

At the October 12 meeting of the Work Group, you asked for additional information in writing. Specifically, in the context of a discussion surrounding the applicability of the Workplace Harassment policy to registered lobbyists, you asked for: 1) Background information on the Oregon Government Ethics Commission’s role in administering the lobbyist registration statutes; 2) A review of Oregon free expression law addressing lobbyists; and 3) Examples of approaches taken by other states to apply harassment policies to lobbyists.

**Oregon Government Ethics Commission**

Oregon’s lobbyist registration scheme was adopted in 1973 and, as originally constituted, was administered by the Secretary of State. The following year, the voters approved a legislative referral creating the Oregon Government Ethics Commission (OGEC). Broadly speaking, this legislation was intended to prevent public officials from using their office for personal gain by, for example, requiring public officials to publicly disclose personal financial information and conflicts of interests and creating OGEC to enforce these obligations. Additionally, the 1974 referral transferred the responsibility to administer the then-nascent lobbying statutes from the Secretary of State to OGEC.

OGEC is a nine-member commission, with members appointed by the Governor. As a statutory matter, the Governor is required to select eight members based upon recommendations from the four legislative caucuses (two each) and no more than three of the nine members may belong to the same political party. The commission continues to enforce an array of ethics laws.

The lobbying statutes have two primary components: registration and disclosure. ORS 171.740 requires a person who lobbies for consideration, or who spends specified amounts of time or money on lobbying, to register with OGEC as a lobbyist and to identify the clients for whom the person lobbies. A second statute, ORS 171.745, requires registered lobbyists to file a document disclosing certain lobbying-related expenditures (e.g. food and entertainment), while a third, ORS 171.750, imposes nearly identical disclosure obligations on the lobbyist’s client. ORS 171.762 requires that OGEC filings be made under penalty of false swearing and ORS 171.992 authorizes the enforcement of all of the above obligations via a civil penalty, in an amount up to $5,000, either in court or under the Administrative Procedures Act.

In addition to these more comprehensive provisions, there are three specific lobby-related statutes worth mentioning. First, ORS 171.756 identifies four prohibited acts that a lobbyist may not engage in. Under the statute, punishable by civil penalty of not more than $5,000, a lobbyist may not:

* Instigate the introduction of a legislative measure in order to gain employment to lobby against the measure.
* Attempt to influence the vote of a legislator by promising financial support or opposition at a future election.
* Enter into a contingency fee arrangement predicated on successful lobbying.
* Receive compensation as a lobbyist from a private source, if the lobbyist is a legislative or executive branch official.

Second, ORS 171.764 prohibits a “lobbyist or public official” from making certain intentionally false statements “to any legislative or executive official.” The penalty under ORS 171.992 for violating this provision is less than clear. Finally, in what may very well be an express reservation of constitutional authority, ORS 171.785 reserves to each house the authority to impose sanctions for specified statutory violations of the lobbyist registration statutes.

**Lobbying and the Oregon Constitution**

In 1993, the lobbyist registration scheme was amended to require certain registered lobbyists to pay a registration fee. Several years later this fee was subject to an Article I, section 8 challenge in *Fidanque v. Oregon Government Standards and Practices Commission*, 328 Or. 1 (1998). Significantly, the plaintiffs in *Fidanque* did not challenge “the preexisting statutory requirements that they register with the state and disclose certain aspects of their lobbying activities. Their sole objection is to the additional imposition of a registration fee.” *Id*. at 5. In the course of nominally employing the *Robertson* analysis, the court observed:

Lobbying is political speech, and being a lobbyist is the act of being a communicator to the legislature on political subjects….Lobbying is expression, for the purposes of the first *Robertson* category, and [the statute] extracts a fee for engaging in that activity. *Id*. at 8.

Ultimately, the court struck down the statute as unconstitutional, although the precise grounds are less than fully clear. The Oregon Supreme Court has subsequently suggested that *Fidanque* may have turned, not on the absence of an historical exception, but on the amount of the fee in relation to the amount of OGEC’s expenses:

*Fidanque* held that the lobbyist registration fee at issue there was impermissible becausethe statute on its face does not tie the fee to the costs associated with registering lobbyists. However, this court assumed that a fee may be charged for the expenses that the government incurs as the result of a particular communicative activity, such as the expense of providing added police protection for a parade. Here, as noted, ORS 377.729 expressly ties the fee to the cost of the regulatory program, and petitioner does not argue that the fee is unreasonable or exceeds the cost of the program. On this record, we cannot conclude that the fee requirement is an impermissible restriction on speech. *Outdoor Media Dimensions v. DOT*, 340 Or. 275, 290-291 (2006) (internal quotations omitted).

The reasoning employed by the Oregon Supreme Court in *Fidanque* does, however, have real implications. As one commentator has noted:

It is difficult to discern which Robertson category the court used to analyze the statute in Fidanque...in a footnote, the court indicated that there is no historical exception to justify this regulation…. if the court did analyze the statute under the first Robertson category, it is questionable whether any regulation of lobbying would be constitutional. *Article: Oregon Government Ethics Law Reform*, 44 Willamette L. Rev. 399, 437 (2007), Johnson et. al.

More recently, in upholding gift limits to public officials, the Oregon Supreme Court has described *Fidanque* in a slightly different fashion:

Although *Fidanque* properly recognized that lobbying the legislature is primarily expressive, that case does not aid plaintiffs here, because it did not examine specific types of lobbying activities to determine whether they involved constitutionally protected expression and, to the extent they involve expression, whether they are subject to legislative regulation. *Vannatta v. Oregon Government Ethics Commission*, 347 Or. 449, 460 (2009) (internal citations omitted).

While this understanding of *Fidanque* suggests a potentially more nuanced analysis going forward, it may be worth noting that the gift limit statues at issue in *Vanatta* weren’t limited to lobbyists per se, but applied to individuals with a “legislative or administrative interest.”

**Other state approaches**

While many other states include lobbyists as a potential respondent to an allegation of sexual harassment, several of these states are silent on the precise remedy. A selection of state approaches is included below.

* Georgia – Application to register as a lobbyist requires a statement that the applicant “has received the Gerogia General Assembly Employee Sexual Harassment Policy set forth in the Georgia General Assembly Handbook, has read and understands the policy, and agrees to abide by the policy.” O.C.G.A. §21-5-71 (b)(9).
* Illinois – Ethics Commission is given jurisdiction over registered lobbyists alleged to have engaged in sexual harassment. 5 ILCS 430/20-15. Substantively, certain lobbyists are required to complete sexual harassment training within 30 days of registering or renewing a registration, are required to have a written sexual harassment policy that contains specified elements, including a reporting mechanism, and are required to “recognize[] the Inspector General has jurisdiction to review any allegations of sexual harassment alleged…” 25 ILCS 170/4.7; 25 ILCS 170/5. Enforcement of these obligations includes a $5,000 fine and a potential three-year lobbying ban. 5 ILCS 430/50-5; 25 ILCS 170/10.
* Massachusetts – A report recommends that, for all third parties, the HR Officer “should bring the incident to the attention of the third party’s employer or the appropriate regulatory authority.”
* Maryland – An existing requirement that the Ethics Commission provide ethics training for regulated lobbyists was expanded to include training on discrimination and harassment. Md. Code Gen. §5-205. In addition, the Ethics Commission is authorized to punish harassment or discrimination by a lobbyist with a $5,000 fine and possible suspension of the license to lobby. Md. Code Gen. §5-405 and 5-714.
* Nevada – If a sexual harassment complaint against a lobbyist is substantiated, “appropriate disciplinary action may be brought against the lobbyist which may include, without limitation, having his or her registration as a lobbyist suspended.” Joint Standing Rule 20.5.