

# SHOULD OREGON ADOPT THE NEW ABA MODEL RULES OF PROFESSIONAL CONDUCT?

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## I. INTRODUCTION

A correspondent for Reuters recently wrote—with typical British understatement—that “Oregon is somewhat of a maverick state.”<sup>1</sup> Indeed, Oregon has distinguished itself from the other forty-nine states in many areas of the law. Oregon was the first state in the nation to pass a bottle bill,<sup>2</sup> the first to establish a statewide system of land-use planning,<sup>3</sup> the first to create a near-universal health insurance system,<sup>4</sup> the first to permit physician-assisted suicide,<sup>5</sup> and the first to conduct elections by mail.<sup>6</sup> Oregon is one of very few states that reject conventional regulation of obscenity,<sup>7</sup> that refuse to impose a sales tax,<sup>8</sup> and that allow doctors to prescribe marijuana for medical use.<sup>9</sup>

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Oregon's courtroom procedures are unique as well. Law school textbooks are replete with U.S. Supreme Court cases that originated in Oregon courts,<sup>10</sup> where judges seem unafraid to test constitutional boundaries, particularly in the area of criminal procedure.<sup>11</sup> Oregon has enforced its confrontation clause with an atypical zeal.<sup>12</sup> Oregon's case law regarding search and seizure imposes far more restrictions on law enforcement officers than does federal case law.<sup>13</sup> Oregon's distinctive approach does not always favor criminal defendants: for example, in prosecutions of domestic violence, Oregon has led the nation in innovating rules that liberalize the admission of hearsay<sup>14</sup> and permit extensive impeachment of defendants.<sup>15</sup>

Nowhere is Oregon's independent streak more evident than in the state's regulation of lawyers. For example, in the case *In re Gatti*,<sup>16</sup> the Oregon Supreme Court construed a provision of the state's ethical code to prevent lawyers (including prosecutors) from supervising deceptive investigative techniques, such as stings in which undercover police attempt to buy drugs.<sup>17</sup> No court in any other state has reached this same conclusion, although virtually all other states' ethical codes include the same rule from which the Oregon Supreme Court derived its ban on attorney supervision of undercover investigations.<sup>18</sup>

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10. Perhaps the most famous case originating in Oregon was *Pennoyer v. Neff*, 95 U.S. 714 (1877), in which the U.S. Supreme Court upheld a jurisdictional ruling by what was then known as the Circuit Court of the United States for the District of Oregon. *Id.*

Oregon's "Gatti problem" attracted national attention<sup>19</sup> from August 2000 until January 2002, when the Oregon State Bar and the Oregon Supreme Court finally agreed on an amendment to the ethical rule that enabled Oregon attorneys to supervise deceptive investigations in certain situations.<sup>20</sup>

There are other ways in which Oregon's regulation of attorneys diverges from the national norm. For example, Oregon is the only state in which the bar provides professional liability insurance for all attorneys.<sup>21</sup> Lawyers in Oregon must contribute to the Professional Liability Fund as a condition of bar membership.<sup>22</sup> A number of states have examined Oregon's model, but none has emulated Oregon yet.<sup>23</sup>

Consistent with its distinctive approach in so many other contexts, Oregon has not followed the majority of states in adopting the various ethical codes promulgated by the American Bar Association (ABA).<sup>24</sup> In fact, the only time when Oregon followed the ABA's blueprint was in 1971, when Oregon adopted the ABA's first code, the Model Code of Professional Responsibility.<sup>25</sup> Even then, Oregon defied convention by adopting only the lowest tier of authority in the Code (the "disciplinary rules"), but not the other tiers of authority in the Code (the "canons" and "ethical considerations").<sup>26</sup> In 1983, when the ABA

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CONDUCT R. 8.4(c) (2002). In the minority of states that follow the ABA Model Code of Professional Responsibility, the relevant provision is DR 1-102(A)(3), which provides that "[a] lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation." CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3) (2002). While all states share the same provision in their codes of ethics, every other court addressing this issue has held that the rule against dishonesty does not automatically bar lawyers from supervising deceptive undercover operations by police. *E.g.*, *Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456 (N.J. 1998) (holding that a public or private lawyer could properly employ an undercover investigator to detect ongoing violations of

promulgated an updated set of ethical rules called the Model Rules of Professional Conduct, Oregon refused to join the majority of states that adopted these rules.<sup>27</sup> Now that the ABA has finished another major revision of its Model Rules in 2002,<sup>28</sup> the Oregon State Bar has convened a task force to determine whether Oregon should adopt some or all of the ABA's suggested changes.<sup>29</sup> The Oregon State Bar will make a recommendation to the Oregon Supreme Court, which has the ultimate authority to determine which ethical rules will apply in Oregon.

This Article considers whether Oregon should fall in line with the rest of the states that are adopting the ABA Model Rules. I will argue that Oregon should continue its nonconformist approach and should reject many of the ABA Model Rules. The remainder of this Article proceeds in three analytical steps. I will begin by considering what is at stake in the decision whether to adopt the ABA Model Rules in Oregon. I will then analyze certain provisions in the ABA Model Rules that I believe are inappropriate for Oregon's Code. Finally, I will examine two of the ABA Model Rules that I believe would be a salutary addition to Oregon's Code.

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ABA Model Code, but not canons and ethical considerations).

27. *Porter*, 890 P.2d at 1383 n.8. See *supra* note 24 for more detail about states that have adopted the ABA Model Rules and states that have taken other approaches.

28. The revisions were drafted as part of a five-year project by the ABA's Ethics 2000 Commission. The revisions were first considered at the ABA House of Delegates' meeting in August 2001, and were finally approved by the ABA House of Delegates in February 2002. For further detail about the origins of the February 2002 amendments, see the ABA website at <http://www.abanet.org>.

29. George A. Riemer, *Ethics Rules: Too Many, Too Confusing?*, 62 OR. B. BULL. 23 (August 2002); Stevens, *supra* note 24, at 19.