

Ethics Q & A: Gatti Is Important  
By Peter R. Jarvis, Esq  
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At a special meeting on January 19, 2001, the Oregon State Bar House of Delegates voted by a two-thirds majority to enact an amendment to the Disciplinary Rules that would effectively repeal much of the dicta, if not the holding, of *In re Gatti*, 330 Or 517, 8 P3d 966 (2000).

The Gatti court had stated that even if the investigation itself was lawful, neither a government nor a private lawyer could directly engage in an undercover or "sting" investigation to gather evidence, because such an investigation involves "misrepresentation." The decision provoked a great deal of national and local concern because it suggests that government attorneys could advise the police on such investigations, that lawyers for civil rights organizations could employ "testers" to help uncover discrimination and that private lawyers could use such investigations to, for example, develop information about the theft of a client's trade secrets. If the amendment is accepted by the Oregon Supreme Court, it will allow lawyers to supervise or advise clients about such investigations but not personally to engage in them.

I spoke in favor of the amendment at the House of Delegates meeting, and while it is not perfect, I hope that the Oregon Supreme Court adopts it. Among other things, it seems to me that lawyers should not be prohibited from advising clients about what clients may lawfully do or may lawfully employ third parties to do. This does not mean, of course, that lawyers should be able to advise their clients to engage in illegal activity in aid of gathering evidence. It also does not mean that lawyers should be able to advise their clients to commit actionable fraud in aid of gathering evidence. Such activities would not be permitted by the amendment.

To the extent, however, that reasonable undercover or sting investigations do not violate such statutory or common-law obligations, lawyers should not be prohibited from supervising such investigations or advising their clients about them. I do not mean to suggest that there are no important issues here. One could well debate, for example, the question what it means to lie and when lying "should" be condemned. Is it, for example, a "lie" when one attempts to deceive the Nazis to save Anne Frank, and, if so, should such action be morally or legally condemned? What about "lying" to one's children about Santa Claus or to one's in-laws about how much one likes their gifts? Why should it be acceptable for lawyers to advise others to do things that the lawyers cannot do themselves?

The ultimate question is what clients and nonclients have a right to expect from lawyers and what lawyers have a right to expect from each other. Most lawyers believe in the duty of zealous advocacy within the bounds of the law. In my opinion, the debate over the Gatti amendment highlights the need for a more nuanced view of what lawyers do and of how we explain what we do to nonlawyers. Not all deception is created equal. If polled, most of the public would likely support undercover investigations to ferret out criminal activity as well as government lawyer assistance to such investigations.

For my part, I am willing to explain to the public why I believe the same rationale should carry over to private attorneys. I also believe that the public and the legal system will be better served

by discussing such matters openly than by trying maintain an ultimately unrealistic position that leaves important societal interests unprotected. I would, however, welcome your thoughts. If you would like to suggest one or more issues for future topics, please contact me at :Peter Jarvis via e-mail.

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