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## OSB Answers Lingering “Gatti Rule” Questions

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The Oregon State Bar recently issued an ethics opinion addressing three key questions on lawyer participation in covert activities left lingering by the Supreme Court in *In re Gatti*, 330 Or 517, 8 P3d 966 (2000), and the subsequent amendment to DR 1-102.

Let’s first take a quick look back. In *Gatti*, the Supreme Court disciplined a plaintiffs’ personal injury lawyer for misrepresenting his identity (relying on his J.D., the lawyer said he was a doctor) when he was investigating a medical review service. The Supreme Court effectively found that DR 1-102(A)(3)—which prohibits lawyers from engaging in misrepresentations—barred lawyers from personally engaging in otherwise lawful covert activities. Later, the Supreme Court disciplined a lawyer under a companion provision—DR 1-102(A)(1), which prohibits a lawyer from violating professional rules through a nonlawyer—in *In re Ositis*, 333 Or 366, 40 P3d 500 (2002), for directing an undercover operation by a private investigator.

In response to *Gatti*, the Oregon State Bar proposed and the Supreme Court adopted an amendment to DR 1-102 generally permitting a lawyer to direct lawful undercover operations. The amendment, DR 1-102(D), which was dubbed “the *Gatti* Rule,” was a useful fix to what had become a festering problem for law enforcement, civil practitioners and the bar. DR 1-102(D), however, left three

primary questions unclear. The new ethics opinion—2003-173—answers those open questions.

*First*, the *Gatti* Rule permits “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.” Although the terms “criminal law” and “constitutional rights” are straightforward, “civil law” is less so. In particular, it was unclear whether the term “civil law” extended to *both* statutory and common law. This was a major issue for civil practitioners who might want to hire a private investigator, for example, to make an undercover purchase of “knock-off” products in a trademark setting or to conduct a covert operation targeting employee theft. 2003-173 states unequivocally that “civil law” applies to both statutory and common law duties (including, specifically, those arising from contract and tort) and that the term “violations” extends to “reckless or negligent breach of civil standards” in addition to intentional ones.

*Second*, the *Gatti* Rule allows a lawyer to “advise” about or “supervise” a lawful covert operation. But, a question remained about whether the lawyer could suggest the covert operation in the first place. To return to the trademark example, did the lawyer have to wait to give the advice until the client thought-up the undercover operation or could the lawyer suggest it? 2003-173 makes plain that a lawyer can suggest a covert operation in the first place.

*Third*, the *Gatti* Rule requires a lawyer to have a “good faith” belief before beginning a covert operation that there is a “reasonable possibility” that unlawful activity either has taken place or will take place. The quoted terms, however, are not defined in DR 1-102(D). 2003-173 defines the lawyer’s “good faith” primarily in subjective terms (does the lawyer believe it) as long as there is also some rational basis for that belief. It then defines “reasonable possibility” as “anything beyond a possibility that is not irrational or absurd” and contrasts this with terms of art in search and seizure law such as “probable cause” that imply a higher standard of suspicion.

2003-173 is available on the Oregon State Bar’s web site at [www.osbar.org](http://www.osbar.org).

#### **ABOUT THE AUTHOR**

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