

Inside Oregon Ethics: Gatti To Go!
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January 2002

In my May 2001 column, I took the position that notwithstanding *In re Gatti*, 330 Or 517, 8 P3d 966 (2000), the prohibition in DR 1-102(A)(3), against "conduct involving dishonesty, fraud, deceit or misrepresentation" should not be construed to prevent government or private lawyers from advising their clients about lawful and nontortious undercover and sting operations. I based this analysis in part upon a construction of the words in the rule, in part upon the purpose of attorney discipline (to protect the public) and in part upon the need for clients to be able to seek good advice from their lawyers about what they can lawfully do to gather information.

The Oregon Supreme Court has now come around to this view. On November 28, 2001, the court proposed a rule amendment that arguably goes further than my position. This is a good thing. For a recent case that also rejects *Gatti*, see *U.S. v. Parker*, 165 F Supp 2d 431, 476-78 (WDNY 2001).

The proposed amendment, as tentatively approved by the court, would add a new DR 1-102(D), which would provide:

"Notwithstanding DR 1-102(A)(1), (A)(3) and (A)(4) and DR 7-102(A)(5), 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 disciplinary rules. '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."

It is hoped that the House of Delegates will approve this amendment on January 18, 2002 and then send it back to the court for formal adoption.

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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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(503) 294-9456 e-mail: prjarvis@stoel.com An ethics article by attorney Peter R. Jarvis appears each month in the Oregon Law Journal . 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. Other articles by Peter can be seen on the member's Archives pages.