

## Testimony in Support of HB 2449

Oregon AFSCME Council 75 asks you to support HB 2449. HB 2449 would ban Assistant Attorneys General from going on strike. The affect of preventing these attorneys from striking would give them access to binding arbitration. Binding arbitration is a process where if the employer and employees cannot come to a resolution after they have bargained for a period of time then the employer decides to implement a contract the employees can ask for binding arbitration. Both parties work to choose an arbiter and then present their case. The arbiter, who is neutral, chooses the best offer. We believe this is a fair process that allows for a fair result, especially for Assistant Attorneys General who because of their special circumstance should never strike.

As the Attorneys for the state of Oregon, Assistant Attorney Generals perform an essential function for state agencies. If they were to go on strike this could have disastrous effects on our State government. Without good legal council on decisions state agencies are likely to make bad decisions and the state would be left open to liability. The work these lawyers do is time sensitive and require a great deal of experience and knowledge. This work cannot be put on hold for a strike. As the law stands now they are legal allowed to strike, but they believe that it would be a bad idea.

In addition Assistant Attorneys General are between and rock and a hard place. There is a significant ethical question on how they could strike and not be subject to discipline. If they strike it could be held that it was abandoning their client the State of Oregon. This would make them subject to discipline from the State Bar Association. There is an opinion from the Bar outlining how they could strike ethically. (See Attached Opinion 2005-162) However, the requirements in that opinion are impractical and not within the power of the attorneys to fulfill. In order to strike ethically under this opinion the Department of Justice would have to make several concessions. The employer would have to allow its employees to strike.

According to Opinion 2005-162 there would need to have enough replacement attorneys to cover for the striking workers. We do not believe there are enough qualified attorneys in the State to meet this requirement. The people hired would need by our estimate a month to be trained to take over the work load of the Department of Justice Attorneys. The employer could assign the work to another attorney however if the entire bargaining unit goes on strike that leave about 50 management attorneys to do the work of three hundred. We believe that there is no way to accomplish an ethical strike under these rules.

AFSCME Council 75 believes that there exists a special circumstance around the work of these attorneys. This bill will only affect the nearly 250 Assistant Attorney Generals and not change the status of other employees of the Department. We believe that the ethical concerns and the essential nature of their work warrants these Attorneys to be strike barred and that they have access to Binding Arbitration.

Joe Baessler  
Political Director  
Oregon AFSCME



## FORMAL OPINION NO. 2005-162

### Competence and Diligence/Neglect of a Matter: Public Employee Lawyer Strike

#### Facts:

Lawyer is a public employee who provides legal services to a public entity. Employees, including Lawyer, have been unsuccessful in negotiating with their employer regarding salary and other employment issues. Employees have the legal right to strike under applicable law, and they are contemplating doing so to force the employer to meet their demands.

#### Question:

May Lawyer ethically engage in an otherwise lawful strike?

#### Conclusion:

Yes, qualified.

#### Discussion:

The Public Employee Collective Bargaining Act (PECBA), ORS 243.650–243.782, grants public employees who are not confidential, supervisory, or managerial employees the right to form, join, and participate in the activities of labor organizations for the purpose of representation and collective bargaining. Nothing in the Oregon RPC prohibits Lawyer from being a member of a union or from participating in the rights and remedies incident to union membership, such as participating in a lawful strike.<sup>1</sup>

The provisions of the Oregon RPC may, however, affect the manner in which Lawyer participates in an otherwise lawful strike. For example, Oregon RPC 1.3 provides that a lawyer “shall not neglect a legal matter entrusted to the lawyer,” and Oregon RPC 1.4 requires a lawyer to “keep a client reasonably informed” and to “promptly comply with reasonable requests for information.”

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<sup>1</sup> This opinion addresses only the propriety of a public employee strike under applicable statutory authority. We offer no opinion on the ethical issues that may surround the right of privately employed lawyers to engage in lawful strikes.

Lawyer's participation in a strike will not amount to "neglect of a legal matter entrusted to the lawyer" if Lawyer provides adequate advance notice of the intent to strike and the public employer has the ability to assign Lawyer's work to others or to hire temporary replacement lawyers. A public employer is likely to have adequate advance notice of Lawyer's intent to strike on account of the procedures imposed on public employers and bargaining units before a lawful strike can occur. These procedures generally provide the opportunity for the public employer to prepare for a strike.

Lawyer also must keep Lawyer's client reasonably informed. Oregon RPC 1.4. In that context, this responsibility, among other things, obligates Lawyer to keep Lawyer's employer-client informed about the status of a matter and to explain a matter to the extent reasonably necessary to permit the employer-client to make informed decisions regarding the representation. This responsibility is not suspended during a strike. While on strike, a situation may arise in which Lawyer's ethical responsibilities require Lawyer to promptly and forthrightly communicate with the employer about a specific legal matter.

In a sense, Lawyer's participation in a strike is similar to an associate in a large law firm taking leave allowed under the Family and Medical Leave Act. In both instances, the lawyers have a legal right to be absent from work, but the provisions of the Oregon RPC may affect the manner in which the lawyers exercise those rights.

In light of the foregoing, we conclude that Lawyer may ethically engage in an otherwise lawful strike, but that lawyer remains subject to the rules of professional conduct during the strike.

**Approved by Board of Governors, August 2005.**

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COMMENT: For additional information on this topic and other related subjects, see THE ETHICAL OREGON LAWYER §§7.2–7.15 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §16 (2003); and ABA Model Rules 1.3–1.4.