



Committee on Professional Ethics

Opinion #455 - 12/30/76 (100-76) Topic: Counseling violation of law of another state.

Digest: Improper for lawyer to counsel or assist client in violating law of another state.

Code: Canon 7
EC 7-5, 7-22
DR 7-102(A)(7)

QUESTION

May a lawyer counsel a parent residing in New York with respect to removing her child from the jurisdiction of another state wherein the child resides with its other parent pursuant to a decree of custody made by a court of that state?

Under the law of the state in question, it is kidnapping even for a natural mother to interfere with the lawful custody of her minor child. While such conduct if committed in New York State would not constitute the crime of kidnapping, under certain circumstances, the same could be deemed a class A misdemeanor. Penal Law, §135.45.

OPINION

The relevant provisions of the Code of Professional Responsibility are set forth in Canon 7 which enjoins lawyers to represent their clients "zealously within the bounds of the law". Pursuant to this injunction, EC 7-5 provides:

"A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

EC 7-22 adds:

"Respect for judicial rulings is essential for the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal."

Finally, DR 7-102 states:

"A. In his representation of a client, a lawyer should not:

* * *

"7. Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

Our question requires an interpretation of the terms "illegal" and "counsel" as employed by DR 7-102(A)(7). We first consider whether, in the absence of some applicable principle of federal law, illegality

should be determined solely by reference to the substantive law of New York or that of the situs of the proposed conduct. Next, we consider whether the term "counsel" is intended to refer to something more than the giving of legal advice.

We note that the Code has been adopted in essentially the same form by 49 states, as well as the District of Columbia and reflects a national consensus on what constitutes professional propriety. It is intended to promote public confidence in the integrity of lawyers throughout the United States in a manner consistent with the realities of our federal system.

Under that system, it is commonplace, if not unavoidable, for lawyers to advise their clients as to the law of jurisdictions to which they have not been admitted; and, they may properly do this, provided they have acquired sufficient knowledge of their subject. See, N.Y. State 375 (1975).

While the legal consequence of any given course of conduct may vary from state to state, the Code's admonition to lawyers that they refrain from counseling their clients to violate the law contemplates that the situs of the act will ordinarily determine its legality.

Whatever may be the law of the situs, however, giving legal advice, in and of itself, cannot cast the lawyer in the role of one who counsels or assists illegal conduct within the meaning of DR 7-102(A)(7). Whether the situs jurisdiction defines a particular act as criminal or otherwise, where the lawyer does no more than advise his client concerning the legal character and consequences of the act, there can be no professional impropriety. That is his proper function and fully comports with the requirements of Canon 7.

But, where the lawyer becomes a motivating force by encouraging his client to commit illegal acts or undertakes to bring about a violation of law, he oversteps the bounds of propriety.

If, for example, the lawyer were to recommend that the child in question be removed from the jurisdiction of another state in violation of its law, he might well be considered a motivating force and his "counsel" would then contravene the provisions of DR 7-102(A)(7). However, if the client has determined to pursue this course of conduct and merely wishes to be informed as to whether a violation of law would result or what the consequences of that violation may be, it would not be unethical to furnish the requested advice.

In the final analysis, professional propriety will be seen to depend upon the often subtle interplay between the lawyer and his client. The borderline between the giving of adequate legal advice and the unprofessional conduct prohibited by DR 7-102(A)(7) is incapable of precise definition. Each case must be viewed carefully in the light of its facts and peculiar circumstances. It is the encouragement of illegal conduct that is proscribed, not the mere giving of advice as to what conduct may be deemed illegal or a discussion of its consequences.
