



Oregon

John A. Kitzhaber, MD, Governor

Government Ethics Commission

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April 17, 2012

Mary H. Williams
Deputy Attorney General
Oregon Department of Justice
1162 Court Street, NE
Salem, Oregon 97301-4096

Dear Deputy Attorney General Williams:

At its April 17, 2012 meeting, the Oregon Government Ethics Commission (Commission) adopted the following advisory opinion:

OREGON GOVERNMENT ETHICS COMMISSION ADVISORY OPINION NO. 12A-1001

STATED FACTS: The Attorney General for the state of Oregon is an elected official and is the chief executive officer for the Oregon Department of Justice (DOJ). Attorneys employed by DOJ are members of the Oregon State Bar (bar) as, in the majority of instances, bar membership is required to practice law in Oregon [ORS 9.160]. Information indicates there is no specific statutory requirement that the Attorney General be a member of the bar; however, as previously cited, ORS 9.160 requires, with limited exceptions, that a person may not practice law in the state of Oregon, or represent that they are qualified to practice law in the state of Oregon, unless an active member of the bar. Historically Oregon Attorneys General have been active members of the bar.

The bar is a public corporation and an instrumentality of the Oregon Judicial Department [ORS 9.010(2)]. The bar is authorized to carry out the provisions of ORS 9.005 to 9.755, including the licensing and disciplining of attorneys in addition to regulating the practice of law in Oregon. Attorneys admitted to practice law in Oregon are subject to bar disciplinary proceedings and may be disciplined by the Oregon Supreme Court. The Attorney General and DOJ do not advise or represent the bar.



DOJ attorneys, including the Attorney General, may be the subject of complaints filed with, or initiated by, the bar alleging professional misconduct in the administration of official duties on behalf of the state of Oregon. The Attorney General or Deputy Attorney General¹ may in some cases find it to be in the state's interest to provide representation, directly or through private counsel paid by DOJ, for a DOJ attorney who is the subject of a bar complaint. Specifically, potential representation for a DOJ attorney, including the Attorney General, would only be considered or provided when the alleged conduct at issue is related to work performed for DOJ, and where DOJ concludes that the attorney's conduct was consistent with DOJ policy and management expectations.

Information indicates compensation and benefits currently provided to DOJ attorneys, either by way of collective bargaining agreement or adopted internal policy [DOJ Policy 6-43 (bar dues) and 5-60 (bar complaints and representation)], includes employer paid bar dues and provides that the Attorney General or Deputy Attorney General, in the majority of instances, may agree to have DOJ provide representation for a DOJ attorney who is the subject of a bar complaint arising out of the attorney's work for the state as discussed in the previous paragraph. The benefit of employer paid bar dues is provided to all DOJ attorneys, including the Attorney General; however, the Attorney General is not covered by either collective bargaining agreement or DOJ Policy 5-60. The Attorney General's compensation and benefits are described in ORS 292.311(4) and ORS 292.430. ORS 180.060(6) provides that "[t]he Attorney General shall, when requested, perform all legal services for the state or any department or officer of the state." In addition, the Attorney General is required to "[a]pppear, commence, prosecute or defend any action, suit, matter, cause or proceeding in any court when requested by any state officer, board or commission when, in the discretion of the Attorney General, the same may be necessary or advisable to protect the interests of the state [ORS 180.060(1)(d)].

QUESTION: Would DOJ attorneys, including the Attorney General, violate Oregon Government Ethics law by accepting representation provided by DOJ when the subject of complaints filed with, or initiated by, the bar alleging professional misconduct in the administration of official duties on behalf of the state of Oregon, as discussed in the stated facts?

ANSWER: No. ORS 244.040(1) prohibits public officials from using or attempting to use an official position or office to obtain financial gain or to avoid financial detriment that would not otherwise be available but for the public official's holding of the official position or office. However, the stated facts describe circumstances where DOJ attorneys, including the Attorney General, may be subject to bar complaints arising out of the attorney's performance of official duties on behalf of the state. Under these

¹ In a complaint involving the Attorney General, the Deputy will make the decision as to whether representation is in the state's interest.

circumstances DOJ attorneys, whether represented or unrepresented by a labor union, and the Attorney General, are not prohibited from accepting representation from DOJ, either directly or through private counsel paid by DOJ, when such complaints are incurred in the conduct of official duties on behalf of DOJ because the purpose of the representation is for the benefit of the state, not the individual public official.

The basis for providing representation, as described in the stated facts, is whether the specific attorney was acting in his or her official capacity and is intensely scrutinized by DOJ in determining whether to provide representation. The Attorney General has wide statutory latitude to appear in proceedings on behalf of an officer of the state. The decision to provide representation is made entirely by DOJ, not the individual public official. The stated facts do not appear to represent circumstances in which public officials would be receiving financial benefits prohibited by ORS 244.040(1) because the decision to provide representation is not made by the public official receiving the benefit and is based on the interests of the state.

Although this is not prohibited financial gain under ORS 244.040(1), it should be understood that public officials are allowed to accept certain financial benefits identified in ORS 244.040(2). Specifically, public officials may receive any financial benefit that is provided by the public body served by the public official as part of an official compensation package or the reimbursement of expenses.

As defined in OAR 199-005-0035(3), an official compensation package includes, in addition to the wages and benefits provided to a public official, the direct payment of a public official's expenses by the public body, in accordance with the public body's policies. As defined in OAR 199-005-0035(4), reimbursement of expenses includes the payment by a public body to a public official serving that public body, of expenses incurred in the conduct of official duties on behalf of the public body. Any such repayment must comply with any applicable law and policies governing the eligibility of such repayment.

While DOJ attorneys may tangentially benefit from representation provided by DOJ in such circumstances, ORS 244.040(2)(a) specifically excludes the benefit as a prohibited use, or attempted use, of office for personal financial gain.

Although it is not the opinion of the Commission that the circumstances described above violate ORS 244.040(1), the Commission would encourage DOJ to revise internal policies regarding the aforementioned compensation and reimbursement of expenses to include the Attorney General and provide more explicit direction regarding any payments or repayments. Nonetheless, DOJ attorneys, including the Attorney General, may accept the aforementioned representation, as described in the stated facts, without violating Oregon Government Ethics law.

The statutes and rules relevant to the issues addressed in this opinion are provided as an addendum to this Commission Advisory Opinion.

THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT ETHICS COMMISSION PURSUANT TO ORS 244.280. A PUBLIC OFFICIAL OR BUSINESS WITH WHICH A PUBLIC OFFICIAL IS ASSOCIATED SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN. OTHER LAWS OR REGULATIONS NOT WITHIN THE JURISDICTION OF THE COMMISSION MAY ALSO APPLY.

Issued by Order of the Oregon Government Ethics Commission at Salem, Oregon on the 17th day of April 2012.



Larry L. Campbell, Chairperson



Samuel E. Sears, Attorney, Larimer & Sears LLC

ADDENDUM

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) are applicable to the issues that are addressed in this opinion:

ORS 244.020(14) "Public official" means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body as defined in ORS 174.109 as an elected official, appointed official, employee, agent or otherwise, irrespective of whether the person is compensated for the services.

ORS 244.040 Prohibited use of official position or office; exceptions; other prohibited actions. (1) Except as provided in subsection (2) of this section, a public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official's holding of the official position or office.

ORS 244.040(2) Subsection (1) of this section does not apply to:

- (a) Any part of an official compensation package as determined by the public body that the public official serves.
- (b) The receipt by a public official or a relative or member of the household of the public official of an honorarium or any other item allowed under ORS 244.042.
- (c) Reimbursement of expenses.
- (d) An unsolicited award for professional achievement.
- (e) Gifts that do not exceed the limits specified in ORS 244.025 received by a public official or a relative or member of the household of the public official from a source that could reasonably be known to have a legislative or administrative interest in a governmental agency in which the official holds any official position or over which the official exercises any authority.

(f) Gifts received by a public official or a relative or member of the household of the public official from a source that could not reasonably be known to have a legislative or administrative interest in a governmental agency in which the official holds any official position or over which the official exercises any authority.

(g) The receipt by a public official or a relative or member of the household of the public official of any item, regardless of value, that is expressly excluded from the definition of "gift" in ORS 244.020.

(h) Contributions made to a legal expense trust fund established under ORS 244.209 for the benefit of the public official.

ORS 244.040(7) The provisions of this section apply regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed under ORS 244.120.

OAR 199-005-0035(1) The purpose of this rule is to define certain terms and to clarify substantive provisions of ORS 244.020(6), 244.025, 244.040, 244.042 and 244.047.

OAR 199-005-0035(2) The term "official duties" means that the public official's actions are directly related to serving the state of Oregon or any of its political subdivisions or any other public body as a public official.

OAR 199-005-0035(3) An "official compensation package" means the wages and other benefits provided to the public official. To be part of the public official's "official compensation package", the wages and benefits must have been specifically approved by the public body in a formal manner, such as through a union contract, an employment contract, or other adopted personnel policies that apply generally to employees or other public officials. "Official compensation package" also includes the direct payment of a public official's expenses by the public body, in accordance with the public body's policies.

OAR 199-005-0035(4) As used in ORS 244.040(2)(c), "reimbursement of expenses" means the payment by a public body to a public official serving that public body, of expenses incurred in the conduct of official duties on behalf of the public body. Any such repayment must comply with any applicable law and policies governing the eligibility of such repayment. Expenses paid by the public body to their own public official need not be reported by the public official under ORS 244.060.