

# 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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1. Bruce Olson, *Oregon Democratic Party Backs U.S. Supreme Court Impeachment*, Reuters News Service (June 22, 2001) (on file with author).

2. The bottle bill was passed in 1971 and is codified at Oregon Revised Statutes (ORS) section 459A.700, *et seq.* This legislation requires stores to give refunds for returned cans and bottles. OR. REV. STAT. § 459A.700 (2001). Oregon’s bottle bill became a model for the rest of the nation.

3. In 1973, the Oregon Legislature passed Senate Bill 100, now codified at ORS 197.005, *et seq.*, which established the Land Conservation and Development Commission, an agency charged with drafting statewide planning goals. OR. REV. STAT. § 197.005 (2001). The legislation also required each city and county to adopt a comprehensive land use plan and zoning ordinance to implement the statewide planning goals. *Id.* Oregon is widely acknowledged as the first state to have created such a system. See *Organization and Regional Profile—What is Metro?*, available at [www.metro-region.org/library\\_docs/finance/12a\\_what\\_is\\_metro.pdf](http://www.metro-region.org/library_docs/finance/12a_what_is_metro.pdf).

4. A series of laws passed between 1989 and 1995 created the Oregon Health Plan, which attempted to provide all of Oregon’s neediest citizens with access to affordable health insurance. The plan, codified at ORS 414.018, *et seq.*, includes three principal components: (1) it extends Medicaid eligibility to all state residents whose incomes are below the federal poverty level; (2) it establishes a High Risk Insurance Pool for those who cannot obtain other health insurance due to pre-existing conditions; and (3) it provides an array of options for small employers to offer their employees. OR. REV. STAT. § 414.018 (2001). Oregon’s novel approach, which relied to some degree on the rationing of health care, was unprecedented at the time of its adoption. Martin Perlman, *Does Oregon Point the Way? Interview with Ralph Crenshaw, M.D.*, WASHINGTON HEALTH TODAY, Fall 2001, available at <http://www.whf.org/images/today/archives/fall%20web%20pages/>. The Oregon Health Plan was the 1996 winner of the “Innovations in American Government” award given by Harvard University’s John F. Kennedy School of Government. Letter from John A. Kitzhaber, Governor of Oregon, to Tommy G. Thompson, Secretary of U.S. Department of Health and Human Services (Sept. 7, 2001), available at <http://www.healthlaw.org/pubs/waivers/orextensionrequest.pdf>.

5. Oregon voters approved Ballot Measure 16, the “Death with Dignity” law, in the 1994 election. The law is now codified at ORS 127.800, *et seq.* This law is the only one of its kind in the United States. The United States Department of Justice has sought to enjoin enforcement of the “Death with Dignity” law, but so far the State of Oregon has prevailed in federal litigation. See *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077 (D. Or. 2002).

6. Ballot Measure 60, approved by Oregon voters in 1998, required that all primary and general elections be conducted by mail. OR. REV. STAT. § 254.462, *et seq.* (2001). Oregon was the first state in the nation to utilize vote-by-mail elections on a statewide basis.

7. In *State v. Henry*, 132 P.2d 9 (Or. 1987), the Oregon Supreme Court struck down an anti-obscenity law on the ground that it violated article 1 section 8 of the Oregon Constitution, which is more protective of obscene material than the U.S. Constitution. *Id.* at 10. In 1994, opponents of obscenity sponsored Ballot Measure 31, which would have amended the Oregon Constitution to include the following provision: “obscenity, including child pornography, shall receive no greater protection under this Constitution than afforded by the Constitution of the United States.” The measure failed by a margin of fifty-seven to forty-three percent. For a comparison of Oregon’s regulation of obscenity with regulations in other states, see the National Obscenity Law Center website at <http://www.moralityinmedia.org/nolc/>.

8. Only five states have no sales tax: Alaska, Delaware, Montana, New Hampshire, and Oregon.

9. Oregon voters approved the Oregon Medical Marijuana Act as Ballot Measure 67 in 1998. The law is now codified at ORS 475.300, *et seq.*

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.* at 736. This case involved two "prominent Oregon lawyer/scoundrels," according to a recent article discussing research by Professor James Mooney. John W. Stephens, *Professor Jim Mooney Details Pennoyer v. Neff*, OREGON BENCHMARKS (The U.S. District Court of Oregon Historical Society Newsletter), Winter 2003.

11. For example, in the context of Miranda warnings, the U.S. Supreme Court has reversed Oregon courts in several famous cases. *Oregon v. Elstad*, 470 U.S. 298, 311-12 (1985) (where police originally failed to give Miranda warnings before interrogation, the U.S. Supreme Court held that delayed warnings purged the taint as to statements preceding these warnings, as long as the statements were made voluntarily); *Oregon v. Bradshaw*, 462 U.S. 1039, 1039 (1983) (after police gave Miranda warnings and defendant requested an attorney, police could properly resume questioning when defendant said at the jailhouse, "Well, what is going to happen to me now?"); *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (failure to give Miranda warnings did not require suppression of confession where defendant voluntarily came to the police, gave a statement, was informed that he was not under arrest, and left the police station without resistance).

12. *State v. Moore*, 49 P.3d 785, 789-91 (Or. 2002) (noting that Oregon follows the two-part test set forth in *Ohio v. Roberts*, but that Oregon does not follow the U.S. Supreme Court's subsequent rulings eroding the unavailability requirement in the *Roberts* test).

13. One of the most conspicuous differences is the lack of a good faith exception under Oregon law. In 1996, victims' rights groups proposed Ballot Measure 40, which, inter alia, would have amended the Oregon Constitution so that no evidence would be excluded except as required under the U.S. Constitution. Voters approved Ballot Measure 40, but the Oregon Supreme Court found that this measure had unconstitutionally presented multiple questions for the voters' review. *Armatta v. Kitzhaber*, 959 P.2d 49, 51 (Or. 1998). Subsequently, the Oregon Legislature referred many of the component parts of Measure 40 to the voters as separate measures, but the legislature declined to refer the provision as a separate measure.

14. Oregon is the only state in which statements by domestic violence victims to police can be admitted without a showing that the declarant was excited, and without a showing that the victim is unavailable as a witness at trial. OR. EVID. CODE R. 803(26) (2003). California is the only other state with a comparable provision. CAL. EVID. CODE § 1370 (2003) (allowing the admission of hearsay statements by victims of domestic violence who are unavailable to testify). For a discussion of Oregon's unique hearsay rule for domestic violence cases, see Douglas E. Beloof & Joel Shapiro, *Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1 (2002) (defending Oregon's rule and urging its adoption in federal court); Peter Dworkin, *Confronting Your Abuser in Oregon: A New Domestic Violence Hearsay Exception*, 37 WILLAMETTE L. REV. 299 (2001) (criticizing Oregon's rule).

15. In prosecutions of domestic violence or related offenses, Oregon Evidence Code Rule 601 permits the government to impeach the defendant who has committed prior misdemeanor crimes involving domestic violence. No other state has taken this approach. OR. EVID. CODE R. 601 (2002). A comparison of all states' impeachment laws is presented in Tom Lininger, *Evidentiary Issues in Federal Prosecution of Domestic Violence*, IND. L. REV. (forthcoming Spring 2003).

16. 8 P.3d 966 (Or. 2000) (en banc).

17. The Oregon Code of Professional Responsibility provides that "[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation." OR. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3) (2002).

18. Oregon's DR 1-102(A)(3) has an analog in every other state's code of legal ethics. In the majority of states that follow the ABA Model Rules, the relevant provision is Rule 8.4(c), which provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L

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 law, especially where detection of these violations would otherwise be difficult); *Minn. Law. Prof. Resp. Bd. Eth. Op. 18* (1996) (same); *Ohio Bd. Com. Griev. Disp. Adv. Op. 97-3* (1997) (same); *Utah St. Bar Eth. Adv. Comm. Op. No. 02-05* (Mar. 18, 2002) (a government attorney does not violate the ethical rule prohibiting dishonesty if the lawyer directs a covert investigation involving dishonesty); *Va. Leg. Eth. Op. 1738* (2000) (same).

19. For example, in an episode of the Fox television show "The O'Reilly Factor," which aired on October 31, 2001, Special Agent Nancy Savage of the Eugene, Oregon FBI office described the implications of the *Gatti* decision as "unintended consequences." *The O'Reilly Factor* (Fox News Channel Oct. 31, 2001). She said the *Gatti* rule has "shut down major undercover operations." *Id.* The host, Bill O'Reilly, derided the *Gatti* holding as "ridiculous," and questioned whether it would hinder the efforts of federal law enforcement officials to stop terrorists. *Id.* Former New Jersey Superior Court Judge Andrew Napolitano, now a Fox News Senior Judicial Analyst, said that the *Gatti* rule was "insane."

20. See discussion *infra* Part III.C.

21. For more information about Oregon's Professional Liability Fund, see the Oregon State Bar website at <http://www.osbar.org/2practice/plf/plf.html>.

22. *Id.*

23. *E.g.*, Robert W. Minto, Jr., et al., *Should Malpractice Coverage be Mandatory in Montana?*, 25 MONT. LAW. 21 (Feb. 2000) (reprinting paper presented at February 1999 meeting of the ABA Standing Committee on Lawyers' Professional Responsibility, which focused on Oregon's rule). Mr. Hall, Executive Director of the Professional Liability Fund in Oregon, offered this rationale for the rule: "We believe in Oregon that some form of malpractice coverage should be mandatory, just as auto drivers are required to carry coverage." *Id.* at 21.

24. Beginning in the late 1960s, the ABA has attempted to codify, in a single set of rules, the ethical strictures governing lawyers. The ABA has no authority to compel the states to adopt these rules, but most states have adopted the ABA's various iterations of these rules. The ABA's first set of rules, the Model Code of Professional Responsibility, was completed in 1970 and was adopted by most states within the next few years. The ABA's second set of rules, the Model Rules of Professional Conduct, was completed in 1983 and adopted by most states as well. A map showing which states follow the Model Rules and which states follow the Model Code can be found on the ABA's website at <http://www.abanet.org/legalservices/clientdevelopment/adrules.html> (this map does not provide any information about Alabama and Tennessee, but both are now Model Rules jurisdictions). This map shows that only four states still use a version of the Model Code (Oregon, Ohio, Nevada, and New York). According to a 2002 article in the *Oregon Bar Bulletin*, approximately forty states have adopted some version of the ABA Model Rules. Sylvia E. Stevens, *DR News: New (and Evolving) Developments in the Disciplinary Rules*, 62 OR. B. BULL. 19 (April 2002). The remaining six states, including California, appear to be taking a hybrid approach that combines some elements of the Model Rules and the Model Code, and incorporates some of the states' own innovations.

25. The Oregon Supreme Court adopted the Model Code in August 1971. See *In re Porter*, 890 P.2d 1377, 1383 n.8 (Or. 1995).

26. *In re Tonkin*, 640 P.2d 660, 665 (Or. 1982) (explaining that the Oregon Supreme Court adopted disciplinary rules in

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.