

Proposed Changes to O.R.S. 672.505 and 672.525

**Opinion by Professor Garrett Epps
University of Oregon School of Law**

This material submitted by Mark H. Reed in support of testimony
on the need for a change in the Geologist Registration Law

Re: House Bill 2893-1

Biographical Information on Garrett Epps¹

Garrett Epps
Associate Professor of Law
B.A., 1972, Harvard
M.A., 1975, Hollins
J.D., 1991, LL.M., 1994, Duke
(OSB Number 95175)

University of Oregon Law School Courses:

Jurisprudence
Comparative Constitutional Law
Constitutional law and history

Dr. Garrett Epps joined the University of Oregon faculty in 1992 after a clerkship with the Honorable John O. Butzner Jr. of the Fourth Circuit Court of Appeals in Virginia. His interests include constitutional law and history, federal civil rights, and comparative law.

Dr. Epps is a former staff writer for the Washington Post. He has written for the New York Times, the New Republic, and the New York Review of Books, and served as articles editor of Law and Contemporary Problems. His most recent book concerns Oregon's famous peyote case: To an Unknown God: Religious Freedom on Trial. It was one of three finalists for the American Bar Association Silver Gavel Award in 2002. He has been a visiting associate professor at Boston College of Law and Duke Law School.

¹ Biographical information on Professor Epps is from his web page at the UO School of Law. OSB number is from letterhead.

MEMORANDUM

To: Mark H. Reed

From: Garrett Epps

Re: Proposed changes to O.R.S. 672.505 and 672.525

March 30, 2003

You asked me to provide input to the effort to change O.R.S. 672.505 and 672.525 to clarify the authority of the Oregon Board of Geologist Examiners (OBGE) to regulate the speech of individuals with geological expertise and training when those individuals give public testimony before Oregon state government agencies about proposed land-use decisions and other measures to which geological knowledge may be pertinent. I can summarize my opinion as follows:

Because giving public testimony before governmental agencies and bodies is unlike other forms of communication geologists may engage in, any effort to require registration of geologically trained individuals who wish to comment on proposals submitted by others will raise serious constitutional questions, both under the First Amendment to the U.S. Constitution and Article I, § 8 of the Oregon Constitution. That speech is almost certainly protected as long as the individual addresses material in the public record, even if the analysis and advocacy before the government agencies and bodies is undertaken in exchange for a fee or repayment of expenses.

I reach this conclusion because public testimony implicates core constitutional values that the state's valid interest in regulating the "public practice of geology" may not entirely displace. Public testimony before government agencies and bodies is doubly protected under both the U.S. and Oregon constitutions. First, of course, it is "core political speech" of the sort that all judicial authorities and commentators agree is at the heart of the protection of free speech. Second, however, it is also "peaceable assembly" and "petition for redress of grievances" of the kind that is independently protected by the First Amendment and by Article I, § 26 of the Oregon Constitution.¹ The freedom of citizens to speak to government about their concerns in a public forum in which such comment has been invited is perhaps the single most strongly protected form of speech known to our system of free expression. In *Thomas v. Collins*, a case striking down a state restriction on the right of unlicensed labor organizers to address a public meeting, the United States Supreme Court noted:

¹ This provision, which is broader in its wording than the First Amendment, provides that "No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of grievances (sic)" (emphasis added).

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights . . . and therefore are united in the First Article's assurance. . . . As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers.

Thomas v. Collins, 32 U.S. 516, 530 (1945); see also *Watchtower Bible & Tract Soc'y of N.Y. v. Stratton*, 122 S.Ct. 2080 (2002) (reaffirming *Thomas*).

This means that once government has invited citizens to bring their views and concerns before it, governmental restrictions on the means by which this is done must be narrowly drawn and must advance governmental interests of the highest order.

Clearly the comprehensive scheme of registration and regulation set up by O.R.S. 675 furthers an important governmental purpose, which is the protection of the public from fraud and danger resulting from improper geological work done by improperly trained or incompetent geological consultants. Furthering that interest, the State may clearly require registration and licensing of all who prepare geological analyses and reports for members of the public, whether for a fee or not, where such analyses independently analyze geological conditions and make original recommendations for measures that may affect the stability and condition of a client's property.² Thus, an unlicensed citizen, no matter how highly trained in geology, would have no free-speech right to offer his or her services to the general public in the independent preparation of geological reports and analyses, any more than a layperson learned in law may claim a free-speech right to offer legal opinions on individual matters to the public, whether for a fee or not, or to represent clients in court. See *Oregon State Bar v. Smith*, 149 Ore. App. 171 (1997).

But the situation is altered when a citizen or a group is invited by a government agency or body to comment on public policy proposals or individual analyses prepared by others and submitted as part of the public record. The central feature of this situation is that (1) the material is available to anyone for review and comment and (2) the agency or body has solicited comment *from the general public* rather than from any subset of the public restricted by expertise, training, or licensure. As anyone who has attended a Board of Commissioners meeting or legislative hearing knows, any person has a constitutional right to appear in such a forum, if time and procedure allow, and give any view of the pending matter,

² This language tracks that of *Oregon State Bar v. Smith*, which states that the U.S. and Oregon Constitutions permit the State to regulate those who "represent[] and counsel[] persons with regard to their particular legal matters" but not those who address general public issues of law.

even if that view is uninformed or outlandish. Any citizen has a free speech right to offer his or her own view that the analyses prepared by others are inadequate, incomplete or erroneous. It is clear that no rule could restrict citizens, regardless of their training, from commenting on geological data in the record. It is further clear that no rule could forbid a group of citizens from seeking the help, advice and public advocacy of another citizen learned in geology, and from presenting testimony to the agency or body, regardless of that individual's training or lack thereof.

What, then, about the case in which a geologically trained individual receives expenses or even compensation to provide comment on specialized materials in the record? As I read the Constitutions and the caselaw, the simple fact that money changes hands does not, in the absence of misrepresentation by the consultant of his or her licensure status, alter the state's inability to censor or regulate such speech; this is so just as the mere fact that an unlicensed legal practitioner does *not* take money to prepare legal opinions or documents is not a defense to a charge of unlicensed practice of law. As the *Smith* court explained, the essence of what can be regulated by the state consistent with free speech is limited to "conduct, including communication, that pertains to representing and counseling persons with regard to their particular legal matters" in order not to "impermissibly burden protected expression." *Smith*, 149 Ore. App. at 188. If our unlicensed geological consultant were to prepare independent geological analyses and reports at the behest of paying clients for application to their property or their construction projects, the State's regulatory power could probably reach that activity, even if the analyses were intended to be filed with a public agency or body. But if the consultant, without claiming to be registered with OSBGE or misrepresenting his or her expertise and experience, simply reads technical reports prepared by licensed geologists and filed as part of the public record and then criticizes those reports to the public agency or body, the consultant is engaged in core political speech to a government body that has invited participation by any member of the public.

That the right to speak to government may not be abridged solely because such speech is undertaken (1) on behalf of others and (2) for compensation was strongly suggested by the Oregon Supreme Court less than a decade ago. In that case, the Court held that the State could not require lobbyists to pay a fee in exchange for permission to speak to legislators on behalf of clients, even paying ones, because the core of the activity was political speech. See *Fidanque v. Oregon Government Standards and Practices Commission*, 328 Ore. 1 (1996). In *Fidanque*, the Court held that even a modest fee for registration as a lobbyist violated Art. I, § 26:

the mere fact that a profession is associated with a certain kind of expression does not transform every statute that regulates that profession into an attack on expression. At the same time, we recognize that that proposition goes only so far: At some point, there may be so little to distinguish between the saying of a thing and the "profession" of saying it that permitting a regulation on the theory that it is directed at the profession, rather than at the statement, would represent a triumph of form over substance. And

that, in this court's view, is the case here. Lobbying is political speech, and being a lobbyist is the act of being a communicator to the legislature on political subjects.

Fidanque, 328 Ore. at 7.

The statute thus was an impermissible content-based restriction on speech: "ORS 171.743 requires payment of a fee that can be avoided by the simple expedient of never espousing a preference concerning the content of Oregon statutory law, except for the purposes of generating good will. So viewed, the statute turns out not to be content-neutral at all. Its focus is political speech." 328 Ore. at 8 n.4.

Providing analyses of public documents is much more closely akin to the lobbying protected by *Fidanque*, or the public advocacy protected in *Thomas v. Collins*, than it is to the kind of court appearances, document drafting, and individualized advice properly subject to regulation under *Oregon State Bar v. Smith*. Accordingly, I advise that any revised language to ORS 675 make clear that citizens may themselves analyze public documents and may employ others to analyze them as long as the results of the analyses are presented to public bodies seeking comment from the general public without any representation that they were prepared by a geologist registered with OSBGE. In my judgment, the language you have proposed³ would accomplish that while providing adequate scope for the appropriate State interest in constitutionally valid regulation of the profession of geology, and would avoid constitutional problems of the kind that brought you into conflict with the OSBGE, resulting in the expense to the State of an attempt to defend an unconstitutional regulation.

³ That language would insert into ORS 672.525 the following: "(9) A person shall not be construed to publicly practice or to offer to publicly practice geology solely because the person testifies or prepares to testify in a public proceeding. "