

## FORMAL OPINION NO 2005-53

### Duty Not to Assist in Fraudulent Behavior

#### Facts:

A and B are brothers who live at the same address and who look alike. While driving B's automobile, A is stopped by a police officer. Because of fears about his past driving record, A misrepresents himself to be B. The police officer, believing A to be B, issues a ticket for driving while suspended in the name of B.

B asks Lawyer to represent him in connection with the driving-while-suspended proceedings. B informs Lawyer of the foregoing and asserts that, to help A continue to conceal A's involvement, B wishes to plead not guilty but to offer no evidence other than evidence that he was not served personally with an order of suspension and thus did not realize that he was suspended at the time. When Lawyer informs B that B should tell the court that it was A who was driving, B refuses to do so.

#### Questions:

1. Did Lawyer act properly calling on B to inform the court that it was A who was driving?
2. May Lawyer ethically represent B if B refuses to reveal the truth?

#### Conclusions:

1. Yes.
2. No.

#### Discussion:

Lawyer clearly was compelled to call on B to tell the truth. See, for example, *In re A.*, 276 Or 225, 554 P2d 479 (1976); Oregon RPC 1.6;

ORS 9.460(3); and Oregon RPC 3.3(b),<sup>1</sup> discussed in OSB Formal Ethics Op No 2005-34. *Cf. In re Hartman*, 332 Or 241, 25 P3d 958 (2001) (lawyers counseled client to return improperly obtained documents and eventually gained client’s permission to do so).<sup>2</sup>

*B*’s refusal to do so shows that *B* intends to continue the pattern of deception begun by *A* when *A* was stopped. Lawyer may not ethically assist *B* in doing so. *See, e.g.*, Oregon RPC 8.4(a)(3) (prohibiting lawyer from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer’s fitness to practice law”); Oregon RPC 8.4(a)(4) (prohibiting lawyer from engaging in “conduct that is prejudicial to the administration of justice”); Oregon RPC 1.2(c) (prohibiting lawyer from “counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer knows is illegal or fraudulent”). *See also In re Haws*, 310 Or 741, 801 P2d 818 (1990); *In re Hockett*, 303 Or 150, 734 P2d 877 (1987); *In re Walker*, 293 Or 297, 647 P2d 468 (1982); *In re Jenson*, 1 DB Rptr 107 (1986).

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

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<sup>1</sup> Oregon RPC 3.3(b) provides:

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.

<sup>2</sup> *See also In re Hoffman*, 14 DB Rptr 121 (2000), in which accused lawyer, knowing that prior lawyer for client had unknowingly made misrepresentation to court concerning whereabouts of witness, perpetrated false impression that witness was out-of-state in her communications with court and opposing counsel, and did not ask client for authorization to correct misimpression.

COMMENT: For additional information on this general topic and related subjects, see *The Ethical Oregon Lawyer* § 6.3-5 (disclosures of criminal intent), § 8.4-3 to § 8.4-4 (presenting evidence and making other disclosures to the tribunal) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 118, 120 (2000) (supplemented periodically); ABA Model RPC 3.3(b); and ABA Model RPC 8.4(c)–(d).