

ANALYSIS OF ORIGINAL BILL

Franchise Tax Board

Author: Nava Analyst: Jahna Alvarado Bill Number: AB 471
Related Bills: See Legislative History Telephone: 845-5683 Introduced and amended date: February 24, 2009, and May 6, 2009
Attorney: Patrick Kusiak Sponsor: _____

SUBJECT: State Agencies May Employ In-House Legal Counsel In Non-Civil Litigation Matters

SUMMARY

This bill clarifies the Attorney General's (AG's) authority to represent state agencies and employees.

SUMMARY OF AMENDMENTS

This bill as introduced on February 27, 2009, and as amended May 6, 2009, clarifies the AG's authority to represent state agencies and employees.

The May 6, 2009, amendments do the following:

- Add state employees as a group that would be subject to the provisions of this bill.
- State factors the AG may consider when considering a request for consent to retain counsel, as specified.
- Preserve the AG's authority, as specified, on matters where consent to retain outside counsel has been given.
- Define several terms.

PURPOSE OF THE BILL

According to the author's office, the purpose of this bill is to do the following:

- Clarify existing law to ensure that the AG maintains authority over litigation involving state agencies, and
- Authorize state agencies to employ in-house attorneys to provide advice in non-litigation matters without requiring the AG's consent.

EFFECTIVE/OPERATIVE DATE

This bill would become effective and operative as of January 1, 2010.

POSITION

Pending.

Board Position:

_____ S _____ NA _____ NP
_____ SA _____ O _____ NAR
_____ N _____ OUA _____ X _____ PENDING

Department Director

Date

Selvi Stanislaus

06/03/09

SUMMARY OF SUGGESTED AMENDMENTS

Amendments 1 through 4 are provided to correct technical errors.

ANALYSIS

FEDERAL LAW

The Judiciary Act of 1789 created the Office of the Attorney General of the United States (USAG) that evolved over the years into the head of the Department of Justice and chief law enforcement officer of the Federal Government. The USAG represents the United States in legal matters generally and gives advice and opinions to the President and to the heads of the executive departments of the Government when so requested. In matters of exceptional gravity or importance the USAG appears in person before the Supreme Court.

STATE LAW

Under the Government Code, existing state law generally requires the AG's office to represent state agencies and their employees in all judicial proceedings. A state agency may retain outside legal counsel upon receiving the AG's consent. Existing law provides for an exception to this requirement for specifically named agencies and boards and for any state agency statutorily authorized to employ legal counsel.¹

THIS BILL

This bill would revise and clarify existing law requiring state agencies, not otherwise excepted, to obtain AG approval prior to being represented by "in-house counsel" or "outside counsel" in a "judicial or other proceeding."

This bill would preserve the AG's authority to:

- provide legal advice to a state agency, commissioner, or officer in circumstances other than "judicial or other proceedings," and
- intervene in or appear as *amicus curiae* (friend of the court) in a proceeding where the AG has consented to representation by "in-house" or "outside counsel."

This bill would specify a number of factors the AG may consider in determining whether to approve a request for representation by "in-house counsel" or "outside counsel."

This bill would define the terms "in-house counsel," "judicial and other proceeding," and "outside counsel."

¹ Govt Code section 11041

IMPLEMENTATION CONSIDERATIONS

The department has identified the following implementation concerns. Department staff is available to work with the author's office to resolve these and other concerns that may be identified.

This bill would define "in-house counsel" as a licensed attorney employed in state service by a state agency and represented by State Bargaining Unit 2. Under this bill, exempt classifications that are not represented by that bargaining unit, for example Chief Counsel and Assistant Chief Counsel, would be outside the definition of "in-house counsel." If it is the author's intent that "in-house counsel" includes all attorneys who are licensed to practice law in California and who are employed in state service by a state agency, the author may wish to amend this bill.

This bill would include "administrative adjudicatory proceedings governed by the Administrative Procedure Act" in the definition of "judicial and other proceedings" impacted by this bill. Although adjudicatory matters of the State Personnel Board (SPB) are not subject to the Administrative Procedure Act, existing law makes specific provisions of the Administrative Procedure Act applicable to SPB hearings. It is unclear whether this definition would include such hearings. The author may wish to amend this bill for clarity.

This bill uses the undefined term "arbitration proceeding" in the definition of "judicial and other proceedings." Lack of a definition for "arbitration proceeding" could result in differing interpretations among state entities. The author may wish to amend the bill to provide a definition for clarity.

TECHNICAL CONSIDERATIONS

This bill uses the terms "judicial or other proceedings" and "judicial and other proceedings" interchangeably. Amendments 1 and 3 are provided to provide consistency.

This bill uses the term "in-house legal counsel" and "in-house counsel" interchangeably. Amendment 2 is provided to provide consistency.

This bill refers to administrative adjudicatory proceeding governed by the Administrative Procedure Act (Chapter 4 (commencing with Section 11370)). Chapter four of the Act relates to the duties and responsibilities of the Office of Administrative Hearings. Chapter 4.5 of the Act prescribes the rules for administrative adjudicatory matters. Amendment 4 is provided to correct this reference.

LEGISLATIVE HISTORY

SB 87 (Stats. 1995, Ch. 893), among other things, eliminated the Insurance Commissioner's exception from obtaining prior AG approval to employ counsel for insurance delinquency proceedings.

OTHER STATES' INFORMATION

The states surveyed include *Florida, Illinois, Massachusetts, Michigan, Minnesota, and New York*. These states were selected due to their similarities to California's economy, business entity types, and tax laws.

Florida law authorizes the AG to "authorize other counsel where emergency circumstances or when professional conflict of interest exists."

Illinois law requires the AG to consult with and advise the state's attorneys on matters of state interest. This can include attendance at trial and prosecution assistance if the AG deems this activity necessary to protect the interest of the state or its citizens.

Massachusetts law requires the AG to appear for the commonwealth and all state departments, officers, and commissions in all suits and civil proceedings, except criminal recognizances and bail bonds.

Michigan requires the AG or the designated solicitor general to represent the state before the Supreme Court and allows the AG, at his or her discretion, to represent the state in any forum for any cause or matter.

Minnesota law allows for the engagement of outside counsel by the AG upon certification by the AG, the governor, and the chief justice of the Supreme Court.

New York law generally requires the AG to represent the state in all actions and proceedings that the state is interested in and requires that the AG be given prior notice of any action or proceeding affecting the property or interest of the state so that the AG may participate in the action or proceeding if necessary to protect the interest of the state.

FISCAL IMPACT

This bill would not significantly impact the department's costs.

ECONOMIC IMPACT

This bill would not impact state income tax revenue.

LEGISLATIVE STAFF CONTACT

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FRANCHISE TAX BOARD'S
PROPOSED AMENDMENTS TO AB 471
As Amended

AMENDMENT 1

On page 2, line 10, strikeout "and", and insert:

or

AMENDMENT 2

On page 2, line 25, strikeout "legal"

AMENDMENT 3

On page 3, line 23, strikeout "and", and insert:

or

AMENDMENT 4

On page 3, line 25, strikeout "(Chapter 4 (commencing with Section 11370))", and insert:

(Chapter 4.5 (commencing with Section 11400))