



Committee on Professional Ethics

Opinion #522 - 6/9/80 (16-80)

Topic: Zealous representation;
illegal or fraudulent
conduct

Digest: Proper for an attorney to
advise client to refuse
breathalyzer test requested
by police officer.

Code: Canon 7;
EC 7-8;
DR 7-102(A) (7).

QUESTION

May a lawyer advise a client to refuse a police officer's request to submit to a breathalyzer test to determine whether the client was driving under the influence of alcohol?

OPINION

New York State's Vehicle and Traffic Law (§§ 1192, 1193-a and 1194) provides sanctions for the use of alcohol by one who operates a motor vehicle in the State. Section 1193-a authorizes the use of breath tests. It states that a driver who has been involved in an accident or violation of any provision of the Vehicle and Traffic Law shall at the request of a police officer submit to a breath test. If the breath test indicates that alcohol has been consumed within three hours of the test, then the officer may require the operator to submit to a chemical test.

Section 1194 provides that any person who operates a vehicle in the State is deemed to have consented to a chemical test of the blood, breath, urine or saliva to determine the alcoholic content of a driver's blood provided the requesting police officer has reasonable grounds to believe the person was driving in an impaired or intoxicated condition or a breath test under §1193-a has indicated recent consumption of alcohol.

Section 1194 further provides that a refusal to submit to a chemical test shall result in the temporary suspension or revocation of the individual's driver's license provided that the individual understood the consequences of his refusal. Subdivision 4 also states

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that a refusal may be offered as evidence to establish that the operator was driving while intoxicated. People v. Thomas, 46 N.Y.2d 100, 412 N.Y.S.2d 845 (1978). Such refusal may be admitted as evidence to establish consciousness of guilt (People v. Haitz, 65 A.D.2d 172, 411 N.Y.S.2d 57 [4th Dept. 1978]), and, in conjunction with evidence that the police officer had reasonable cause to request the test, such refusal may be a sufficient basis for the revocation of a driver's license.

But what is critical for the issue raised by the inquiry here is that New York law has established that a refusal to submit to a breathalyzer is not itself criminal conduct. A refusal invokes no criminal sanctions, and a revocation of the license constitutes a civil sanction. Minnick v. Melton, 53 A.D.2d 1016, 386 N.Y.S.2d 488 (4th Dept. 1976).

The advice an attorney gives his client must be tested ethically under Canon 7 which states that "A lawyer should represent a client zealously within the bounds of the law." DR 7-102(A)(7) prohibits a lawyer from counselling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent. Inasmuch as a refusal to take a breathalyzer test is neither illegal nor fraudulent and a client who wishes to take the risk of a license revocation would be acting well within the law, a lawyer who recommends such a refusal to a client can hardly be deemed to be violating any ethical standard.

Consistent with the broad mandate of Canon 7, EC 7-8 provides that a lawyer "should use his best efforts to insure that his client makes decisions on a fully informed basis." In this connection, we note that there are circumstances when it may seem more appropriate for a client to invite the loss of his driver's license than to submit to a breathalyzer test. For example, because a second offense of driving while intoxicated may result in a felony conviction, a lawyer might understandably counsel a client who already has one conviction to refuse the test. The risk of losing one's license to drive may be preferable to submitting to a test which might provide evidence to support a felony conviction.

For the reasons stated, the question posed is answer in the affirmative.
