

**TESTIMONY OF EVAN OUE ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) IN SUPPORT OF
HB 166**

Date: Wednesday, February 5, 2025

Time: 2:00 p.m.

My name is Evan Oue and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in **SUPPORT of HB 166, RELATING TO DEFENSE OF STATE EMPLOYEES.**

HAJ supports HB 166 as it prevents professionally licensed state employees from being forced to secure private counsel at great expense for an event which is ultimately the financial responsibility of the State of Hawaii. Presumably many of these professionals do not maintain insurance because their professional actions are on behalf of the State of Hawaii.

Moreover, HAJ stands in support of this measure as it offers an avenue of recourse for the injury or loss of property, or personal injury or death, arising or resulting from the wrongful acts or omissions of any professionally licensed or certified employee of the State while acting within the course and scope of the employee's office or employment.

This measure appropriately balances the protection of resident's rights to recovery while offering protection to our hardworking professionally licensed or certified state employees.

Thank you for allowing us to testify regarding this measure. Please feel free to contact us should you have any questions or desire additional information.



Randy Perreira
President

HAWAII STATE AFL-CIO

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The Thirty-Second Legislature
House of Representatives
Committee on Judiciary & Hawaiian Affairs

Testimony by
Hawaii State AFL-CIO

February 5, 2025

TESTIMONY IN SUPPORT OF HB166 – RELATING TO THE DEFENSE OF STATE EMPLOYEES

Chair Tarnas, Vice Chair Poepoe, and members of the committee:

The Hawaii State AFL-CIO is a state federation of 74 affiliate labor organizations representing over 68,000 union members across Hawaii in industries including healthcare, construction, hospitality, entertainment, transportation, and government. The Hawaii State AFL-CIO serves its affiliates by advocating for the rights of working families, promoting fair wages, safe working conditions, and policies that strengthen Hawaii's workforce.

We support HB166, which requires the State to defend professionally licensed or certified state employees in civil actions or proceedings when their actions are within the scope of their employment and not grossly negligent. Public employees play an essential role in delivering critical services to our community, and they should not be left vulnerable to financial and legal burdens for performing their duties in good faith. Ensuring they are protected fosters confidence and stability among the workforce, allowing them to focus on serving the public effectively.

This measure strikes a fair balance by allowing employees to hire their own attorneys if desired and providing a structured process for the Attorney General to transfer or withdraw representation when necessary. These safeguards help maintain trust between employees and the State, encouraging a positive working environment and demonstrating a commitment to fairness for public servants.

We urge the committee to support this legislation as a meaningful step toward protecting state employees and strengthening the public services they provide.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Randy Perreira".

Randy Perreira
President



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Thirty-Third Legislature, State of Hawaii
The House of Representatives
Committee on Judiciary and Hawaiian Affairs

Testimony by
Hawaii Government Employees Association

February 5, 2025

H.B. 166 — RELATING TO THE DEFENSE OF STATE EMPLOYEES.

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly supports the purpose and intent H.B. 166, which requires the State to defend professionally licensed or certified state employees from civil actions or proceedings, under certain circumstances. Clarifies that the employee may employ their own attorney at the employee's own expense. Establishes a process for the Attorney General to transfer or withdraw representation if the Attorney General declines to defend the employee.

As the State's largest public sector union, we represent many professionally licensed or certified employees who will be impacted by the passage of this measure, including physicians, nurses, psychiatrists, and engineers, among others. While we believe that employees are generally afforded qualified immunity, this measure will further strengthen their legal protections when exercising their professional judgment in their capacity as public employees. Furthermore, requiring the court to conduct a hearing if the Attorney General chooses to withdraw as council provides a fair 'check', particularly if the Attorney General unjustifiably withdraws as council. There have been far too many instances where the Attorney General has, in our opinion, decided to wrongly not defend an employee and that employee had to pay out of pocket for private council to defend themselves. In those cases, the inaction by the Attorney General has caused financial constraint for our members.

Thank you for the opportunity to testify in strong support of H.B. 166.

Respectfully submitted,

Randy Perreira
Executive Director



To: HAWAI‘I HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS (JHA)

Re: Testimony Opposing HB 166 [Relating to The Defense of State Employees]

Aloha Chair Tarnas, Vice Chair Mahina, and Esteemed JHA Committee Members,

Please oppose HB 166. In its place, I encourage much-needed reforms to Hawai‘i Revised Statutes CHAPTER 661 (*Actions By and Against the State*) and CHAPTER 662 (*State Tort Liability Act*).

HB 166 concerns our State of Hawai‘i Department of the Attorney General’s (“AG”) system of legal **representation for** state employees who, individually, become a **defendant** in a civil tort when sued by a plaintiff, often a private citizen.

On the flip side, this session’s HB 616 (*3O2A- Educational workers; protection and workplace safety; harassment; reporting; training*) involves our AG “assisting,” i.e., **representing** individual state educational workers who become a **plaintiff** in harassment litigation against a defendant who is often a private citizen. Even though HB 616 doesn’t specifically mention the AG, it says the department (of Education) will assist with legal actions which means the AG gets involved.

There are many antiquated, cumbersome, confusing, and indiscriminate laws governing how our AG decides to “assist” individual state employees who are either plaintiffs, defendants, or witnesses. AG representation decisions *significantly* impact public confidence in government, the integrity of our educational system, state financial expenditures, and residency. Built on a very poor foundation, the current system desperately needs fixing. HB 166 and HB 616, along with Act 44 of 2022 (mentioned in the first sentence of HB 166), are just a few obvious indicators that the basic structure needs repair. Treating cracks in the fabric with laws like HB 166 doesn’t fix the root cause. More cracks will appear.

If the committee wants to salvage this bill, I suggest the JHA amend HB 166 to something this:

A BILL FOR AN ACT:

RELATING TO THE DEFENSE OF STATE EMPLOYEES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

The legislature finds that Act 44, Session Laws of Hawaii 202(Act 44), addresses the personal liability requirements for professionally licensed or certified employees of the State. However, the legislature notes that Act 4 did not clarify the circumstances under which the State has a duty to defend professionally licensed or certified state employees.

Accordingly, the purpose of this Act is to:

(1) Initiate significant improvements in state law regarding the Department of the Attorney General's defense of state employees and prosecution of individuals accused of offenses against state employees.

GOOD & BAD MODELS FOR APPROVING ATTORNEY GENERAL REPRESENTATION REQUESTS

In 2022, I researched how states' Attorneys General authorize legal representation for state employees sued for something they did or didn't do while working. A UIPA request to the Hawai'i AG for its procedures yielded the nine pages in this testimony's APPENDIX (the AG's Ethics & Conflicts Committee Review Process). When I read Ohio's process, which unlike Hawai'i was easy to find on the web, I was impressed. Ohio has a "Court of Claims Defense" (COCD) that decides whether or not a state employee defendant is entitled to legal representation paid for by the state. The COCD webpage states:

"If the Court of Claims determines that the state employee was acting within the scope of employment in furtherance of the interests of the State, the State will accept responsibility for the employee's act, and the litigation may only be pursued against the State in the Court of Claims. However, if the Court of Claims determines that the state employee was not acting within the scope of employment, the employee is personally answerable for his/her acts in common pleas court."

How intelligent to have a court that specializes in qualified immunity cases involving state employees. The COCD decides, in an open, public court whether the AG should defend an employee before spending state funds to so. You can read more about the Ohio COCD here:

www.ohioattorneygeneral.gov/About-AG/Service-Divisions/Court-of-Claims-Defense

Compare this to the Hawai'i AG's hinky process. When a plaintiff serves a state employee with a legal complaint, the employee contacts the AG for help. A deputy AG writes a memo to the E&CC asking for approval to represent for this employee. The E&CC makes a recommendation to the State Attorney General who is the only person authorized to make a decision about representation. If approved, the plaintiff is now interacting with one or more state deputy attorneys general (see *David v. Goliath*). If a plaintiff asks to see written documentation of the E&CC's recommendation, it will be denied for reasons of "attorney/client privilege." That's the response I got to my UIPA request for information about the AG's decision to represent the defendant in my lawsuit against an individual state employee.

It's quite clear that E&CC recommendations occur *before* an attorney/client relationship is authorized. So, there are no reasonable grounds for keeping such information secret, yet secret it is. There's no public oversight of E&CC recommendations for representation because the AG asserts these are not public records. I say, "Poppycock!" I wonder if the State Attorney General *ever* overrides an

E&CC recommendation or simply rubber-stamps them. I suspect reality tends toward the latter. One person can't possibly do a good job of E&CC oversight with all the other responsibilities as the head of a state agency. The Hawai'i system for approving state employee requests is fraught with the potential for mistakes because there's no checks and balances on which cases they take on.

HB 166 is designed to give the AG a way out of a bad representation decision. This backwards and extremely unfair to the person who gets dumped mid-suit by the AG after the AG already agreed to represent the employee. We need laws that *prevent* such mistakes from occurring in the first place. We don't need a messy kludge like HB 166 applied to a system with fundamental design flaws. We need to need to fix the unsound foundation because the one we've got is *not* serving the best interests of the state and the people of Hawai'i. Before the AG agrees to defend a state employee, a thorough investigation of the employee's credibility and the facts in the case should be well-understood. If Hawai'i had a system like Ohio's, the need for something like HB 616 would be moot. Ohio makes darn sure that the decision to represent a state employee defendant is appropriate *before* it takes on the financial and moral responsibility to do so.

A major overhaul of Hawai'i's system will not happen right away. In the meantime, we should enact a law that opens E&CC recommendations to public scrutiny. That is the best way, in the short run, to help ensure that the AG makes sure a state employee deserves representation. In the long run, opening AG operations to scrutiny will help legislators enact better laws affecting the AG's process.

Currently, I'm a *pro se* plaintiff suing a state employee for defamation. I'm *astounded* that the AG is spending government resources in defense of this case. I'd love to know how much money the AG is spending to defend state employees who defame members of the public or colleagues, even if it never makes it to court. I hope reading, "My Story," below will convince you that bad representation decisions need to be prevented, not mitigated for the AG later by withdrawing counsel, leaving a defendant high and dry, and plaintiffs forced to contend with a new opposing attorney, which HB 166 seeks to do.

Distinguishing fact from opinion and being as brief as best I can, I hope my story gives you insights that inspire better legislation concerning the AG's operations.

MY STORY

My involvement with the Hawai'i Department of Education's legal system began when I became a licensed DOE teacher in 2007. I quit in 2012 after years of years of fighting with the DOE Civil Rights Compliance Branch to get a simple, workplace ADA disability accommodation (a key to the parking gate so I could access handicapped parking to work in my classroom after 4:30 pm and on the weekends). Since 2012, I've testified to the Board of Education dozens of times. Often, I advocate for

better family & community engagement, and greater oversight for how the DOE handles conflict, unfortunately to little effect.

In 2017, I volunteered at my local school, and tutored a 10-year-old Special Education student. This led to a personal arrangement with the child's mother, a Tongan national with limited English fluency. I offered to homeschool the child full time in School Year ("SY") 2017-18 for no money. In exchange, the mother gave me permission to write about my experiences with her son. The experiment was fabulously successful. When he returned to public school in SY 2018-19, I continued to tutor the child nearly every day, collaborating with his Grade 5 teachers. His achievements gaps were closing quickly. All that changed when he entered Stevenson Middle School in SY 2019-20. His Math and Language Arts skills plummeted, and no wonder.

This school's principal discouraged the child's teachers from cooperating with me! She demanded I stop contacting the teachers and trying to arrange a meeting with each of them. Why? I speculate that: she wasn't a very good principal; she resented any criticism of how a problem was being handled; and she was either encouraged to be, or not discouraged from being, uncooperative.¹ So, I helped the mother submit an IDEA (U.S. Individuals with Disabilities Education Act) request for a due process hearing in early 2020. The COVID quarantine began March 2020, and the proceedings were conducted via video conferences.

To our surprise, an IDEA due process hearing in Hawai'i is a sort-of-quasi-judicial court proceeding adjudicated by a deputy attorney general! (Note: Not all states handle IDEA due process hearings this way, and only in Hawai'i are school disputes handled by the state rather than local school districts.) In my opinion, the deputy AG we got knew very little about Special Education or the IDEA. She's a lawyer and not an IDEA expert. Being a court proceeding of sorts, and because I'm an attorney, I was not allowed to speak for the mother, and she was not educated enough about the IDEA to represent herself even if there was a Tongan translator available. I later learned that I *could have* requested a due process hearing as a third party and spoken for the child, but the presiding deputy attorney general never informed us of this fact when ruling that I could not speak for the mother. By July 2020, the problems weren't fixed, but the mother had managed to negotiate an agreement that moving forward, the principal would respond to my correspondences. It wasn't long before the principal reneged.

When SY 2020-21 began, students attended classes via the internet. The child video conferencing from my small apartment so that I could help him. In spite of my reminders, the child kept forgetting to mute his microphone. In September, one of his teachers accused me of yelling at her repeatedly during class for about 10 minutes demanding that she reboot her computer. She also accused me of repeatedly screaming, "I'm bored," claiming it upset her students. I knew nothing of the teacher's accusations until a month later when the mother received a certified letter from principal barring me from communicating with her and the child's teachers at all because of my disrespectful behavior.

¹ This is the same principal featured in these 2022 news stories: [staradvertiser.com/2022/09/22/hawaii-news/former-principal-sues-doe-over-threat-case](https://www.staradvertiser.com/2022/09/22/hawaii-news/former-principal-sues-doe-over-threat-case) and [hawaiinewsnow.com/2022/02/04/middle-school-principal-who-got-death-threats-says-doe-isnt-taking-her-safety-seriously](https://www.hawaiinewsnow.com/2022/02/04/middle-school-principal-who-got-death-threats-says-doe-isnt-taking-her-safety-seriously). Apparently, I'm not the only person upset with this principal's conflict resolution skills.

I appealed to the Complex Area Superintendent, eventually supplying written witness statements from me, the child, the mother, and my husband. All of us were in my apartment during these incidents. We all confirmed that: (1) I was talking to the child when telling him to reboot his computer for about 10 minutes as he couldn't stream the video the class was discussing; and (2) some students were yelling out, "I'm bored," and the teacher ignored the utterances. The CAS supported the principal's ban, and never spoke to me or the other three witness. I sent the witness statements to the teacher asking her to reconsider her accusations, retract them, and apologize. I asked more than once. The teacher never responded. The following excerpt from the teacher's deposition reveals that her silence was apparently based on the AG's advice! When I tried to find out the whole truth, I was shut down with attorney/client privilege objections from deputy attorney general Mr. Azuma (who, BTW, was abruptly withdrawn by another deputy AG, and disappeared from this case in July 2024).

<p style="text-align: right;">Page 57</p> <p>14 Q Do you acknowledge that after receiving 15 the witness declarations, you made no attempt to 16 investigate whether what the witnesses were saying 17 was true or not? 18 A Yes. 19 Q On page -- on page 9 through 11 is a 20 letter that the Plaintiff sent to you asking you to 21 avoid court by writing an apology. Why did you -- 22 Did you respond to this letter? 23 A I did not respond to the letter. 24 Q Why did you not make any attempt to 25 communicate with Ms. Ott about these issues?</p>	<p style="text-align: right;">Page 58</p> <p>1 A My principal said to cut off ties. 2 Q In cutting off ties, you refused to 3 discuss -- oh, I'm sorry. Did your principal tell 4 you to not try to resolve these issues? Is that what 5 you're saying? The principal says "Cut off ties," 6 which means you were instructed to not try to resolve 7 this issue out of court? 8 A She said we're going to work with the 9 attorney general on it. 10 Q So did anyone else instruct you to not 11 try to resolve the issue out of court? 12 MR. AZUMA: I'll object to potential 13 attorney-client-privilege infringement.</p>	<p style="text-align: right;">Page 60</p> <p>1 BY MS. OTT: 2 Q Ms. Asuncion, you've testified that after 3 receiving the November 12th email from Erik Ott 4 asking you to retract your statements, and including 5 four witness statements from people who were 6 colocated, that you did not respond and you did not 7 retract and that this was based on the instructions 8 of your principal. I have that correct; true? 9 A My principal and the attorney general. 10 Q When did you first speak to the attorney 11 general? 12 MR. AZUMA: I'm objecting again. This is 13 infringing on attorney-client privilege.</p>
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A year later, I sued the teacher for defamation in small claims court, discovered it was the wrong venue, and subsequently filed a complaint in the matter of defamation in circuit court the next year (2022). I had asked for a jury trial, but in August 2024, the First Circuit Court Judge granted defendant's motion to dismiss the case. His opinions were: the teacher is protected by qualified privilege immunity from liability because she was performing her job duties, and I was at fault for disrupting classes because I didn't think to remind the child to mute his microphone every time I spoke to him. The judge said it didn't matter that I was in my own home, helping the child, and we were unaware the mic wasn't muted because no one told us. The judge said *I* was responsible because I had invited the child into my home to attend remote school. Of course, I appealed this crazy interpretation of the law. We won't know the outcome for another two to four years, maybe five years from now because appeals courts are way backed up according to many sources, and if I win my appeal as a *pro se* plaintiff in Hawai'i in a defamation lawsuit, it will be a miracle.

THE CONSEQUENCES OF OUR AG'S INADEQUATE PROCESS

With all the secrecy, "confidentiality," attorney/client privilege assertions, I can only hypothesize how it all works. I suspect that the AG approves almost ALL employee representation requests without a decent investigation to discover the truth *before* agreeing to expend state resources defending someone. Why else would the AG want or need HB 166? Why else would I be involved in this lawsuit?

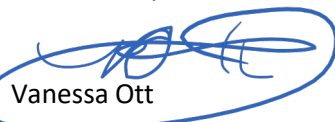
Here's another theory. The reason for the exodus of Hawai'i's children settling elsewhere is because they want a good education for themselves and their children, and they can't afford private school. Why does Hawai'i have one of the highest rates of private school enrollment in the nation? It's because of incidents like mine. How about the teacher retention problem? DOE data says the number one reason is low pay, but the survey methodology is flawed. This data comes from an exit survey where the respondent can select *only one* reason for leaving, not *all* the reasons, from a preselected list which probably hasn't been updated in over a decade based on comments in the "other" box. I believe the primary reason teachers leave involves low pay, but the bigger picture is because they aren't getting paid enough to put up with injustice, retaliatory defamation, and conflicts they can never win when ultimately, they're up against the State AG, with its seemingly bottomless pockets to crush dissent.

Probably 99% of folks who've had a conflict with the DOE simply go elsewhere. Very few spend thousands of dollars and thousands of hours trying to defend truth and justice. My lawsuit is not just about clearing my reputation. It's for all of Hawai'i. I know we can do better if we develop systems that *avoid* lawsuits, and deal with conflict by focusing on solving problems, not denying them.

There are pros and cons to just about everything in life. Hawai'i's state-run education system consistently ranks high in student equity amongst other states because of the fairness built into our weighted student formula. I believe lots of teachers would tolerate low pay in beautiful Hawai'i if working conditions were better. But, when the all-powerful, STATE DEPT OF THE ATTORNEY GENERAL lurks behind every dispute in our public schools, often giving bad advice and defending unjust causes that too often erupt into lawsuits, we have a huge problem. I'm pretty sure that *all* complaints to the DOE Civil Rights Compliance Branch are handed to the AG for comment or action (which makes one wonder what the CRCB actually does). A fact of life in the U.S. is that attorneys are motivated to keep their win scorecard high, and vigorously (which is sometimes offensively) defend their client's position, right or wrong. They don't win if they settle amicably and fairly. We need less litigation, and more responsibility (with oversight) for what the AG is doing in the state's best interests – OUR best interests.

Therefore, **I beg the JHA committee members to VOTE NAY on HB 166.** It's best for Hawai'i to "just say no" to HB 166, and as soon as possible, enact laws that save money and create a more just society by reforming the AG's processes, responsibilities, and accountability.

Mahalo for your consideration,



Vanessa Ott

ETHICS & CONFLICTS REVIEW PROCESS

Note: All forms referred to in this document are located on the AG intranet.

A. RULES OF PROFESSIONAL CONDUCT

Attorneys are expected to adhere in all their conduct to the Hawai'i Rules of Professional Conduct, the Rules of the Supreme Court of the State of Hawai'i, and LR 83.3 of the U.S. District Court for the District of Hawaii.

B. STATE ETHICS CODE

As state employees, attorneys are also expected to conduct themselves consistent with the State Code of Ethics, Chapter 84, Hawaii Revised Statutes (HRS). See General Department Manual, Chapter XI. Staff attorneys at the State Ethics Commission are available to provide advisory opinions about the requirements and applicability of the Code of Ethics to particular situations. Employees are encouraged to present questions directly to the State Ethics Commission.

C. PROHIBITION AGAINST PRIVATE PRACTICE

HRS § 28-10, Prohibition on private practice of law by attorney general, first deputy, and other deputies, provides:

The attorney general, the attorney general's first deputy, and other deputies shall devote their entire time and attention to the duties of their respective offices. They shall not engage in the private practice of law, nor accept any fees or emoluments other than their official salaries for any legal services. This section shall not apply to any special deputy employed on a part-time basis for a limited period.

D. FUNCTION OF THE ETHICS AND CONFLICTS COMMITTEE (E&CC)

The primary function of the E&CC is to develop a consistent process and forum through which the department reviews, evaluates, and makes recommendations on issues relating to attorney ethics, and conflicts of interest generally. This includes evaluation of requests for Attorney General representation from state employees who have been sued in their individual capacities. All decisions and actions of the E&CC are subject to the approval of the Attorney General. The E&CC is also tasked with the standardization of client representation letters and other forms, and making recommendations relating to department policies and procedures that address attorney ethics, and conflicts of interest generally.

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E. ATTORNEY GENERAL'S AUTHORITY TO REPRESENT INDIVIDUAL STATE OFFICERS AND EMPLOYEES

The Attorney General is authorized, but not required, by § 662-16, HRS, to defend state officers and employees when they are sued in their individual capacities for damages resulting from property loss or bodily injuries, including death, in connection with their performance of their state duties and responsibilities.

The Attorney General may offer representation if the Attorney General is satisfied that the claims are based on events that occurred while the employee was acting in the scope and course of his or her state employment. Claims made in this kind of lawsuit are against the state official personally and any damages awarded are payable out of the official's personal assets, unless the official asks for, and the Legislature appropriates, state funds to pay the damages instead.

The Attorney General is not authorized to assert any affirmative claims on an individual state employee's behalf against the plaintiff(s) (no compulsory or non-compulsory counterclaims), the other defendants the plaintiff may have sued (no cross claims), or others who are not already sued (no third party claims).

F. RECEIVING AND PROCESSING REQUEST FOR REPRESENTATION

1. Receipt of Request: OAG receives the complaint, by service of process or with a request for representation. OAG assigns the matter to a litigation division. Within 24 hours of receipt, if there is a possible conflict because there is an individual defendant sued in their individual capacity, OAG assigns the request for representation to advice & counsel division for review and recommendation. OAG notifies the litigation division supervisor at the same time, with the complaint. OAG sets up two different matter IDs - one for advice & counsel to author the representation request, one for litigation.

Within 24 hours of receipt, the advice & counsel division supervisor assigns the request for representation to a deputy to review and make a recommendation. If the complaint leaves capacity unstated, the deputy should analyze the claims made and relief sought to assess whether it includes the employee's individual capacity; if it is still unclear, assume that it includes claims in the individual capacity.

NOTE: If the advice and counsel Deputy receives the complaint or request for representation first, the Deputy should forward the material to OAG, AND start the memo requesting representation already.

2. Submission of Request to E&CC: The Request for Representation memo should include a recommendation for all employees named in their individual

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capacity for whom the authoring Deputy has enough information to make the recommendation, regardless of whether the individual has been served with the complaint.

The Attorney General will approve the recommendation as to all defendants for whom there is enough information to make a determination. A Deputy may not make an appearance for a defendant who has not been served, in accordance with the Rules of Professional Conduct, provided that the assigned litigation Deputy may counsel the un-served employee on whether waiving service would be in the employee's interest and other matters approved by the AG, and take appropriate action with the employee's consent. Once a Defendant is served, it will be the assigned litigation Deputy's responsibility to determine if there is any change in circumstances since the representation was approved that would require the Deputy to update the request for the AG's review.

- a. Timing: The authoring deputy is responsible for submitting the representation request sufficiently in advance of the filing deadline for the answer, preferably within 7 days of receiving the assignment, or sooner depending on when the answer is due. Time needed beyond that is determined on a case-by-case basis, and should be discussed with your supervisor.

The E&CC recommends submitting representation requests as soon as you know that representation of an individual state employee has or may be requested, to allow time for circulation of the E&CC recommendation for OAG's approval.

E&CC will acknowledge receipt of the recommendation within 24 hours and inform the authoring Deputy who on the committee is lead on it.

- b. Extension on answer if necessary: Sometimes, it may be necessary to request an extension of time to file an answer. In that case, if there is a Deputy assigned to represent the State, the authoring Deputy must contact opposing counsel or ask the litigation supervisor to contact opposing counsel to secure an agreement for the extension of time to file the answer.

If opposing counsel does not respond or does not cooperate, the authoring Deputy may ask if the litigation (State) Deputy can file a motion to request an extension on behalf of all defendants, or the authoring Deputy should file a standard, carefully written motion for extension of time to file an answer. The motion is made on behalf of the State of Hawaii; to be filed no later than 3 days before the answer is due. If the State is not a party, the authoring Deputy has to do this.

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The authoring Deputy will notify the litigation division supervisor about the result of efforts to seek an extension.

- c. E-mail protocol: Representation memos may be sent to the E&CC by e-mail at anytime. The subject line should read as follows:

E&CC Representation Request - Case Name - (Answer Due DATE)

Include the following with your e-mail:

- i. Memo. Send the memo as both a document COPY and the .nrl link to the iManage number. The first page of the memo must be filled in completely, and the substance of the memo should minimally include information as set out in the Representation Memo Drafting Guidelines, attached as Exhibit A.
 - ii. Supporting documents. The Complaint and any other supporting documents (e.g., Department head's request addressed to the AG requesting representation for the employees named in their individual capacity; court orders limiting the charges and defendants, etc.) may be scanned and included as attachments with your e-mail submission. If supporting documents are not attached to the e-mail, identify how the supporting documents will be transmitted or delivered.
- d. Form: Use the Representation Request form (**iManage #81364**) with the Matter Information, Individual Defendant Name(s) and Answer Date(s) completed. A copy of this form is attached as Exhibit B. The substantive portion of the memo should conform to the guidelines attached as Exhibit A.
- e. Access Rights: All representation memos should be in Microsoft Word format and stored in iManage. The iManage security profile must be set so the default security is "**Private**" and give the author's supervisor, the E&CC, and OAG "**Full**" access to your iManage document.

Give **Full** access to:

- Your Supervisor
- OAG (ALL_OAG)
- E&CC (E&C COMMITTEE)

- f. Supervisor Approval: All representation requests must be approved by the authoring Deputy Attorney General's supervisor. All requests submitted to the E&CC will be presumed to have supervisor approval.

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- g. Submit to E&CC: Choose the email group ATG Ethics and Conflicts Committee or enter: atg.ethicsandconflicts.committee@hawaii.gov

Copy your supervisor as well as your Steno or Legal Assistant (whoever can assist and answer questions about the submission).

- h. If e-mail is not functioning: Deliver or fax your memo and attachments to the committee members as soon as possible after you discover the problem.

G. DECISION-MAKING

1. Review by E&CC: Representation requests will be reviewed informally without the need for a meeting, except in special circumstances. The E&CC rotates lead responsibility among its members; the member assigned as lead to your request is responsible for completing the recommendation to the AG and will follow-up with you after the Attorney General makes a decision.
2. E&CC Recommendation: E&CC will review the recommendation and forward it to the AG (and the AG's secretary) along with the E&CC's recommendation within 3 business days after receipt. This time frame is dependent on the recommendation memo being complete and may be longer than three days depending on the circumstances, for example, if the E&CC is required to follow up with the authoring Deputy to obtain more information. If the request will take longer than 3 business days to process, E&CC will notify litigation supervisor, authoring deputy, and authoring deputy's supervisor of the status. The E&CC written recommendation will recommend:
 - a. Approve the request;
 - b. Deny the request; or
 - c. Approve the request in part or with conditions. The E&CC will detail its recommendations, such as recommending separate counsel for certain individual defendants.

E&CC provides the recommendation to the AG, with a copy to the AG's secretary, no later than the 3rd business day after receipt. If the AG is out of the office or is otherwise unavailable, or cannot review the recommendation due to a conflict, the recommendation will be forwarded to the First Deputy and the First Deputy's secretary for review.

3. Attorney General Decision: The Attorney General will review the E&CC recommendation and the memo, and then notify the E&CC of the decision on whether to provide representation. The E&CC will notify the authoring Deputy and the representation Deputy of the AG's decision.

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4. Conflicts Among Multiple Defendants: If the Attorney General approves the request for representation and there are potential or actual conflicts identified at this stage, the Attorney General will make division assignments for representation of the various individual and state parties.
5. Decision and Form Letter: The E&CC will determine which form of representation letter to use for each individual defendant, and then forward the Attorney General's decision to the authoring Deputy and the Deputy (or supervisor) assigned to provide representation. The E&CC lead Deputy fully completes the Representation Request Memo form by filling in the check boxes, the form letter used, the E&CC recommendation and AG's response. If individual representation is approved, the representation Deputy notifies each individual client by representation letter.

NOTE: If representation of an individual is declined, the authoring deputy sends a letter to notify the individual and the client agency.

6. Confidentiality of memo and related materials: Materials gathered to draft the representation memo should be kept confidential unless and until representation is approved. After a decision is made to provide representation, the authoring Deputy should give access to appropriate information to the litigation Deputy providing representation. The authoring deputy should keep a log of what material was accessed for the review. The log should reflect what information is given to the litigation Deputy and what was withheld. [Have to be able to separate out information as necessary to prevent conflict of interest.]

NOTE: The request for representation memo to the E&CC should always be kept confidential and is not shared with the litigation deputy.

H. REPRESENTATION LETTER

1. The Department's policy is to have consistent representation letters going to all individual clients. Accordingly, the Attorney General has approved the following form representation letters:
 - a. **iManage #544795**: For use when representing employees named with State, agency, and/or official capacity employee.
 - b. **iManage #544796**: For use when representing individual employee(s) only.
 - c. **iManage #544799**: For use when representing a volunteer jointly with the State or individually.
 - d. **iManage #550375**: For use when representing a notary who is not a state employee, jointly with the State, or individually

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2. Each Deputy who is assigned to represent any one or more individual defendants is required to use the appropriate representation letter identified on the Representation Request Form by the E&CC after receipt of the Attorney General's decision. If the form is not specified in the response, refer to the descriptions in H.1. above and use the appropriate form.
3. The Deputy's supervisor must approve the final representation letter before it is sent to the client.
4. The representation letter must be sent and written consent received before substantive representation is provided. (If a department head calls for advice about service or individual liability, the Deputy should respond to the client, even before the representation letter is sent.)
5. Retain copies in the case file of:
 - a. The signed representation letter; and
 - b. The request for representation from the client agency.
6. Suggestions for modifications to the representation letters should be submitted to the E&CC for consideration.

I. REQUEST FOR OTHER ASSISTANCE ON ISSUES RELATING TO ATTORNEY ETHICS AND CONFLICTS OF INTEREST

Requests for assistance with other issues relating to attorney ethics, and conflicts of interest should be set forth in a written memorandum that presents the question, a proposed answer to the question or a recommendation for resolving the controversy, and sufficient background facts and legal basis for the E&CC to evaluate the proposed answer or recommendation.

The written memorandum and any relevant documents should be sent to the members of the E&CC by e-mail. The E&CC may request more information or a meeting with the Deputy to discuss the issues presented before making a recommendation to the Attorney General.

J. REQUESTS FOR CONFLICT WAIVERS/CONSENT FROM THE ATTORNEY GENERAL

(Reserved – contact the E&CC for assistance)

E&CC Representation Recommendation Memo Drafting Guidelines

A. Background Information

All representation memos should include the authoring Deputy's conclusions and recommendations, including the following information:

1. Identify the matter, parties, and court.
2. Concise description of the facts, cause(s) of action, and any pertinent procedural history, including the course and scope factors and conflict factors noted in sections B and C, below.
3. Describe any unusual problems of which the E&CC should be aware, such as problems with deadlines, inability to obtain information from the agency client or prospective employee client, etc.
4. Statement of conflict concerns that the authoring deputy has, or statement that the authoring deputy has no conflict concerns, with supporting information.
5. State whether there is any other information that would be helpful in determining whether there are any conflicts.
6. Any other information that would assist the E&CC in evaluating the representation request.

B. Course and Scope

The authoring Deputy must make an assessment of the authority that allows the Attorney General to represent an individual and make a recommendation on whether the individual requesting representation was acting within the course and scope of the individual's employment, considering factors such as:

1. When did the incident take place?
2. Where did the incident take place?
3. What caused the incident?
4. What are each defendant's duties and responsibilities?

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5. Is there a written position/job description for each defendant?
6. What is the assessment of each defendant's supervisor – was each defendant doing what he or she was hired to do at the time of the incident?

C. Conflict

The authoring Deputy must make an assessment of any possible conflicts that may exist or are likely to arise between the individual requesting representation and the State or any other defendants represented by the Attorney General, considering such factors as:

1. Has the client agency requested that the Attorney General provide representation for each defendant?
2. What is the organizational relationship, if any, between the parties?
3. Are there any reports related to the events described in the complaint?
4. Has there been an internal investigation, and if so, what was the outcome?
5. Have there been or will there possibly be any disciplinary proceedings initiated against anyone involved in the events described in the complaint? Describe.
6. What do the defendants say about the events described in the complaint?
7. What do the defendants say about one another?
8. Do any of the defendants have any pending suits or claims against the State, i.e., collective bargaining grievances, workers' compensation, or civil rights claims?
9. Has this office represented any of the parties in their individual capacities before? Name the case, and the Deputy and Division assigned.