



Committee on Professional Ethics

Opinion #529 - 2/18/81 (2-80) Topic: Representation of fugitive
Digest: Lawyer may represent fugitive who refuses to surrender
Code: EC 7-5;
DR 2-110(B) and (C),
7-102(A)(7).

QUESTION

Is a lawyer required to withdraw from the representation of a fugitive client if the client refuses to surrender?

OPINION

The question posed requires us to balance what has been viewed by some authorities as a conflict between the lawyer's duty to represent the interests of his client and his duty as an officer of the court. We conclude that the interests of justice and the ethics of our profession are best served when the lawyer continues to give legal advice to his fugitive client.

One of the most fundamental guarantees of the Bill of Rights is the Sixth Amendment's right to the assistance of counsel -- "the right of every American . . . to have the protective shield of a lawyer between himself and the awesome power of the State." Brewer v. Williams, 430 U.S. 387, 409 (1977) (Marshall, J., concurring). This right has been held by the courts to mean that a person is entitled to the help of a lawyer at or after the time proceedings have been initiated against him -- "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682 (1972). It is a right which is no less significant because the client remains a fugitive from justice. As was observed in Brewer, when suggesting that the conditions negotiated by counsel for the surrender of his fugitive client should have been honored:

"Under any analysis, this [is] a critical stage of the proceeding in which the participation of an independent professional [is] of vital importance to the accused and to society. At this stage -- as in countless others in which the law profoundly affects the life of the individual -- the lawyer is the essential medium through which the demand and commitments of the sovereign are communicated to the citizen." Brewer v. Williams, supra, at 415 (Stevens, J., concurring).

OVER---

The Code of Professional Responsibility does not require a lawyer to withdraw from representation of a fugitive when the fugitive refuses to follow the lawyer's advice to surrender. In fact, EC 7-5 states that the lawyer:

"may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct. . . ."

However, the Code distinguishes between giving legal advice and giving advice which would aid the client in escaping punishment for past crimes. EC 7-5 warns that "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." See also DR 7-102(A) (7).

There are several ethics opinions which conclude that once the lawyer has advised the fugitive of his rights and suggested that he give himself up, he must withdraw if the client refuses to follow his advice. For example, in considering whether a lawyer consulted by a military deserter must reveal the whereabouts of his client, the ABA Committee distinguished between whether the lawyer has been consulted for advice on how best to remain a fugitive. It concluded that if the lawyer is consulted with respect to that problem, he should (a) advise the client to surrender; (b) refuse to represent a fugitive who declines to do so; and (c) advise the fugitive that the lawyer will reveal his whereabouts to the authorities if he persists in his illegal conduct and the matter is brought to the lawyer's attention again. See ABA Inf. 1141 (1970). Similarly, ABA 155 (1936)* concludes that an attorney may be disciplined if he continues to represent a client who refuses to heed his advice to surrender. See also ABA 156* (1936) and N.Y. County 462 (1958). The rationale behind these opinions is that the fugitive is guilty of the continuing crime of removing himself from the process of the law, and continued counsel of the lawyer may constitute aiding and abetting the client to escape trial on the charge for which he was indicted.

We believe that the result of these opinions is unsound and should not be followed. A lawyer should not be required to withdraw from representation merely because his client refuses to surrender to the authorities; and it should make no difference how many times his client refuses to heed his advice to surrender. The lawyer is free to continue to give legal advice to the client and to represent him before the authorities, as long as the lawyer

* ABA 155 and 156 were withdrawn by ABA 349 (1984).

does nothing to aid the client to escape trial. See United States v. Weinstein, 511 F.2d 622, 629 (2d Cir. 1975) (Court of Appeals expressly recognizes power of District Court to entertain motions to dismiss indictments made by counsel on behalf of fugitive defendants where fugitives had agreed to be represented by counsel). A contrary result would remove the lawyer from a position where he can negotiate on behalf of his client for the client's surrender.

DR 2-110(B), governing mandatory withdrawal from employment, does not require a contrary result, provided that such continued representation would not result in the violation of a Disciplinary Rule. Cf. DR 2-110(B)(2) and (C). We believe that as long as the lawyer's representation is limited to advice concerning the legal rights and liabilities of the client or negotiation of the client's surrender, and the lawyer in no way aids the client in escaping prosecution, the lawyer's withdrawal would not be mandated. See N.Y. State 455 (1976) ("[G]iving legal advice, in and of itself, cannot cast [a] lawyer in the role of one who counsels or assists illegal conduct within the meaning of DR 7-102(A)(7)").

For the reasons stated, the question posed is answered in the negative.
