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DISTRICT OF OREGON
EUGENE, OREGON

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UNITED STATES DISTRICT COURT

12

FOR THE DISTRICT OF OREGON

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14

UNITED STATES OF AMERICA,)

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Plaintiff,)

Civil Action No. 01-6168-HC

16

v.)

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OREGON STATE BAR,)

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

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Defendant.)

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Plaintiff, United States of America, by its undersigned

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attorneys, brings this civil action for declaratory and

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injunctive relief, and alleges as follows:

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INTRODUCTION

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1. This action is brought pursuant to the Supremacy Clause

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of the United States Constitution, Article VI, Clause 2, by which

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federal officers are immune from state control for the

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28

Complaint for Declaratory
and Injunctive Relief

1 performance of federal duties consistent with federal law. The
2 Oregon State Bar, through a delegation of authority from the
3 State legislature, Or. Rev. Stat. § 9.490, has enacted
4 Disciplinary Rules which prohibit an attorney from engaging in
5 deceit or misrepresentation, Or. Code of Prof. Resp.,
6 Disciplinary Rule ("DR") 1-102(A)(3), or knowingly making a false
7 statement of law or fact, DR 7-102(A)(5). These Rules
a effectively prevent federal attorneys admitted to practice in
9 Oregon from participating in, directing, or overseeing covert
10 investigations for criminal or civil law enforcement purposes.
11 Covert activities are necessary and proper to an attorney's
12 performance of federal law enforcement duties and are authorized
13 under federal law.

14 2. Plaintiff seeks a declaration that the Supremacy Clause
15 bars any application to federal attorneys of DR 1-102 and DR 7-
16 102, as interpreted in In Re Gatti, 8 P.3d 966 (Or. 2000), for
17 otherwise lawful activities relating to their official duties.
18 Plaintiff also seeks a permanent injunction precluding defendant
19 from enforcing DR 1-102 and DR 7-102 against federal attorneys
20 admitted to practice in Oregon for otherwise lawful activities
21 relating to their official duties.

22 JURISDICTION AND VENUE

23 3. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331
24 and 1345. Declaratory relief is appropriate pursuant to 28
25 U.S.C. §§ 2201 and 2202.

26 4. Venue lies in the District of Oregon pursuant to 28
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1 U.S.C. § 1391(b)(2).

2 PARTIES

3 5. Plaintiff is the United States of America, suing on its
4 behalf, as well as on behalf of the Attorney General of the
5 United States, the United States Department of Justice, the
6 United States Attorney's Office for the District of Oregon, and
7 all attorneys for the Government admitted to practice in Oregon.
8 The Attorney General and the United States Attorney are officers
9 of the United States Department of Justice, an executive
10 department of the United States. 28 U.S.C. § 501.

11 6. Defendant Oregon State Bar is a public corporation and
12 an instrumentality of the Judicial Department of the government
13 of the State of Oregon. Or. Rev. Stat. § 9.010. The Oregon
14 State Bar may sue and be sued. Id. § 9.010(2).

15 STATEMENT OF THE CLAIM

16 Federal Law Enforcement Authority

17 7. Under the Supremacy Clause of the United States
18 Constitution, U.S. Const. art. VI, cl. 2, the activities of the
19 Federal Government are free from regulation by any state except
20 to the extent that Congress expressly provides to the contrary.
21 Hancock v. Train, 426 U.S. 167, 178-79 (1976).

22 8. Article II, section 3 of the Constitution requires the
23 President to faithfully execute the laws. As a department head
24 in the Executive Branch, the Attorney General has a direct
25 responsibility for carrying out this constitutional duty.

26 9. Congress has granted the Attorney General extensive law
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1 enforcement powers in broad terms that provide him with the
2 authority to engage in covert or undercover activities. The
3 Attorney General is authorized to supervise all litigation to
4 which the United States is a party and to direct United States
5 Attorneys and their assistants in the discharge of their
6 respective duties. 28 U.S.C. § 519. The Attorney General and
7 his designees are authorized to conduct any kind of civil or
8 criminal legal proceeding authorized by law. Id. § 515(a). The
9 Attorney General and his subordinates in the Department of
10 Justice are specifically authorized to conduct investigations,
11 id. § 533(3); detect and prosecute crimes, id. § 533(1);
12 prosecute or defend all civil actions in which the United States
13 is concerned, id. § 547(2); and secure evidence related to the
14 conduct of litigation, id. § 516. The Attorney General also has
15 general authority to "make such provisions as he considers
16 appropriate" authorizing the performance by any other officer,
17 employee, or agency of the Department of Justice of any function
18 of the Attorney General. Id. § 510. These expansive provisions
19 allow for the use of covert or undercover techniques by federal
20 attorneys in the performance of the official duties described.

21 10. The Supreme Court has upheld the government's use of
22 covert law enforcement tactics for over a century, and this
23 Circuit has approved the use of such tactics by the government
24 for law enforcement purposes. See United States v. Aguilar, 883
25 F.2d 662, 705 (9th Cir. 1989).

26 11. The use of covert operations in the conduct of federal
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1 law enforcement investigations and the participation of federal
2 attorneys in those investigations are essential. Because
3 organized illegal activity is, by its very nature, covert and
4 surreptitious, undercover activities by law enforcement agencies
5 are frequently necessary in order to detect, and collect evidence
6 concerning, such activities. More often than not, but for the
7 infiltration of or covert contact with an organization, the
8 illegal conduct would remain undetected or unprovable.

9 12. Misrepresentation as to identity and purpose by a law
10 enforcement agent participating in an undercover investigation is
11 inherently necessary for the agent to gather information about
12 illegal activity. Such investigations will be rendered
13 ineffective if law enforcement agents or cooperating witnesses
14 are prevented from engaging in the deceit and misrepresentation
15 requisite to covert operations. Indeed, the placement of
16 obstacles in the way of otherwise lawful covert activities,
17 whether conducted within individual states, across state borders,
18 or beyond United States boundaries, would undermine federal law
19 enforcement efforts nationwide. Consequently, violations of
20 federal civil and criminal laws designed to protect the safety
21 and well being of United States citizens could go undetected and
22 unpunished.

23 13. Federal attorneys participate in federal undercover
24 investigations in a variety of circumstances and contexts. The
25 nature and degree of the attorney's involvement depends on the
26 nature of the case, the requirements of the law, and Department

1 of Justice policies. The degree of participation ranges from
2 very minimal to heavy involvement.

3 14. Supervision by a federal attorney of the conduct of the
4 law enforcement agents is often critical to an effective
5 investigation and prosecution. An attorney's involvement in and
6 direction of undercover investigations helps to ensure that
7 undercover investigations are conducted for legitimate purposes,
8 that necessary evidence is properly obtained and preserved, and
9 that legal rights are not violated. Undercover operations often
10 raise sensitive legal and policy issues. It is essential not
11 only to their effective conduct, but also to ensuring that
12 investigations remain within lawful bounds, that attorneys be
13 actively involved in these law enforcement decisions. Attorney
14 oversight, which serves the interests of promoting law
15 enforcement and protecting the rights of suspects, is a vital
16 component of covert operations.

17 15. Through its agencies and departments, the United States
18 employs numerous attorneys who are admitted to practice in
19 Oregon. Those attorneys are agents of the United States
20 authorized to investigate and prosecute federal criminal and
21 civil cases, or to assist with their investigation and
22 prosecution. They are also authorized to conduct and participate
23 in covert activities in the fulfillment of their official
24 responsibilities. Federal attorneys admitted to practice in
25 Oregon cannot conduct or participate in covert activities without
26 risking the imposition of sanctions by the Oregon State Bar for

1 violating DR 1-102 and DR 7-102. Fear of such disciplinary
2 proceedings is a real and immediate inhibition on the performance
3 of their otherwise lawful official duties.

4 Oregon Code of Professional Responsibility

5 16. DR 1-102 of the Oregon Code of Professional
6 Responsibility states as follows: "It is professional misconduct
7 for a lawyer to . . . [e]ngage in conduct involving dishonesty,
a fraud, deceit or misrepresentation." DR 1-102(A)(3). This
9 provision also applies when a person acting under the lawyer's
10 direction engages in the prohibited conduct. See DR 1-102(A)(1)
11 (It is professional misconduct for a lawyer to "knowingly assist
12 or induce another to [violate the disciplinary rules], or do so
13 through the acts of another").

14 17. DR 7-102 states as follows: "In the lawyer's
15 representation of a client or in representing the lawyer's own
16 interests, a lawyer shall not . . . [k]nowingly make a false
17 statement of law or fact." DR 7-102 (A) (5).

1a **1a.** A violation of the Oregon Code of Professional
19 Responsibility is considered a basis for sanctions. See OSB BR
20 **2.3.** The sanctions include public reprimand, suspension, and
21 disbarment. Or. State Bar Rules, BR 6.1; see also Or. Rev. Stat.
22 § 9.527(4), (7).

23 19. The Oregon State Bar is authorized to carry out the
24 provisions of the Oregon Revised Statutes, Chapter 9, relating to
25 attorneys. Pursuant to that authority, it is required to
26 formulate rules of professional conduct and has the power to

1 enforce them. Or. Rev. Stat. § 9.940. It also has the power to
2 investigate and review the conduct of attorneys and institute
3 disciplinary proceedings against them. Id. § 9.532.

4 20. The rules of professional conduct formulated by the
5 Oregon State Bar are contained in the Oregon Code of Professional
6 Responsibility. Pursuant to Federal Local Court Rule 83.7,
7 attorneys representing the United States, who are either
8 generally admitted to practice as active members in the Oregon
9 State Bar or specially admitted to appear in a case, are subject
10 to the Oregon Code of Professional Responsibility.

11 21. The Oregon Supreme Court has declined to recognize an
12 "investigatory exception" to DR 1-102 and DR 7-102 that would
13 permit government attorneys to participate in or supervise law
14 enforcement operations that involve the use of covert or
15 undercover operations. In Re Gatti, 8 P.3d at 974.

16 22. The Court in In Re Gatti rejected a rule proposed by
17 the United States Attorney for the District of Oregon (appearing
18 as amicus curiae) that stated as follows: "Government attorneys
19 who advise, conduct or supervise legitimate law enforcement
20 activities that involve some form of deception or covert
21 operations do not violate DR 1-102(A) (3) ." In Re Gatti, 8 P.3d
22 at 975.

23 23. Instead, the Court held that the "disciplinary rules
24 . . . apply to all members of the Bar, without exception." Id.
25 at 976. The **Oregon State Bar** is obligated to enforce DR 1-102
26 and DR 7-102 in accordance with the Gatti decision.

1 24. In April 2001, the Oregon Supreme Court declined to
2 adopt an amendment to DR 1-102 approved by the Oregon State Bar
3 after the Gatti decision which would have created a similar
4 investigatory exception. The proposed amendment stated as
5 follows:

6 "Notwithstanding section A1 and A3 of this rule or DR
7 7-102(A)(5) it is not misconduct for a lawyer to
8 supervise or advise about lawful activity in the
9 investigation of violation of civil or criminal law or
10 constitutional law, provided the lawyer's conduct is
11 otherwise consistent with these disciplinary rules."

12 Effects on Federal Law Enforcement

13 25. Requiring federal attorneys to comply with DR 1-102 and
14 DR 7-102, as interpreted in In Re Gatti, interferes with the
15 proper and effective conduct of federal investigations and
16 prosecutions. This interest is being injured in at least three
17 ways:

18 26. First, federal attorneys may be held responsible for
19 undercover activities of investigative agents or informants
20 acting pursuant to their advice or direction. See DR 1-
21 102(A) (1). Accordingly, beginning with the issuance of the Gatti
22 decision and continuing to the present, the United States
23 Attorney's Office ("USAO") has ceased giving advice and direction
24 with respect to undercover investigations so as to avoid running
25 afoul of the Oregon rules as interpreted in Gatti. Whether
26 required by federal statute or Department of Justice policy, the
27 oversight of covert activities by the USAO is necessary to make
28 certain that the evidence gathering is lawful, that the evidence
itself will be admissible, and that constitutional rights are

1 honored. Nevertheless, as a result of In Re Gatti, the Oregon
2 field office of the Federal Bureau of Investigation ("FBI") has
3 been thwarted from obtaining the USAO's review and concurrence,
4 as required under Department of Justice guidelines, for sensitive
5 undercover operations and consensual monitoring of verbal
6 communications. Consequently, the FBI has been forced to suspend
7 a child pornography investigation developed by undercover agents,
8 and has been precluded from utilizing cooperating witnesses to
9 pursue at least two major drug investigations, three extortion
10 cases, and a major white collar crime investigation.

11 27. Since the issuance of In Re Gatti, the Drug Enforcement
12 Administration ("DEA") field office has been severely hampered in
13 its enforcement of the Controlled Substances Act, given that the
14 work of the DEA is heavily involved with and dependent upon the
15 ability of its agents and investigators to conduct undercover and
16 covert operations. To avoid threatened enforcement of DR
17 1-102 and DR 7-102, the USAO has refused to review or approve
18 search and arrest warrants that involve the use of undercover or
19 other covert investigative techniques, tracking device orders,
20 and applications for wiretaps by the DEA. Hence, DEA
21 investigations of major drug trafficking organizations have been
22 hampered and delayed and have not resulted in prosecutions, even
23 though several major cases deserving prosecution have arisen.
24 The DEA has also been barred from conducting electronic
25 surveillance on important targets in two separate cases
26 originating in other districts but involving illegal drug

1 activities in Oregon.

2 28. Second, the USAO has largely ceased prosecuting cases
3 developed through covert activity because of the objectively
4 reasonable fear that they may be held in violation of the
5 Disciplinary Rules for supervising or directing the conduct of
6 undercover agents. See DR 1-102(A)(1). The FBI cases that
7 cannot be prosecuted as a result of DR 1-102 and 7-102 involve or
8 could involve organized crime, illicit drug trafficking, public
9 corruption, money laundering, white collar crime, and child
10 exploitation and pornography. Similarly, the great majority of
11 DEA cases have ground to a halt because of DR 1-102 and 7-102,
12 with the result that individuals and groups involved in ongoing
13 illegal drug trafficking have been allowed to remain at large.

14 29. Third, DR 1-102 and DR 7-102 are hampering civil as
15 well as criminal law enforcement activities in Oregon that
16 involve legitimate covert operations. For example, without
17 risking disciplinary sanctions, the USAO cannot oversee or
18 provide advice regarding the "testing" of discriminatory housing
19 or banking practices in Oregon, even though such testing may be
20 initiated in response to a valid complaint, and even though the
21 United States Supreme Court has approved of testing as an
22 effective means of discovering discrimination. See 42 U.S.C.
23 § 3613 (authorizing Attorney General to bring civil action for
24 violations of Fair Housing Act of 1968).

25 30. Moreover, DR 1-102 and DR 7-102 have largely prevented
26 the USAO from prosecuting qui tam actions pursuant to the

1 "whistleblower" provisions of the False Claims Act. Such actions
2 comprise a major portion of the USAO's health care fraud cases
3 and all of its defense procurement fraud cases. Nevertheless,
4 since these actions are frequently initiated by whistleblowers
5 who covertly gather information about government contractors
6 suspected of fraud, they may involve deceptive conduct prohibited
7 by the Disciplinary Rules.

8 31. Attorney supervision and/or direction over these qui
9 tam investigations is often indispensable to insure the
10 lawfulness of the evidence gathering, safeguard the admissibility
11 of evidence so that the prosecution will be successful, and
12 protect the rights of others.

13 FIRST CLAIM FOR RELIEF -- VIOLATION OF THE SUPREMACY CLAUSE

14 32. Plaintiff incorporates paragraphs 1 through 31 of the
15 Complaint as if fully stated herein.

16 33. DR 1-102 and DR 7-102 stand as an obstacle to the
17 accomplishment and execution of the full purposes and objectives
18 of federal law.

19 34. As applied to federal attorneys in the performance of
20 their otherwise lawful duties, DR 1-102 and DR 7-102 violate the
21 Supremacy Clause.

22 SECOND CLAIM FOR RELIEF -- REQUEST FOR EQUITABLE RELIEF

23 35. Plaintiff hereby incorporates paragraphs 1 through 34
24 of the Complaint as if fully stated herein.

25 36. DR 1-102 and DR 7-102 violate the Supremacy Clause and
26 should be declared null and void as they apply to federal
27

1 attorneys in the performance of their otherwise lawful duties.

2 37. In addition, by reason of the foregoing, the United
3 States has suffered and continues to suffer irreparable harm for
4 which it has no adequate remedy except by this action. Defendant
5 should be enjoined from enforcing DR 1-102 and DR 7-102 against
6 federal attorneys for actions taken by them in the performance of
7 their otherwise lawful duties.

8 WHEREFORE, the United States prays for the following relief:

9 1. That this Court enter judgment declaring that DR 1-102
10 and DR 7-102 are invalid, null, and void, as applied to federal
11 attorneys for actions taken in the performance of their otherwise
12 lawful duties on behalf of the United States;

13 2. That this Court enter a permanent injunction, enjoining
14 the Oregon State Bar, and its successors, agents, and employees,
15 from instituting, prosecuting, or continuing any disciplinary
16 proceeding or action against federal attorneys for actions taken
17 in the performance of their otherwise lawful duties on behalf of
18 the United States on the ground that such attorney violated DR 1-
19 102 or DR 7-102; and

20 3. That this Court award any other relief it deems just and
21 proper.

22 DATED this 22nd day of May, 2001.

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Respectfully submitted,

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28 Complaint for Declaratory
and Injunctive Relief

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