

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 Rules of Professional Conduct (RPCs) prohibit 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.¹

¹ 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.

The provisions of the Oregon RPCs 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.”

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 RPCs 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.

COMMENT: For additional information on this topic and other related subjects, see *The Ethical Oregon Lawyer* § 7.2 to § 7.2-8 (competence), § 7.3 (diligence), § 7.4 (client communication) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 16 (2000) (supplemented periodically); and ABA Model RPC 1.3–1.4.

