

Ethics Q & A: An Analysis of the Gatti Problem and the Need for Resolution
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At a public meeting on April 11, 2001, the Oregon Supreme Court rejected the "fix" to the problems created by *In re Gatti*, 330 Or 517, 8 P3d 966 (2000), which the Oregon State Bar House of Delegates had approved by a two-thirds vote. The justices who were present apparently agreed that Gatti creates significant problems and agreed as well that they have not been able to come up with a "fix" that is better, but they preferred to send us all back to the drawing boards. So where does this leave us, where do we go from here and how do we get there?

Gatti held that a lawyer could not make knowing misrepresentations of fact in aid of evidence-gathering on behalf of clients even though those misrepresentations are not themselves tortious or unlawful. The court reached this conclusion primarily because of the word "misrepresentation" in DR 1-102(A)(3), which prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

The court's opinion, if not also remarks by several justices on April 11, also suggests that it may well be ethically impermissible for a lawyer to advise or direct a client to take such actions. This arguably follows from DR 1-102(A)(1), which makes it professional misconduct for a lawyer to "knowingly assist or induce another to [violate the DRs], or do so through the acts of another."

This is a problem substantially of the court's own making. There is no legislative history behind DR 1-102(A)(3) which compels or requires such holdings, and no other state has made such holdings as to either government or private lawyers. Moreover, the result cannot be justified on the ground that the "plain meaning" of the word "misrepresentation" requires such a result. Any number of Oregon cases hold, for example, that the word "misrepresentation" in this rule does not apply to negligent or innocent misrepresentations, yet they too are misrepresentations.

Similarly, the extent to which the court has gone to define the other three terms in the rule—dishonesty, fraud and deceit—makes no sense at all if "misrepresentation" is so broadly construed. See, e.g., Peter R. Jarvis & Bradley F. Tellam, "The Dishonesty Rule: A Rule with a Future," 74 Or L Rev 665 (1995). And since the rule applies not only in the course of the private practice of law, but also to wholly private conduct by individuals who happen to be attorneys, an overly broad interpretation of "misrepresentation" would include not only dramatic lies to save a life (e.g., lying to the Nazis to save Anne Frank), but also far less dramatic everyday ones (e.g., lying to a spouse that one had been at the office when one was out for a beer or lying to one's children about Santa Claus or the Easter bunny).

If "misrepresentation" means "any misrepresentation," we cannot exclude merely "social" or noneconomic misrepresentations. If we are to exclude any classes of misrepresentations (e.g., non-knowing, social, etc.), we must do so on a principled basis and not on the "plain meaning" of misrepresentation.

The better approach, and one that has been recognized at least twice in the literature, is that the word "misrepresentation" must, under long-standing and well-established doctrines of

interpretation such as *eiusdem generis* and *noscitur a sociis*, be construed together with the words "dishonesty," "fraud" and "deceit." See, e.g., *Dearborn v. Real Estate Agency*, 165 Or App 433, 437, 997 P2d 239 (2000); *Boyd v. Essin*, 170 Or App 509, 517, 12 P3d 1003 (2000).

Once this is done, the proper question emerges: Is a particular misrepresentation the kind of misrepresentation that ought to be included and prohibited along with dishonesty, fraud and deceit or is it not? How one answers the question as to Mr. Gatti in particular is far less important than that the right question be asked. After all, Gatti and countless other cases say that the purpose of attorney discipline is not to punish lawyers, but to protect the public.

How much "protection" does "the public" want or need from noncriminal, nontortious representations that are not akin to dishonesty, fraud or deceit and that anyone who is not a lawyer can make without fear of government sanction? To repeat: The proper question is not "Is it a misrepresentation?" but "What kind of misrepresentation is it?"

The interpretation of the word "misrepresentation" is not the only critical problem here. The lawyer's job is to advise clients "zealously and within the bounds of the law" about what his or her clients may lawfully do. Cf. OSB Legal Ethics Op No 1991-92. If a client may lawfully and nontortiously engage in an undercover or sting operation in order to protect himself or herself or his or her interests, any rule that would prohibit a lawyer from so advising him or her is highly suspect.

In fact, I submit that such a rule would violate not only the First Amendment to the U.S. Constitution, but also the state constitutional free-speech guaranty in Article I, section 8, of the Oregon Constitution. See, e.g., *Legal Services Corp. v. Velazquez*, 121 S Ct 1043 (2001) (striking, on free-speech grounds, congressional limitations on advice by Legal Services Corporation lawyers); *State v. Rangel*, 328 Or 294, 977 P2d 379 (1999) (discussing Oregon's free-speech protection and historical exception thereto); *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982) (same).

I am aware of no authority, for example, that holds that at the time of statehood, Oregon prohibited lawyers from advising their clients about what their clients might lawfully do.

But let's consider what this means. For a highly sophisticated and well-resourced client such as a Fortune 500 company, it may be that the lawyer need go no further than to say "go hire some high-priced nonlawyer to tell you how to run a lawful sting operation." Clients who are less well-resourced, however, or who happen to be policemen or FBI agents, may understandably want more guidance from their lawyers about where the dividing lines are located.

Indeed, the less well-resourced the client, the more likely it is that the client will need the lawyer's help to draw appropriate lines. Note also the irony here regarding the unauthorized practice of law: If we do not allow lawyers to give such advice, lawyers would then be forbidden from giving advice about the law that nonlawyers would presumably give instead.

In this set of circumstances, "in for a penny" really does mean "in for a pound." A rule that would allow a lawyer to advise a client that she has a right to protect herself through the use of

an undercover or sting operation (or through the use of a plea agreement with the prosecutor in which the client will wear a wire to a meeting with co-conspirators) but that would not allow a lawyer to give any further advice about what to do or what to refrain from doing would be foolish at best.

This means, however, that unless we are willing to and can constitutionally hold that lawyers may not advise their clients about what their clients may lawfully do in this one special set of circumstances, we have to accept a substantial portion of what the rejected Gatti amendment postulated: that lawyers must be able to advise their clients about how to, and how not to, conduct such operations.

One highly likely result of our state's inability thus far to come to grips with the Gatti question will be that the US Department of Justice will succeed in getting Congress to adopt a rule that exempts US Attorneys in all states from the need to comply with all state disciplinary rules. It also seems likely that our own state legislature will legislatively reverse the Gatti result as applied to Oregon government lawyers.

Both actions will tear away at the props that support the case for state-based judicial regulation of lawyer conduct. We cannot afford to be this out of touch on this issue not only with the public but also with every other American jurisdiction that has reached this issue. If the public is willing to have the conduct be both nontortious and noncriminal (and it is), it is not up to us to overrule them.

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If you would like to suggest one or more issues for future topics, please contact me a: Peter Jarvis via e-mail.

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An ethics article by attorney Peter R. Jarvis will appear in the Oregon Law Journal each month. Peter gives advice to and represents lawyers who have matters of discipline before the Oregon State Bar. E-mail your questions directly to Peter R. Jarvis. Prior articles by Peter can be seen by going to the Archives navigation button on the left, above.