

FORMAL OPINION NO 2005-34

Information Relating to the Representation of a Client: Client Perjury

Facts:

Lawyer *A* is appointed by a court to represent ostensibly indigent Defendant *A* in a criminal case. While handling the case, Lawyer *A* learns that Defendant *A* was not and is not indigent but simply wishes the benefits of free counsel.

Lawyer *B* represents Client *B* in civil litigation. During cross-examination, Client *B* commits what Lawyer *B* knows to be perjury.

Question:

What are the ethical obligations of Lawyer *A* and Lawyer *B* in light of their clients' conduct?

Conclusion:

See discussion.

Discussion:

Several different rules are relevant to the scenarios set forth above. Oregon RPC 1.6¹ provides, in pertinent part:

(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).

¹ See also ORS 9.460(3), which 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.” The phrase *confidences and secrets* was also used in *former* DR 4-101, the predecessor to Oregon RPC 1.6. *Information relating to the representation of a client* is defined in Oregon RPC 1.0(f) using definitions previously found in DR 4-101.

(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;

Also relevant is Oregon RPC 3.3, which provides, in pertinent part:

(a) A lawyer shall not knowingly:

....

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;

(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal. . . .

....

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, but in no event require disclosure of information otherwise protected by Rule 1.6.

See also Oregon RPC 8.4, which provides:

(a) It is professional misconduct for a lawyer to:

....

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;

(4) engage in conduct that is prejudicial to the administration of justice. . . .

The conflicting duties confronted by the lawyers in this opinion were addressed by the Oregon Supreme Court in *In re A.*, 276 Or 225, 554 P2d 479 (1976). The court there held, citing former DR 7-102(B), that when a lawyer knows through confidential information that a client has committed perjury, the lawyer must call on the client to rectify the perjury. If, however, the client does not do so, the lawyer's only option is to withdraw, or seek leave to withdraw, from the matter without disclosing the client's wrongdoing.² The analysis in the *In re A* case is consistent with the above Oregon Rules of Professional Conduct and is directly dispositive of Lawyer *B*'s situation. The only option available to Lawyer *B* if Client *B* will not voluntarily correct the wrongdoings is to endeavor to withdraw from the representation. *Cf. In re A.*, 276 Or at 240.

The case of Lawyer *A* is somewhat different, however, because it involves not only a past crime, such as Client *A*'s perjury, but also a continuing future crime in the form of theft of services. *See* ORS 164.125. Pursuant to Oregon RPC 1.6(b)(1), Lawyer *A* may ethically reveal information relating to the representation of Client *A* to the extent that Lawyer *A* reasonably believes necessary to prevent the future crime. *Cf. State v. Charlesworth*, 151 Or App 100, 951 P2d 153 (1997), *rev den*, 327 Or 82 (1998); *State ex rel. N. Pac. Lumber Co. v. Unis*, 282 Or 457, 579 P2d 1291 (1978); *State v. Ray*, 36 Or App 367, 584 P2d 362 (1978); *State v. Phelps*, 24 Or App 329, 545 P2d 901 (1976). It would also be

² If the court does not permit a lawyer to withdraw, the lawyer may ethically continue with the case. *Cf. In re Lathen*, 294 Or 157, 654 P2d 1110 (1982). If this happens, however, the lawyer could not endeavor knowingly to "offer evidence that the lawyer knows to be false" in arguing the client's case. Oregon RPC 3.3(a)(3).

ethical, however, for Lawyer A to seek to withdraw from the representation while saying nothing about Defendant A's wrongdoing.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 6.3-6 (client or witness perjury), § 8.4-3 to § 8.4-4 (presenting evidence and other disclosures to the tribunal) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 59–67 (2000) (supplemented periodically).

This result would likely differ under ABA Model RPC 3.3(c), which states that the duty to disclose the fraud to the tribunal applies “even if” compliance requires disclosure of information protected by ABA Model RPC 1.6, whereas Oregon requires disclosure “unless” Oregon RPC 1.6 is offended.

See also OSB Formal Ethics Op No 2005-53 (lawyer may not represent potential client after potential client informs lawyer of client's intent to defraud court); OSB Formal Ethics Op No 2005-119 (lawyer must call on client to reveal breaches and fraud, and withdraw if client refuses; if client discloses intent to commit future crime, lawyer may disclose information necessary to prevent it or instead must withdraw).