

## FORMAL OPINION NO 2005-95

[REVISED 2014]

### Duty to Report Misconduct

#### Facts:

During the course of representing Client, Lawyer A learns that Lawyer B, who formerly represented Client, and Lawyer C, who never represented Client, have violated the Oregon Rules of Professional Conduct (RPCs).

When Lawyer A discusses these observations with Client, Client informs Lawyer A that Client does not wish Lawyer A to report these violations to the Oregon State Bar because doing so could embarrass Client or could otherwise harm Client.

#### Questions:

1. May Lawyer A report Lawyer B's or Lawyer C's violations?
2. If no information relating to the representation of a client is involved, when must a lawyer report another lawyer's violation of an Oregon RPC?

#### Conclusions:

1. No.
2. See discussion.

#### Discussion:

Oregon RPC 8.3 provides, in pertinent part:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Oregon State Bar Client Assistance Office.

....

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or ORS 9.460(3). . . .

Pursuant to this rule, a lawyer may not report another lawyer's Oregon RPC violation if the source of knowledge of the violation is protected by Oregon RPC 1.6 or ORS 9.460(3), unless one of the exceptions permitting disclosure is present. In the present circumstance, it appears that no exception permitting disclosure is available. *Cf.* OSB Formal Ethics Op No 2005-81 (rev 2014); ORS 9.460(3);<sup>1</sup> Oregon RPC 1.6.<sup>2</sup>

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<sup>1</sup> ORS 9.460(3) requires a lawyer to “[m]aintain the confidences and secrets of the attorney’s clients consistent with the rules of professional conduct established pursuant to ORS 9.490.” For a discussion of the relationship between ORS 9.460(3) and *former* DR 4-101 (current Oregon RPC 1.6), see *State v. Keenan*, 307 Or 515, 771 P2d 244 (1989).

<sup>2</sup> Oregon RPC 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer’s compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

Even if Client authorizes or consents to the report to the Oregon State Bar,<sup>3</sup> Lawyer would be required to report a violation only if Lawyer knows,<sup>4</sup> rather than merely suspects, that the violation occurred and if the violation raises “a substantial question as to [the reported] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” This language in Oregon RPC 8.3(a) is identical to the language in ABA Model RPC 8.3. The official comment to ABA Model RPC 8.3 provides, in pertinent part:

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(6) in connection with the sale of a law practice under Rule 1.17 or to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm. In those circumstances, a lawyer may disclose with respect to each affected client the client’s identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7 or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer’s clients, except to the extent reasonably necessary to carry out the monitoring lawyer’s responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

<sup>3</sup> If Client directs Lawyer to report a rule violation to the bar, Lawyer must do so. *Cf.* OSB Formal Ethics Op No 2005-26.

<sup>4</sup> Oregon RPC 1.0(h) defines *knows* as “actual knowledge of the fact in question. . . . A person’s knowledge may be inferred from circumstances.”

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. *The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.* A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct. [Emphasis supplied.]

ABA Model RPC 8.3 cmt [3].

*See* Geoffrey C. Hazard Jr., W. William Hodes & Peter R. Jarvis, 2 *The Law of Lawyering* § 68.03 (4th ed 2015) (supplemented periodically) (“the rule [applies] to cases of known violations that directly implicate the integrity of the legal profession. . . . Merely technical violations of the conflict of interest rules, for example, would not qualify, whereas destruction of evidence under subpoena, suborning perjury, or self-dealing with trust funds assuredly would.”). *See also* Arizona Ethics Op No 87-26; 4 ABA/BNA *Lawyers’ Manual on Professional Conduct* 449 (1988) (supplemented periodically) (willful failure to file tax returns meets “substantial question” test).

**Approved by Board of Governors, April 2014.**

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COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.2-1 to § 6.2-3 (elements of duty of confidentiality), § 6.3-1 (client consent), § 6.3-4 (disclosures required by law), § 6.3-5 (disclosures of criminal intent), § 13.3-2(c) (duty to report misconduct within a firm), § 14.2 to § 14.2-1(f) (disclosure requirement), chapter 20 (conflicts-waiver letters) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 5, 78 (2000) (supplemented periodically); ABA Model RPC 1.6; and ABA Model RPC 8.3. *See also* Washington Advisory Op No 175 (1982); Washington Advisory Op No 1247 (1988); Washington Advisory Op No 1633 (1995); Washington Advisory Op No 1701 (1997) (Washington advisory opinions are available at <[www.wsba.org/resources-and-services/ethics/advisory-opinions](http://www.wsba.org/resources-and-services/ethics/advisory-opinions)>).