

# CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS

## Study Session Worksheet

**Presentation Date:** 7/19/12 **Approximate Start Time:** 9:45a **Approximate Length:** 15 min

**Presentation Title:** Ethics Complaint Representation

**Department:** County Administration

**Presenters:** Steve Wheeler, County Administrator

**Other Invitees:** Stephen Madkour, County Counsel

### WHAT ACTION ARE YOU REQUESTING FROM THE BOARD?

Affirm request for County to pay for outside legal representation for Commissioner Bernard regarding an ethics complaint

### EXECUTIVE SUMMARY (why and why now):

An ethics complaint was filed against Commissioner Bernard. It alleges a conflict of interest was not disclosed by Commissioner Bernard arising from the Portland to Milwaukie light rail project – specifically regarding land holdings near the project. See attached June 7 summary memo from County Counsel Madkour.

There are Board guidelines to deal with this situation, also attached. The Board has discretion to pay for outside legal representation. The process states the request must be made to the County Administrator. The Administrator is to consult with County Counsel and forward the request to the Board with or without a recommendation.

Having considered the request and discussed the overall situation with County Counsel it is my recommendation that the Board approve outside legal assistance for Commissioner Bernard subject to the following provisions:

1. Legal defense is appropriate because given the situation and facts as presently understood there is a responsible defense that can be developed;
2. A not-to-exceed amount of \$5,000 shall be the payment limit to outside legal counsel without further Administration and Board review;
3. Defense work shall be limited in scope to allegations of conflict related to the Commissioner's service with Clackamas County and not allegations that would cover his service as the Mayor of Milwaukie.
4. Should facts emerge that would reveal the ethics complaint charges are validated the Board shall, as per policy guidelines, retain the ability to consider the recovery of legal defense funds expended.

**FINANCIAL IMPLICATIONS (current year and ongoing):**

NTE \$5,000 without further review. This will be a General Fund expenditure.

**LEGAL/POLICY REQUIREMENTS:**

Described in attached summary.

**PUBLIC/GOVERNMENTAL PARTICIPATION:**

N/A

**OPTIONS:**

1. Affirm request to pay for outside legal assistance.
2. Deny request noted above.

**RECOMMENDATION:**

Affirm request.

**ATTACHMENTS:**

1. Memo on Request from County Counsel.
2. Board Order 2006-185 with Exhibit.

**SUBMITTED BY:**

Division Director/Head Approval \_\_\_\_\_

Department Director/Head Approval \_\_\_\_\_

County Administrator Approval SW \_\_\_\_\_

For information on this issue or copies of attachments, please contact \_\_\_\_\_ @ 503- \_\_\_\_\_



**OFFICE OF COUNTY COUNSEL**

**PUBLIC SERVICES BUILDING**

**2051 KAEN ROAD OREGON CITY, OR 97045**

**To: Steve Wheeler, County Administrator**

**CC: Jim Bernard, County Commissioner**

**From: Stephen L. Madkour, County Counsel**

**Re: Ethics Complaint Representation**

**Date: June 7, 2012**

**Stephen L. Madkour**  
County Counsel

**David W. Anderson**  
**Kimberley Ybarra**  
**Kathleen Rastetter**  
**Scot A. Sideras**  
**Chris Storey**  
**Scott C. Ciecko**  
**Alexander Gordon**  
**Rhett C. Tatum**  
Assistants

An ethics complaint has been filed against Commissioner Bernard. The complaint was filed by attorney Tyler Smith on behalf of Mac Woods and alleges a conflict of interest arising from the Portland to Milwaukie light rail project.

Last Friday, the Oregon Government Ethics Commission held an executive session to consider the complaint and decide whether to proceed to a preliminary investigation. Commissioner Bernard and I attended that executive session. Pursuant to County policy, I accompanied the Commissioner to provide consultation services as to the necessity and appropriateness of outside legal counsel. The Commission voted to proceed with an investigation.

At this juncture, I recommend that Commissioner Bernard retain independent counsel. I contacted attorney Roy Pulvers, whose practice focuses on legal and governmental ethics. Roy's regular hourly rates are \$300-\$500. He stated that he would bill the County his hourly rate of \$300.

County policy requires that the request be made to the County Administrator in writing. The policy further states that you will forward the request to the Board of Commissioners with or without a recommendation. I am providing you with a copy of the applicable policy.

Please let me know if you have any questions.

**BEFORE THE BOARD OF COUNTY COMMISSIONERS  
OF CLACKAMAS COUNTY, STATE OF OREGON**

**FILED**

**MAY 31 2006**

*Clackamas County Clerk*

In re the Matter of Adopting a Policy of  
Providing Legal Representation for Officers  
and Employees in Certain Circumstances

ORDER NO. 2006-185

This matter having come before the Board of County Commissioners at its regularly scheduled business meeting of May 25, 2006; and

It appearing to the Board that there are certain situations in which County officers and employees may be the subject of claims, charges, or allegations arising from their official duties, but not within the Oregon Tort Claims Act; and

It further appearing to the Board that it is in the public interest that County officials and employees be protected from financial hardship in appropriate circumstances; and

It further appearing to the Board that from time to time it may also be necessary to retain outside legal assistance or representation in matters where County Counsel is precluded from providing legal services due to a conflict of interest, or in matters requiring special legal expertise; and

It further appearing to the Board that there should be a written policy establishing the process for determining the appropriate use of counsel in such circumstances. Now therefore, it is

**RESOLVED AND ORDERED** that Exhibit "A", attached and by this reference incorporated herein, is adopted and shall be used as the guide to process, evaluate, and decide requests for legal representation as set forth therein; and it is further

**RESOLVED AND ORDERED** that, although any officer or employee may seek representation or reimbursement as provided in Exhibit "A", nothing shall entitle any officer or employee to representation or reimbursement; the Board retains sole and exclusive authority and discretion to determine whether such action is in the best interests of the public.

ADOPTED this 25th day of May, 2006.

BOARD OF COUNTY COMMISSIONERS

  
\_\_\_\_\_  
Bill Kennemer, Chair

  
\_\_\_\_\_  
Recording Secretary

294 528

**Policy and Procedural Guidelines Regarding  
Retention of Independent Legal Counsel**

**Purpose**

1). Defense of unmeritorious complaints relating to alleged ethical violations. The Oregon Tort Claims Act (OTCA) requires the County to provide county officials and employees with a legal defense in tort claims arising from the performance of their official duties. The Board of County Commissioners recognizes that it may be in the public interest to pay for legal representation for officials and employees in certain circumstances arising from the proper performance of their official duties that are not covered by the OTCA.

2). Retention of outside legal services. The Office of County Counsel is responsible for providing legal services to the County; however, from time to time it may be necessary for the County to acquire outside legal assistance and/or representation in the event County Counsel is precluded from providing legal assistance due to a conflict of interest, or specialized legal services are required.

The purpose of this policy is to set forth the Board's intent and guidelines regarding the above-described circumstances.

**Policy and Procedural Guidelines**

Defense of alleged ethics violations. It is within the Board's sole discretion to consider requests to pay for legal representation for County officials and employees involving claims arising from the proper performance of their official duties but not covered under the OTCA. The Board has determined that it is in the public interest that County officials and employees be free of fear of personal financial hardship associated with such matters. However, nothing in this policy should be construed to entitle any County official or employee to a legal defense or representation, nor is it the intent of the Board in adopting this policy to pay for independent legal counsel for a County official or employee involving matters for which the County has established formal administrative procedures and processes, including but not limited to the personnel complaint and appeal policies and procedures set forth in Title 2 of the Clackamas County Code relating to disciplinary procedures and appeals. Further, the board shall in all cases, in light of new or additional information, retain the right to revisit and alter any decision to pay for a defense or representation and, in so doing, seek reimbursement of any public monies expended and, if unwarranted, pursue disciplinary action through appropriate channels.

In no event shall the Office of County Counsel provide primary representation to the official or employee. County Counsel may, however, provide information and assistance to the retained attorney as County Counsel deems consistent with the interest of the County and with the Code of Professional Responsibility governing attorneys.

EXHIBIT "A", p. 1

In considering a request, it shall not be construed that the Board of County Commissioners has undertaken or is required to undertake more than a preliminary assessment. Where claims or charges against an official or employee are involved, the presumption is that such claims or charges are unfounded unless or until otherwise proven. Should it later appear that the official or employee misstated or failed to disclose facts which, if known, would have influenced a decision or, in the event that claims or charges are validated through subsequent review, the County shall be entitled to recover any public funds expended on that person's behalf and to pursue discipline through existing processes. Further, if the Board pays for legal representation for an employee or official charged with violating a law, rule or regulation and such law, rule or regulation provides for payment of costs and/or attorney fees if the official or employee prevails, then the County shall be entitled to reimbursement of any recoverable costs and/or attorney fees incurred by the County.

In the event the Board chooses to pay for representation, the Board may impose certain terms and conditions including, but not limited to, monetary and scope of work limits. In no event will the County's payment of expenses exceed what is determined by the Board to be reasonable and prudent. Unless expressly provided for otherwise, the official or employee shall be principally responsible for payment. A commitment to pay for legal representation pursuant to this policy may involve direct payment of costs, as incurred, or the Board may elect to commit only to reimbursement upon satisfying certain conditions, such as exoneration of any claims or charges made against the official or employee.

Outside legal assistance. When it appears to the Board that it is necessary for a County official or employee to retain outside legal assistance and/or representation in the event of a conflict of interest, or there is a need for specialized legal services, County Counsel, unless precluded by a conflict of interest or otherwise, shall: a) Provide consultation services as to the necessity and appropriateness of outside legal counsel; b) provide advice as to the selection of outside legal counsel; and c) shall monitor performance of outside legal counsel performance and provide necessary and appropriate assistance.

#### Administrative Process

A request for the County to pay for legal representation must be submitted in writing to the County Administrator, who will consult with County Counsel and forward the request to the Board of Commissioners with or without a recommendation. Any such request must be submitted by the official or employee at the earliest opportunity, and prior to the employee or official making any arrangement for representation or incurring any cost or payment obligation.

The County Commissioners shall be the final decision maker in these matters.

EXHIBIT "A" *pp. 2*

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