hawai'i Judiciary testifies in support of Senate Bill No. 3200.

Under current law, the attorney general, through the deputy attorneys general within the department of the attorney, must provide counsel and representation to state departments, as set forth in Hawai'i 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.)

Hawai'i 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-



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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 Hawai'i 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 Hawai'i 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



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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 office 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.



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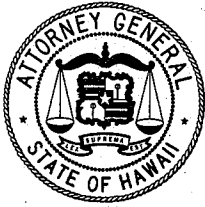
Under the present law, departments may be permitted to retain their own counsel. From a practical point of view, however, that is not necessarily feasible. For instance, the department, unlike the department of the attorney general, may not have any budget to retain an attorney and cover litigation expenses. 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.

We recognize that the present language in this bill may be amended to more clearly specify the gap the bill is designed to address. One such change to the language may be:

[By] For and on behalf of a department, [in the event] if the attorney general [for reasons deemed by the attorney general good and sufficient, declines, to] determines and discloses a conflict that precludes the attorney general from representing that department. In such event, the attorney general shall retain and fund independent legal counsel acceptable to the department [employ or retain an attorney for a department provided that the governor thereupon waives the provision of this section.]

(b) For purposes of this section the term “department” includes any department, board, commission, agency, bureau, or officer of the State[.] the legislature, and the judiciary.

Finally, we note that this bill appears designed to flesh out how representation is to be provided when different departments find themselves in adverse positions. It does not require any attorney to advocate a legal position for a department that the attorney believes is barred by Rule 11, Hawai‘i Rules of Civil Procedure (i.e., the claims, defenses and other legal contentions must be warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal, of existing law or the establishment of new law.)



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

ON THE FOLLOWING MEASURE:

S.B. NO. 3200, RELATING TO GOVERNMENTAL RETENTION OF ATTORNEYS.

BEFORE THE:

SENATE COMMITTEE ON TOURISM AND GOVERNMENT OPERATIONS

DATE: Tuesday, February 5, 2008 **TIME:** 1:15 PM

LOCATION: State Capitol Room 229
Deliver to: Committee Clerk, Room 229, 1 copies

TESTIFIER(S): Lisa M. Ginoza, First Deputy Attorney General
or Deputy Attorney General Charleen M. Aina

Chair Nishihara 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.