

CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS
Sitting/Acting as (if applicable)
Policy Session Worksheet

Presentation Date: March 10, 2020 **Approx. Start Time:** 11:00 **Approx. Length:** 30 Min

Presentation Title: Legal Representation Policy

Department: County Counsel and HR/Risk Management

Presenters: Stephen Madkour and Eric Machado

Other Invitees:

WHAT ACTION ARE YOU REQUESTING FROM THE BOARD?

This session will be focused primarily on the Board's current policy on Legal Representation by outside counsel for matters that are not covered loss under the Oregon Tort Claims Act. The policy has been in place since 2006. On various occasions, members of the Board have requested that we revisit the policy and have also asked about the potential for insurance to cover such situations.

EXECUTIVE SUMMARY:

The Office of County Counsel represents the county and its elected officials and employees who during the course and scope of their official action find themselves involved in a claim or filed litigation. The Oregon Tort Claims Act imposes a statutory requirement that the governing body defend and indemnify a government employee who is sued as a result of the work they were doing for the governmental entity.

Occasionally a claim will be filed against a government official that is outside of the coverage afforded by the Oregon Tort Claims Act. The most obvious situation would be a claim filed with the Oregon Government Ethics Commission claiming an ethics violation against a public official. Ethics complaints and claims are personal to the individual and are not torts under the Oregon Tort Claims Act.

The current policy was adopted to address those situations that involved either intentional acts or ethics complaints. The current policy has been applied inconsistently over the course years.

County Risk Management has explored the possibility of obtaining insurance coverage for these types of situations and is prepared to discuss those options with the Board.

FINANCIAL IMPLICATIONS (current year and ongoing):

Is this item in your current budget? YES NO

What is the cost? \$ Unknown at this time
County Administration or perhaps the Risk Fund.

What is the funding source? Most likely

STRATEGIC PLAN ALIGNMENT:

• How does this item align with your Department's Strategic Business Plan goals? County Code and the office's strategic plan provide that all outside counsel shall be approved by County Council.

• How does this item align with the County's Performance Clackamas goals? The Legal Representation Policy is an administrative policy as opposed to an outward goal or objective. As such, it does not align itself squarely with the County's performance goals and objectives. Internal administrative policies do ensure, however, for an orderly operation of county government.

LEGAL/POLICY REQUIREMENTS:

The Board should establish a policy that provides for a consistent, orderly, and transparent process for requesting, securing, and funding the use of outside counsel to represent county officials in situations where County Council is precluded by state law, county code, or government ethics from doing so. Such a policy should include details on how and when the request is made, the types of claims covered, and perhaps limitations on the amount spent.

PUBLIC/GOVERNMENTAL PARTICIPATION:

None to date

OPTIONS:

- 1. Continue with the Current policy;
- 2. Revise the current policy;
- 3. Further explore obtaining insurance coverage

RECOMMENDATION:

- Staff recommends that the Board either
- 2. Revise the current policy; or
 - 3. Further explore obtaining insurance coverage

ATTACHMENTS:

Board Order No 2006-1856 Retention of Independent Legal Counsel
Draft Retention of Outside Legal Counsel Policy

SUBMITTED BY:

Division Director/Head Approval _____
Department Director/Head Approval _____
County Administrator Approval _____



For information on this issue or copies of attachments, please contact Stephen L. Madkour at 503-655-8362



Counsel/Admin Retention of Outside Legal Counsel

POLICY: Counsel/Admin
DATE: 3/5/2020
REVISION: 1.0
REVIEW: Annual
Approved BCC: TBD
Board Agenda #: TBD

1. PURPOSE

The purpose of this policy is to establish a consistent procedure for the retaining of outside counsel. As set forth in Chapter 2.12 of the County Code, the Office of County Counsel will provide and oversee legal representation in all civil matters on behalf of the County. On occasion, certain circumstances may arise that preclude County Counsel from representing the County, its officials, or employees.

2. SCOPE

This policy applies to all situations that involve hiring outside legal counsel.

3. AUTHORITY

Situations Warranting Outside Legal Counsel. The retaining of outside legal counsel may be warranted in the following situations:

- Situations that require the hiring of an outside attorney who is a subject matter expert;
- Situations that require the hiring of an attorney when the Office of County Counsel has a non-waivable conflict, or is otherwise prohibited from continued representation by the Rules of Professional Responsibility;
- Complaints filed with the Oregon Government Ethics Commission; or
- Complaints filed with State or Federal regulatory, investigatory, or disciplinary agencies.

4. PROCESS

- County Counsel. The Office of County Counsel shall oversee all legal matters of a civil nature involving the County. For all civil matters, County Counsel may employ outside legal counsel on behalf of the county or its agents when the County Counsel deems it necessary or appropriate to do so.
- County Administrator. The County Administrator may employ outside legal counsel on behalf of any elected County official, or employee when the County Administrator deems it necessary or appropriate to do so. The County Administrator shall consult with the elected official or employee and County Counsel prior to retaining outside counsel. Under this section, the County Administrator may not incur legal fees in excess of \$5,000 without the specific authorization of the Board of County Commissions.

- Board of County Commissioners. The Board of County Commissioners may retain outside legal counsel to advise and represent the Board, its individual members, any other elected County official, or a county employee or agent. The Board shall consult with the elected official or employee, the County Administrator and County Counsel prior to retaining outside counsel. The Board may specify the amount of the County's budget that may be appropriated for these legal fees.

A request for the providing of outside legal representation and payment of any associated services 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 official or employee incurring any cost or payment obligation.

5. KEY RESTRICTIONS

In considering a request, the Board of County Commissioners is not 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.

6. QUESTIONS & RESOURCES

For questions related to this policy please contact Stephen Madkour, County Counsel or Don Krupp, County Administrator.

**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

CCP-PW25 (3/04)

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" *per*

294 529

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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