

FORMAL OPINION NO. 2005-173
Dishonesty and Misrepresentation:
Participation in Covert Investigations

Facts:

Scenario 1: Lawyer *A* represents a client in a workers' compensation case who was injured in a fall. The insurance company denied her claim on the theory that it resulted from idiopathic fainting. There is no indication of negligence, fraud, or a safety violation. The client does not remember the accident. A coworker witnessed the accident, but does not want to get involved or talk to the client. The employer does not know about the witness. Applicable procedure does not provide for depositions of witnesses. Lawyer *A* counsels the client to have a friend approach the coworker-witness, pretend to be from the employer's personnel office, and question the witness about the accident. The client follows Lawyer *A*'s advice.

Scenario 2: Lawyer *B* represents a company in a negligence action brought by Plaintiff *X*, who was allegedly injured in an apparently minor collision between Plaintiff *X*'s vehicle and a company truck. Lawyer *B* receives a copy of a doctor's report diagnosing multiple serious injuries and attributing them to the collision. Lawyer *B* suspects that the report is fraudulent and decides to investigate. Using a fictitious name, Lawyer *B* calls the doctor's office and sets up an appointment. Lawyer *B* attempts to convince the doctor to report that he is severely injured. In doing so, Lawyer *B* refers to Plaintiff *X* and tries to get the doctor to acknowledge that the doctor falsified Plaintiff *X*'s report.

Scenario 3: Lawyer *C* is a deputy district attorney. Police officers come to her for advice about developing evidence of illegal drug activity at a residence. The officers tell her that all they know is that some neighbors have observed increased foot traffic to the house at certain times of the day. Lawyer *C* states that, depending on its nature, the foot traffic can suggest illegal drug activity, and advises them to hire someone to pose as a drug customer, go to the house, and inquire about purchasing drugs. The police follow Lawyer *C*'s advice.

Question:

Is the conduct of Lawyer *A*, Lawyer *B*, or Lawyer *C* permissible?

Conclusion:

See discussion.

Discussion:

Oregon RPC 8.4 provides:

- (a) It is professional misconduct for a lawyer to:
 - (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
 - (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
 - (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; or
 - (5) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
- (b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

These three scenarios highlight several issues relating to Oregon RPC 8.4(b),¹ which provides safe-harbor exceptions to Oregon RPC 8.4(a)(3).²

Scenario 1.

The first scenario relates to the meaning of “violations of civil or criminal law or constitutional rights” and “unlawful activity.” Oregon RPC 8.4(b). In many situations involving clients’ legal rights, such as the no-fault context of workers’ compensation, the facts may not include evidence of potential “violations” of “civil law,” “criminal law,” or “constitutional rights.” Here, there is no evidence to suggest wrongdoing by any person. The employer has asserted only that the claimant’s fall resulted from idiopathic fainting. There is no evidence of fraud or misconduct on the part of the injured worker. Thus, the issue is whether Oregon RPC 8.4(b) applies to covert investigations involving intentional or negligent breaches of legal standards.

The key terms in deciding this issue are *violations* and *unlawful*, terms that are not defined in the Oregon RPC. In such situations, the Oregon Supreme Court has looked to the “history, text and context” of the rule at issue. *In re Porter*, 320 Or 692, 700, 890 P2d 1377 (1995); *see In re Gastineau*, 317 Or 545, 550, 857 P2d 136 (1993) (relying on “close examination of the text and context” of rule at issue). This examination may include consulting standard and legal dictionaries for definitions of key terms. *In re Brandt/Griffin*, 331 Or 113, 134-135, 10 P3d 906 (2000) (Webster’s Dictionary); *In re Hockett*, 303 Or 150, 158, 734 P2d 877 (1987) (Black’s Law Dictionary).

Of note in Oregon RPC 8.4(b) is that the terms *violations* and *unlawful* are used interchangeably. The first sentence of the rule refers to lawyers who advise or supervise covert activity “in the investigation of violations of civil or criminal law or constitutional

¹ Oregon RPC 8.4(b) (*former* DR 1-102(D)) was adopted in response to *In re Gatti*, 330 Or 517, 8 P3d 966 (2000), in which the Oregon Supreme Court stated that the then-existing rules against deceitful conduct applied to all lawyers, including those in the public sector who engage in or supervise others in undercover investigations of illegal activity. See also *In re Ositis*, 333 Or 366, 40 P3d 500 (2002) (lawyer disciplined for directing another person’s deception), in which the court offered no opinion whether the adoption of *former* DR 1-102(D) would have changed the outcome of the case.

² This opinion does not consider the effect, if any, of the addition of the “reflects adversely” language to what is now Oregon RPC 8.4(a)(3) (*former* DR 1-102(A)(3)).

rights.” The second sentence then defines the term *covert activity* as “an effort to obtain information on unlawful activity.” Plainly, therefore, “unlawful activity” is activity that is in “violation” of “civil or criminal law or constitutional rights.”

The word *violation* means “the act or action of violating,” and to *violate* means “to fail to keep : break, disregard.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2554 (unabridged ed 1993). It is a “breach of right, duty or law”; the “act of breaking, infringing, or transgressing the law.” BLACK’S LAW DICTIONARY 1570 (6th ed 1990).

What may constitute a violation of “civil law” is not immediately obvious. The term *civil law* can mean Roman law and jurisprudence, not generally followed in Oregon, in contrast to “common law.” See *United States Fidelity & Guaranty Co. v. Bramwell*, 108 Or 261, 266–267, 217 P 332 (1923); BLACK’S LAW DICTIONARY, *supra*, at 246. The term *civil liability* refers to a person’s amenability to civil actions, distinguished from criminal liability. BLACK’S LAW DICTIONARY, *supra*, at 246. Oregon statutes and cases provide no definition of *civil law* but the cases most commonly distinguish the term from *criminal law*. See *Delgado v. Souders*, 334 Or 122, 145, 46 P3d 729 (2002) (analyzing application of vagueness challenge to criminal law or to “civil law”); *State v. Riddle*, 330 Or 471, 484 n 4, 8 P3d 980 (2000) (ORCP provision is “civil law parallel” to analogous criminal statute).

Oregon RPC 8.4(b) refers broadly to *civil law*, without reference to statutes, case law, or other sources of law. As such, the term *civil law* clearly encompasses both statutory and common-law duties, including duties imposed by tort or contract law. “Civil law” duties regulate both intentional violations and reckless or negligent breaches of civil standards. It is not, however, reasonable to conclude that a “violation” of “civil law” refers to a situation in which no breach of any recognized duty is evident or alleged.

A lawyer’s involvement in covert activity is not protected by Oregon RPC 8.4(b) when, as here, there are no “violations of civil law, criminal law, or constitutional rights” to investigate. A lawyer may not supervise or advise others on covert activity related to the worker’s suspected idiopathic fainting.

Scenario 2.

The second scenario concerns the meaning of *advise* and *supervise*, and whether Oregon RPC 8.4(b) permits a lawyer directly to participate in the covert activity.

The word *advise* means “to give advice, counsel,” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra*, at 32; to “give an opinion or counsel, or recommend a plan or course of action; . . . to give notice[; t]o encourage, inform, or acquaint,” BLACK’S LAW DICTIONARY, *supra*, at 54. The word *supervise* means “to coordinate, direct, and inspect continuously and at first hand the accomplishment of : oversee with the powers of direction and decision the implementation of one’s own or another’s intentions : superintend,” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra*, at 2296; to “have general oversight over, to superintend or to inspect,” BLACK’S LAW DICTIONARY, *supra*, at 1438.

The definitions of these words do not appear to encompass a lawyer’s direct participation in the covert activity. The last sentence of Oregon RPC 8.4(b) speaks of covert activity being “commenced” by a lawyer in addition to a lawyer’s involvement in such activity as an “advisor or supervisor.” The word *commence*, however, does not necessarily connote direct participation, but can mean simply to “initiate,” “begin, start, originate.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra*, at 456. Moreover, reading the word *commence* to include direct participation in covert activity as distinct from “advis[ing]” or “supervis[ing]” such activity would create an inconsistency with the first sentence of the exception, which does not use *commence* in defining the exception’s basic scope. Although the exception makes it appropriate for either public or private lawyers to “commence” a covert activity by initiating the contact with a client or by conceiving the concept of a covert activity, the exception does not contemplate that the lawyer will speak the deceptive words, take deceptive action, or undertake an “undercover” identity in the course of that activity.

The history behind Oregon RPC 8.4(b) also supports limiting lawyer activity to “advis[ing]” and “supervis[ing]” covert behavior. As reflected in *In re Gatti*, 330 Or 517, 536, 8 P3d 966 (2000), any lawyer involvement in activity that includes the lawyer’s direct misrepresentation or deception runs counter to the fundamental tenet of lawyer “honesty and personal integrity.” One exception to this basic tenet, proposed by *amici curiae* in the *In re Gatti* case, would have expressly authorized lawyer participation in covert activity, whether “personally or through an employee or agent.” *In re Gatti*, *supra*, 330 Or at 532. Similarly, in *In re Ositis*, 333 Or 366, 370, 40 P3d 500 (2002), the accused proposed an exception to *former* DR 1-102(A)(3) for certain misrepresentations by a lawyer, whether made “directly or indirectly.” The Oregon Supreme

Court refused to recognize either of the two requested exceptions and Oregon RPC 8.4(b) does not include such language.

In light of the history of Oregon RPC 8.4(b), including that parties have repeatedly requested and been denied a more expansive judicial exception to *former* DR 1-102(A)(3), it seems clear that Oregon RPC 8.4(b) is meant to permit a lawyer only to provide advice and supervision regarding covert activity, not to participate directly in that activity. The safe harbors of Oregon RPC 8.4(b) preserve the fundamental tenet of the basic truthfulness of the words spoken by a lawyer. Accordingly, Lawyer *B*'s direct participation in the covert activity described in this scenario would violate Oregon RPC 8.4(b).

A final question raised by this scenario is whether the Oregon Supreme Court's ruling in *In re Ositis, supra*, decided under prior standards, would be different under Oregon RPC 8.4(b). In *Ositis*, the lawyer engaged an investigator who misrepresented his identity to interview a party to a potential legal dispute. The supreme court found that the lawyer "suggested a particular line of inquiry" to the investigator and, on that basis, found that he had violated the then-existing rules "through the acts of another." *In re Ositis, supra*, 333 Or at 374. Although the court expressly declined to address how *former* DR 1-102(D) might have applied to the facts at issue in the case, it appears that the lawyer's involvement with the trick interview as an advisor and not as a direct participant would be permissible under Oregon RPC 8.4(b), if the lawyer had the requisite good-faith belief that there was a "reasonable possibility that unlawful activity [has] taken place, [was] taking place or [would] take place in the foreseeable future."

Scenario 3.

The last sentence of Oregon RPC 8.4(b) provides: "Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer *in good faith* believes there is a *reasonable possibility* that unlawful activity has taken place, is taking place or will take place in the foreseeable future." (Emphasis added.) The third scenario relates to the meaning of the expressions *good faith* and *reasonable possibility*, and to the kind of information and mental state that a lawyer must have before commencing, advising, or supervising covert activity.

The expression *good faith*, when used in a general sense, means "a state of mind indicating honesty and lawfulness of purpose : . . . belief that one's conduct is not unconscionable or that known circumstances do not require further investigation : absence of fraud, deceit, collusion, or

gross negligence,” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra*, at 978; “[h]onesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry,” BLACK’S LAW DICTIONARY, *supra*, at 693.

As for the expression *reasonable possibility*, a “possibility” is “something that is possible,” which means “that may or may not occur,” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra*, at 1771; “[a]n uncertain thing which may happen,” BLACK’S LAW DICTIONARY, *supra*, at 1165. The word *reasonable* means “being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra*, at 1892.

From these definitions, it is evident that Oregon RPC 8.4(b) requires both an honest subjective belief in the possibility that unlawful activity “has taken place, is taking place or will take place in the foreseeable future,” and some rational basis for that belief. The rule does not encompass a good-faith belief merely in a “possibility” of unlawful activity, but a good-faith belief in a “reasonable possibility” of such activity. To give full effect to this language, therefore, the rule must be read to require at least some assessment of the rationality of the lawyer’s good-faith belief. If a lawyer’s mental state in advising or supervising covert activity is challenged, therefore, the lawyer must be able truthfully to state that he or she subjectively believed that there was a possibility that unlawful activity “ha[d] taken place, [wa]s taking place or [would] take place in the foreseeable future,” and also to articulate some basis in reason for that belief.

Having said that, it is equally clear under Oregon RPC 8.4(b) that any review of the rationality of a lawyer’s good-faith belief in unlawful activity should be minimal. There is no indication in the wording or history of the rule that the expression *reasonable possibility* was meant to convey anything beyond a possibility that is not irrational or absurd. On the contrary, the choice of the generic expression *reasonable possibility* appears to be a deliberate attempt to state a bare-rationality standard in this area and to avoid confusion with specialized expressions in other areas, such as *probable cause* or *reasonable suspicion* in criminal law. There is certainly no indication in the rule that it was intended to prevent a lawyer from advising about or supervising any covert activity that the lawyer believed in good faith was authorized by law. Nor is there any indication that the rational basis for a lawyer’s belief may not be based completely on information supplied by others, or include

consideration of the lawyer's or another's specialized knowledge or experience with similar situations.

In the third scenario, Lawyer *C* believed in good faith that increased foot traffic at a particular house made illegal drug activity at that location a possibility. Assuming that Lawyer *C* could articulate a rational basis for her belief based on her knowledge and experience, that possibility would be "reasonable" within the meaning of Oregon RPC 8.4(b) and her advice would not subject her to discipline under the rule.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§7.39, 7.44 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§16, 98 (2003); and ABA Model Rule 8.4.