



STATE OF OREGON
Legislative Counsel Committee

September 26, 2018

To: Members of the Oregon Law Commission Workplace Harassment Workgroup

From: Dexter A. Johnson, Legislative Counsel

Subject: Role of Legislative Counsel in Rule 27 formal complaint or informal report process

You asked several questions concerning the role of the Office of Legislative Counsel (LC) in a formal complaint or an informal report made under Legislative Branch Personnel Rule 27. Your specific questions and my short answers are set forth below, followed by a general discussion of the issues raised.

Question: Who does LC represent in a Rule 27 complaint or report?

Answer: LC represents the institution of the legislative branch. LC does not represent individual legislators or employees/interns.

Question: Are there legal services available to legislators involved in the Rule 27 complaint/report process that are not available to legislative employees and interns on equal terms?

Answer: No. The legal services that LC provides in the context of Rule 27 are available on equal terms to legislators and to employees or interns.

Question: Does LC provide legal representation or legal advice to a legislator in the context of a Rule 27 complaint or report if the legislator is a complainant or is a respondent?

Answer: LC does not provide legal representation to a legislator who is either a complainant or a respondent. LC provides legal advice to any legislator in the form of explaining what Rule 27 provides, what is entailed in making a complaint or a report, how an investigation would be conducted, and on procedural details. Put more simply, LC does not serve as an advocate, but does explain the rule to any legislator.

Question: Does LC provide legal representation or legal advice to an employee or intern in the context of a Rule 27 complaint or report if the employee or intern is a complainant or a respondent.

Answer: The answer mirrors the answer given about legislators. LC does not provide legal representation to an employee or intern who is either a complainant or a respondent. LC provides legal advice to any employee or intern in the form of explaining what Rule 27 provides, what is entailed in making a complaint or a report, how an investigation would be conducted, and on procedural details.

Discussion

A good starting point is to briefly summarize LC's routine legal services provided to legislators, because the relationship in between LC, a specific legislator and the Legislative Assembly as an institution in the provision of routine legal services parallels the relationship between these entities in the Rule 27 context as well.

The routine services that LC provides to legislators consist of drafting bills and amendments legislators request and answering legislators' legal questions.¹ It is very common for an LC attorney to meet with one legislator to discuss the drafting of a bill that will do one thing and within minutes to meet with another legislator to discuss the drafting of a bill that will do the exact opposite thing, and then to prepare both bills. Similarly, it is also common for a LC attorney to provide a written legal opinion about, for example, the constitutionality of a bill, at the request of a legislator who is a bill proponent and then to prepare what is essentially the same opinion for a legislator who is an opponent of the bill. In both instances, the actual client is the institution of the Legislative Assembly; each legislator shares an interest with the Legislative Assembly in having a bill or amendment that accurately and effectively achieves the policy objectives the legislator seeks, no more and no less. That is the service that LC provides in drafting bills and amendments. Significantly, LC does not take a position in favor of or opposed to proposed legislation but remains neutral on whether proposed legislation should become law or rejected. Such a neutral position is required in order for LC to provide drafting services to all members. Similarly, in providing opinions or other legal advice, LC refrains from advocacy on behalf of a legislator to another legislator, legislative committee or other entity. LC provides neutral legal advice to legislators to assist legislators in making informed decisions.

The services that LC provides under Rule 27 are similar, with three notable exceptions. We explain to anyone subject to the rule or who has rights under the rule what the rule means, what rights an individual has under the rule, what processes are available, and what procedural steps may or will occur if a report or complaint is made under the rule. LC's role is not ever advocacy, and generally is merely explanatory.

The first exception to this explanatory role is that an LC attorney may be the party that receives an informal report of harassment from staff or a legislator. Rule 27 (4). The Chief Deputy Legislative Counsel is required to receive a formal complaint from staff or a legislator, but only in very narrow circumstances; namely if the complaint is about the Human Resources Director or if there is some other conflict that would arise if the Human Resources Director received the complaint. The general rule, however, is that the Human Resources Director receives all formal complaints. Rule 27 (6)(a).

The second exception to this explanatory role is that with informal reports and with formal complaints that do not involve legislators, LC will consult with Employee Services personnel in determining whether an investigation is warranted and in determining who would conduct the investigation. LC and Employee Services may decide that an LC attorney will assist in the conduct of the investigation, though it is formally conducted by Employee Services. Rule 27 (5)(g). If a formal complaint involves a legislator, Rule 27 requires an investigation to be conducted by an outside investigator independent of the legislative branch. In informal reports and in formal complaints that do not involve a legislator, the rule permits an outside investigator to conduct the investigation if the Human Resources Director and the Legislative Counsel determine that an outside investigator is warranted. Rule 27 (6)(e). If an outside

¹ ORS 173.130 sets forth the basic duties that LC is to perform.

investigator is required or warranted, the Legislative Counsel and the Human Resources Director select the outside investigator.

The third exception to LC's explanatory role is that LC and Employee Services are required to take immediate and appropriate action to ensure that the reporting party or complainant has a safe and non-hostile work environment. Rule 27 (5)(f) and (6)(d).