

# **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?

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.

# **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.

## **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

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.

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.

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

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



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)