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Advising a Client as to a Continuing or Future Crime

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The situation envisioned by this note is one where the client seeks out the attorney for legal advice which, when the client has given the attorney the facts, turns out to be for the purpose of aiding the client in a continuing crime or to aid him in the commission of a crime in the future. Many of the considerations herein discussed apply also to torts, but by definition the discussion will be limited to crimes. The question raised is, what advice can the attorney lawfully and ethically give; in particular how far can he go in advising a client under such conditions without implicating himself as a conspirator, accessory or aider and abettor?

Where it is *clear* that the advice will further a continuing crime or will aid the commission of a future one, there should be no problem as to the proper and lawful course of conduct. The attorney's latitude in advising such a person is narrow. The margins can be found in the canons of Professional Ethics. Canon 32 clearly states the attorney's duty upon discovery that a client is asking him to render advice involving disloyalty to the law. That duty is to the law.[1] It is not within the professional character of a lawyer to give advice on the commission of a crime.[2] As we shall see, the lawyer not only has the duty of refusing advice but also an affirmative duty to his client and to law enforcement officers.

An attorney must advise with care a client whose problem is of *questionable* legality. The attorney whose advice involves the client in a violation of the laws of the state implicates himself in his client's guilt, when, by following the advice, a crime against the laws of the state is committed.[3] To co-operate in the commission of a crime, by advice coupled with or without positive action, may make the attorney guilty of conspiracy.[4] In Matthews v. Hoagland the attorney was accused of furthering a fraud by opening the deceased's strong box and removing certain securities and giving them to his client. The opposing party claimed that the securities belonged to the estate.[5]

There is no question of the right of an attorney to defend a criminal against an existing criminal charge, but in this connection the attorney cannot legally or ethically advise the client as to evading apprehension where that person is wanted by the law as a defendent. He becomes a conspirator if in this capacity he knowingly accepts stolen property as a fee or knowingly conceals or assists in disposing of the loot. In *Laska v.*

1. Canons of Professional Ethics, No. 32.
2. 58 Am. Jur. Witnesses § 516 (1948).
3. Goodenough v. Spencer, 46 How. Pr. 347 (N.Y. Sup. Ct. 1874).
4. Black, Law Dictionary (4th ed. 1951).
5. Matthews v. Hoagland, 48 N.J. Eq., 21 Atl. 1054 (1891).

U.S.[6] the attorney entered into a kidnapping conspiracy after the kidnapping had taken place, by knowingly accepting ransom money as a fee, counseling the criminals as to evading capture, and aiding in changing the marked ransom money. The attorney was found quilty of being an accessory to conspiracy. Where the advice is sought as to a continuing crime the attorney is ethically and morally bound as an officer of the court to advise the client to turn himself into the authorities. The attorney cannot advise the violation of the law.[7]

Advising a client as to a contemplated or future wrong is not as fraught with pitfalls as is advising concerning a continuing crime, because at the time the former advice is sought no wrong has been committed—providing the advice does not further the contemplated crime. In a conversation, somewhat desultory, it may not always be an easy matter to determine the purpose for which certain communications are made.[8] An attorney consulted concerning the punishment for murder under certain circumstances can properly give advice to the extent of reading the statutory penalty and advising against such a course of conduct if he has reason to believe the inquiry was motivated by the client's intention to kill someone.[9] Where an attorney is asked the consequences of forging a promisory note he should advise that it would be forgery and contrary to the law and should not be done. This the attorney in *People v. Mahon* did when the client asked him what would be the effect of making a note and signing another person's name to it to raise some money.[10] The advice to a client whose contemplated act constitutes blackmail is to so inform him and advise against it.[11] The advice to one contemplating killing his wife should be against such a course of action, and such advice is not privileged communication. It was relied on by the wife in connection with her plea of self-defense after she "beat her husband to it" and killed him.[12] However, where a client consulted an attorney and was advised that a contemplated act would be illegal and desisted from it the

6. Laska v. U.S., 82 F.2d 672 (1936), cert. denied, 298 U.S. 689. Laska was subsequently disbarred in proceedings in Colorado in which some of the most prominent people and public officials came to his defense including the next governor who had aided in his defense on the charge of conspiracy. The court disbarred him pursuant to a provision requiring disbarment for conviction of a felony. The charge was made that due to public feeling where the trial was held (Oklahoma) and a possible deal with the prosecution's witness Laska had not been accorded a fair trial. In the opinion, 105 Col. 428 the dissent wrote a 19 page dissent in answer to a terse 2 page majority. On Petition for reinstatement in 1942 after serving his sentence, Laska was denied reinstatement without majority opinion and the same dissenting judge wrote a another passionate dissent. In the disbarment opinion the court said:
   The public safety demands that no ability however great, no practice however long or creditable, and no reputation however unblemished, should exculpate a lawyer who thus prostitutes his profession, or temper the judgment which should follow his conviction.
7. Drinker, Legal Ethics, 152 (1953).
8. Annot., 125 A.L.R. 508 (1940).
9. Orman v. State, 22 Tex. App. 604, 6 S.W. 544 (1886).
10. People v. Mahon, 1 Utah 205 (1875).
11. State v. Richards, 98 Wash. 158, 167 Pac. 46 (1917).
12. Ott v. State, 222 S.W. 261 (Tex. 1920).

client was held to be protected by the attorney-client privilege.[13] It is basic that the advice must not aid the future crime; and where the client persists, the attorney should then disclose the facts related by the client to the authorities.[14]

Where a client is engaged in a crime or a contemplated crime, and desires to contract with the attorney to defend him if he is caught, the contract will be held void as against public policy.[15]

The attorney's ethical duty stems from his character as an officer of the court. This duty was set forth as early as 1743, when the court said of the duty of the attorney:[16]

> If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligation can dispense with the universal one, which lies on every member of the society, to discover every design which may be formed, contrary to the laws of society, to destroy the public welfare.

Such a fundamental principal would appear easy to apply, yet apparently capable attorneys have forgotten or chosen to ignore it to the extent that they become a criminal conspirator.[17] Where his client's actions are determined, from the client's declarations, to be fraudulent, the attorney should at once withdraw from such a case and attempt to prevent the consummation of the contemplated crime by revealing to the proper authorities the facts as related to him.[18] The result of failure to come forward where a client is contemplating or is engaged in a wrongdoing is aptly summed up in In re Davis:[19]

> When properly retained lawyers have a right to defend persons charged with crime. They must realize, however, that aiding and abetting the commission of crime will not be tolerated. They may not, as did the respondent, undertake to defend persons for offenses thereafter to be committed and thereby encourage the perpetration of crimes. When the conduct and actions of an attorney over a period of years clearly show that his purpose and intention was to aid and guide a combination of persons engaged in crime, he becomes, in effect, a member of the criminal organization and forfeits his rights to membership in an honorable profession.

Consulting to further a continuing or future crime or tort is not within the attorney-client privilege, and the court will order the attorney to disclose such communication made by the client.[20] Many attorneys feel that as a matter of self protection it is proper to assert the attorney-client privilege and compel the court to order the attorney to give up his know-

13. Annot., 125 A.L.R. 508 (1940).
14. Drinker, op. cit. supra at 137.
15. Bowman v. Phillips, 41 Kan. 362, 21 Pac. 230 (1889).
16. Annesley v. Earl of Angesea, 17 How. St. Tr. 1229 (1743).
17. Supra note 6.
18. Gebhardt v. United Rys. Co. of St. Louis, 220 S.W. 677, 9 A.L.R. 1076 (Mo. 1920).
19. In re Davis, 299 N.Y. Supp. 632 (1937).
20. In re Selser, 15 N.J. 393, 105 A.2d 395 (1954), and supra note 12.

ledge. Attorneys have asserted the privilege as to a continuing crime where they knew that their client was bribing public officials;[21] where the communication was to further a contemplated fraud on an insurance company by committing arson;[22] the maintaining of a false tort suit.[23] Lawyers could justifiably adopt the position that it is unnecessary to assert the privilege because the person who consults them under these circumstances is not a client in the true sense of the word. A "client" is one who consults an attorney only for the purpose of securing advice which the attorney may lawfully give in his professional capacity.[24] As has been pointed out, to give advice to further a future or continuing crime is not within the professional character of a lawyer.[25]

An attorney who aids a client in violating a law demonstrates moral turpitude for which he may be disbarred. In In re Hofstede the attorney aided one to avoid registration under selective service law which was said to demonstrate lack of moral turpitude.[26]

What should the attorney do when in doubt? The duty of an attorney when there is a conflict between advising or shielding a client and his duty to the public has been well stated thusly:[27]

> There is a delicate balancing of this 'fidelity to private trust' and fidelity to 'public duty', but when the conflict is sharp, the duties of citizenship weight more heavily in the balance. The paramountcy of one's duty to society is based upon moral priniciple which in an earlier period was recognized as a fundamental law of nature.

The above quotation is consistent with several of the canons of Professional Ethics[28] which deal with situations in which the lawyer faces a conflict between private and public interest. Though it may be due to the fact that the cases were not reported, research indicates that courts, and the Bar Associations, except in the most flagrant cases, have been reluctant to pursue the attorney who has invoked the attorney-client privilege to withhold information clearly outside the attorney-client privilege, beyond compelling the attorney to reveal the unprivileged information. Writers have stated that under certain circumstances it is permissible and under other circumstances it is the duty of the attorney to come forward and speak to the court, but it is still held that the attorney cannot be compelled to come forward until there is a foundation laid by introducing sufficient evidence to support the charge of wrongfulness of purpose of the client in seeking the consultation.[29] Where the attorney knows that the client is involved in a wrong it is incongruous that he may

21. Ibid.
22. Standard Fire Ins. Co. v. Smithhart, 183 Kent. 679, 211 S.W. 441 (1919).
23. Supra Note 18.
24. Metalsalts Corp. v. Weiss, 76 N.J.S. 291, 184 A.2d 435 (1962).
25. Supra note 2.
26. In re Hofstede, 31 Idaho 448, 173 Pac. 1087 (1918).
27. Gardner, The Crime or Fraud Exception to the Attorney-Client Privilege, 47 A.B.A.J. 708 (1961).
28. Canons of Professional Ethics Nos. 29 and 32.
29. Gardner, supra note 27 at 711.

remain quiet while the authorities attempt to obtain enough evidence to force the court to unseal the attorney's lips.

One would suppose that where an attorney is compelled to reveal that he has counselled a client concerning a continuing or future crimes the bar or the courts would take disciplinary action against him. For example, in In re Selser there was evidence that the attorney had knowledge of admitted bribes to public officials through 200 conferences with his client. The bar may have taken action, but the reported cases do not disclose any further action. In fact the state's attorney said there was no evidence of consipiracy to obstruct justice between attorney and client![30] A court reprimand was the extent to which an attorney was disciplined for contracting to defend persons whom he knew intended to engage in illegal activities.[31] In contrast, an attorney who was told by his client that he would lie on the witness stand to aid the prosecution if the prosecution would dismiss charges against him, voluntarily offered to testify as to his client's conduct.[32] This case is remarkable in the light of the paucity of cases where an attorney has voluntarily informed the court concerning a client's illegal or contemplated illegal conduct. The attorney should come forward whenever the statements of the client offer reasonable evidence of a guilty intent such as where the client has revealed a criminal plan to the attorney.[33]

Gardner has summed up the situation in the following language:[34]

> When it appears to an attorney that his client has abused the professional confidence by seeking advice for the purpose of committing a wrong in the future, it is proper for the attorney to come forward and disclose the content of the communications between the parties. Generally there would be an ethical duty to do this, but the writer has found no recognition of a legal duty to come forward and testify when the attorney is not a party to the wrongdoing. There would be serious difficulties raised by imposing a legal duty, and the matter is probably best left to the conscience of the individual attorney.

We may conclude as follows: When a client discloses that he is a party to a continuing crime, the attorney should give no advice except to counsel the client to turn himself into the authorities; when the client seeks advice as to a future crime the attorney should advise him of the consequences of his contemplated act and counsel him not to carry it out. If he still appears bent on carrying it out, the attorney has an ethical but not a legal duty to report the conversation. As to both situations the governing principles are contained in Canons 29, 41, and 44 of the Canons of Professional Ethics. The profession should take disciplinary action against an attorney who acts unethically. If necessary, the *Court* should maintain its purity and dignity by calling to account attorneys who have conducted their legal affairs in a manner inimical to the public interest.

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30. Supra note 20.
31. Supra note 15.
32. Petition of Sawyer, 229 F.2d 805 (7th cir. 1956).
33. State v. Barrows, 52 Conn. 323 (1885).
34. Gardner, supra note 27 at 711.
35. Howard v. Wilbur et al., 166 F.2d 884, 70 FS 930 (6th cir. 1947).