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How Far May A Lawyer Go in Assisting a Client in Legally Wrongful Conduct?

GEOFFREY C. HAZARD, JR.*

Professor Hazard discusses the dimensions of the lawyer conduct prohibited by DR 7-102(A)(7) of the Model Code of Professional Responsibility, which provides that a lawyer shall not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." After reviewing relevant principles of agency, tort, and criminal law, Professor Hazard concludes by asking whether it is this positive law outside of the Code that defines the scope of conduct prohibited by DR 7-102(A)(7), or whether the Code contains its own standard that, because of the nature of the lawyer-client relationship, permits lawyers to engage in otherwise forbidden activity.

I.

This article discusses a question or, perhaps more accurately, a series of questions. The general question to be considered is: How far may a lawyer lawfully go in providing assistance to a client that might enable the client to carry out an act that is to some degree illegal?

Although there is no hard and fast answer to this question, examination of its several aspects should suggest the bounds within which an answer will lie.

First, the question addresses how far a lawyer *may* lawfully go in providing assistance that furthers his client's illegal purposes. It does not ask how far lawyers actually go in providing such assistance. We do not know, and probably shall never know, the answer to that question. Studies of the incidence of legal violations are beset with notorious difficulties and their results are notoriously unreliable. The subjects of such studies usually are not eager to respond, and lawyers are no doubt particularly reserved in such matters. It must be true, however, that some lawyers often help further their clients' illegal purposes and that almost every lawyer at one time or another has provided assistance to clients that the

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lawyer suspected might be put to unlawful use. Furthermore, cases show that as a matter of historical truth, at least a few lawyers have provided services that in fact helped clients to commit legal wrongs.¹ Thus, although the quantitative impact of the question cannot be established, its applicability is real as a matter of fact. Certainly, the question is a real one as a matter of principle for the legal profession.

Second, the question is how far the *law* allows a lawyer to go in assisting a client in illegal purposes. It does not ask how far a lawyer in particular circumstances behaviorally *ought* to go. Like everyone else, a lawyer is subject to imperatives in addition to those of the law. He or she must think of cold self-interest in order to survive as a political and social entity, and as an income-earner. There can be situations in which a lawyer's duty is overborne by concern for personal survival. We might well be sympathetic to unlawful acts in some of these situations, even to the point of forgiveness, but they are violations of law nevertheless. Quite apart from self-interest, however, lawyers are governed by norms that compete with the law and sometimes neutralize it. Lawyers have feelings of loyalty to particular clients that may suspend their sense of legal duty. Lawyers also have moral convictions that may supersede legal duty. Some lawyers may even have paramount religious beliefs. One or all of these imperatives may operate in particular circumstances to guide a lawyer into conscious, indeed conscientious, disobedience of the law. The question presented is not, however, whether a lawyer should comply with his or her legal duty in particular circumstances, but what, in particular circumstances, that duty is as a matter of law.

1. *Townsend v. State Bar*, 32 Cal. 2d 592, 197 P.2d 326 (1948) (attorney censured for advising client to alter and falsify documentary evidence as to the value of client's property); *Attorney Grievance Comm'n v. Kerpelman*, 288 Md. 241, 420 A.2d 940 (1980) (attorney suspended from practice of law for advising client to take possession of his child in violation of a court order that placed the child in the custody of the client's former spouse); *In re Sears*, 71 N.J. 175, 364 A.2d 777 (1976) (attorney suspended from practice of law for attempting, on behalf of his client, to influence a Federal Securities and Exchange Commission investigation, and for giving false testimony in connection with the underlying investigation); *In re Feltman*, 51 N.J. 27, 237 A.2d 473 (1968) (attorney censured for sending his client's wife an acknowledgment of service that was untrue on its face, because it purported to acknowledge receipt of complaint in a divorce action that, in fact, had not yet been commenced); *In re Giordano*, 49 N.J. 210, 229 A.2d 524 (1967) (attorney suspended for representing a lender in a usurious transaction that would provide the borrowers with money to pay the fees of their own attorney, thereby himself participating in the unconscionable transaction); *In re Bullowa*, 223 A.D. 593, 229 N.Y.S. 145 (1928) (attorney censured for counseling client to cancel old contracts and draw up new ones at a higher price for property about to be requisitioned by the United States Government).

Third, the question is how *far* a lawyer may lawfully go in providing assistance that might enable a client to carry out an illegal purpose. The services that a lawyer can provide cover a wide spectrum, regardless of the client purposes that may be involved. At one end of the spectrum is simply advice as to what the law "is," without specific aid or encouragement to the client. It is not easy to provide advice that is neutral with respect to the purposes implicit in the request for advice. Nevertheless, it is possible to give unsuggestive advice, and doing so is the least instrumental form of assistance that a lawyer can provide a client. At the other end of the spectrum of lawyer assistance is pure instrumentalism—the lawyer's physical execution of a purpose that the client would like to realize but cannot or will not actually execute himself. One example would be a lawyer who serves as "bagman" in an illegal payoff for a client who wishes to remain behind the scenes.

At the least instrumental end of the spectrum, the lawyer merely provides the client with an expert definition of the limits of the law, leaving it to the client to consider whether those limits should be transgressed. At the other end of the spectrum, the lawyer personally provides the means without which the client could not achieve the illicit purpose. The law clearly sanctions providing assistance at the least instrumental end of this spectrum. The law clearly prohibits conduct at the other end.² But what about forms of conduct that fall within these extremes? Obviously, the farther we move away from simple, unsuggestive advice, and the closer we move toward active assistance, the farther we get from what the law encourages and permits and the closer we get to what the law abhors and proscribes. The questions raised by conduct falling in the middle of the spectrum, however, are difficult, and the answers are usually qualified. What advice should the lawyer give about the limits of the law of fraud or breach of fiduciary duty to a client who has fiduciary obligations but shows signs of being self-interested? What about a client who requests his attorney to prepare documents for a transaction whose factual particulars the client refuses to disclose but the lawyer has reason to suspect? What about a client who asks his lawyer to make frequent, but unscheduled, deposits of very large sums of cash in bank accounts bearing fictitious names? In the latter case, what if the city is Miami in 1981, and the client is twenty-four years of age?

The fourth aspect of the question is how far a lawyer may go

2. See, e.g., cases cited in note 1 *supra*.

in conduct that *might* enable the client to accomplish an illegal purpose. The term "might" suggests a dimension related to, but different from, the third point just considered, which dealt with the dimension of causal proximity between the lawyer's conduct and the client's illegal purpose. The fourth point deals with the additional dimension of probability, or, to refer to it by another name, the dimension of uncertainty.

It is rare that the lawyer fully knows a client's purposes or fully anticipates the ways in which the client might make use of the lawyer's services. Indeed, the client himself often does not fully realize his purposes until the moment of choice has come and gone. Furthermore, a lawyer does not learn of a client's purposes in a continuous narrative. Rather, revelation comes in fragments, often beginning in the historical middle rather than at the historical beginning. As the matter unfolds, it may appear to the lawyer that the portents of abuse are strong or weak, clear or ambiguous, firm or wavering. When are these portents sufficiently certain so that the lawyer "knows" that the client intends an illegal objective and is bent on its accomplishment?

It is sometimes suggested that the dilemma is false, because surely a lawyer cannot "know" what a client intends. This suggestion is either disingenuous or absurd. Of course, speaking in terms of radical epistemology, it is true that a lawyer cannot "know" what a client—or anyone else—intends. In these terms it is impossible for a lawyer to "know" anything. Yet the practice of law is based on practical knowledge, that is, practical assessments leading to empirical conclusions which form the basis for irrevocable action. Lawyers certainly possess such practical knowledge. If a lawyer can have practical knowledge of how the purposes of others may affect his client, he can have the same knowledge of how his client's purposes may affect others. It is in that sense that the lawyer can "know" when a client's purpose is illegal. The question, therefore, is what degree of certainty imposes legal obligations on one who "knows"?

Finally, the question concerns action by the client that is in some *degree* illegal. "Illegality" is itself a matter of degree. The narrowest connotation of illegality is conduct violative of the criminal law that is *mala in se*.

Although *mala in se* has no precise definition, it generally comprehends conduct that any civilized society would regard as obnoxious, such as homicide without justification, rape, robbery, or

theft.³ Offenses against the administration of justice, such as bribery and perjury, are also within the category of criminal offenses *mala in se*. These forms of conduct are clearly "illegal." Thus, the aspect of the question considered here is implicated when the lawyer is aware that a client contemplates murder. It is also implicated when the lawyer is aware that a client contemplates, or has actually committed, perjury. A case resting on testimony by the client that the lawyer knows to be false involves not only a crime by the client, but a question of the lawyer's furtherance of the crime. Whether the lawyer's furtherance of perjury may be excused in deference to the necessities of the adversary system is, of course, a difficult question.

"Illegality" can be construed somewhat more broadly to include violations of the criminal law at large, including *mala prohibita*.⁴ The nature of lawyer involvement in this area is more ambiguous than in the area discussed above. The fact that certain conduct has been made a crime by statute, however, should not be taken lightly. A statute imposing criminal penalties signifies at the least that society regards the conduct as warranting, in principle, a response that goes beyond private compensatory redress. Moreover, many "regulatory crimes" involve behavior that, although harmless in itself, may be a prelude to dangerous behavior. Behavior such as the violation of safety or pollution regulations is, for example, only minimally dangerous when considered in isolation, but may be materially dangerous in the aggregate. On the other hand, legislatures can be indiscriminate in embracing criminal sanctions to the point that some of the regulatory criminalizations may be better regarded as rhetorical flourishes than genuine condemnations. In any case, regulatory crimes are legal wrongs by a client in which a lawyer can be implicated. Indeed, in the ordinary practice of law the offenses that clients are most likely to risk are regulatory offenses.

3. 'Crimes have been divided according to their nature into crimes *mala in se*, and crimes *mala prohibita*; the former class comprises those acts which are immoral or wrong in themselves, such as murder, rape, arson, burglary, and larceny, breach of the peace, forgery, and the like, while the latter embraces those things which are prohibited by statute because they infringe upon the rights of others, although no moral turpitude may attach, and they are crimes only because they are prohibited by statute. Generally, but not always, crimes *mala in se* involve moral turpitude, while crimes *mala prohibita* do not.'

Kempe v. United States, 151 F.2d 680, 688 (8th Cir. 1945) (quoting 22 C.J.S., *Criminal Law* § 8 (1944)).

4. *Id.*

The general category embraced by the term "illegality" also includes, beyond the criminal law, various torts. Certain kinds of torts are readily subsumed under the rubric of "illegality."⁵ These torts include the civil counterparts of criminal offenses that are *mala in se*: wrongful death by willful unexcused act, physically harmful battery, knowing conversion, and some forms of abuse of process. Other intentional torts, such as piracy of trade secrets or invasion of privacy, can also be included.

On the other hand, it is less apparent why negligence should be regarded as "illegal" conduct even if it results in tort liability. Yet negligence is a violation of the legal standard of reasonable care and is in this sense a violation of law. Suppose, for example, a client asks his lawyer whether compliance with old safety regulations is sufficient, and the lawyer indicates that such compliance would be sufficient because a tenuous argument can be made that new and stricter safety regulations are constitutionally invalid. If someone is injured as a result of the client's noncompliance with the new regulations, is the lawyer chargeable with having materially assisted the client in "illegal conduct"? How would the outcome be affected if that violation also entails criminal sanctions?

Is there some kind of boundary to be drawn here? By what criteria can the types of client conduct that it is legally improper for a lawyer to further be identified? Put differently, what kind of wrongfulness should we include in the term "illegal" for this purpose? We may feel confident about including crimes that are *mala in se*, but as we move away from this core meaning, the boundaries become increasingly doubtful.

We can also approach the question from a different direction. There is a wide range of client conduct that gives rise to civil liability, but which we would not readily call "illegal" in the present context. Consider, for example, the deliberate default in performance of a contract obligation, the deliberate exercise of dominion and control over property of which another person claims ownership, or the deliberate decision to make a search and seizure of doubtful legality. Should any of these forms of conduct be categorized as "illegal" for the purpose of limiting the client endeavors

5. In one rather anomalous respect, however, the ideas underlying the criminal law have invaded the field of torts. Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action 'punitive' or 'exemplary' damages

PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971) (footnotes omitted).

that a lawyer may further?

The term "illegality" in ordinary legal parlance does not embrace breach of contract or invasion of a property interest. Yet there are breaches of contract and invasions of personal and property interests that are more flagrant and more harmful than many torts, and indeed more harmful than many regulatory offenses.

II.

It should be kept in mind that we are not engaged in a purely academic exercise. The term "illegal" is pivotal in DR 7-102(A) of the ABA Model Code of Professional Responsibility,⁶ which defines the lawyer's responsibility for his involvement in his client's conduct. DR 7-102(A) provides: "In his representation of a client, a lawyer shall not: . . . (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."⁷

There are no footnotes to this section of the Code. The corresponding Ethical Consideration in the Model Code, EC 7-5, adds little to the substance of DR 7-102(A)(7). The Annotated Code of Professional Responsibility,⁸ published by the American Bar Foundation in 1979, has few annotations to the rule. Most involve situations readily classified as illegal, such as bribery or attempted bribery of a judge. The only case discussed in the Annotated Code that mentions an offense other than bribery involves "an attempt to influence improperly or limit an investigation by the Federal Securities and Exchange Commission; the delivery of an illegal campaign contribution; and the giving of false testimony during investigations into the underlying conduct."⁹ We thus have no clear definition of the term "illegal" as used in DR 7-102(A)(7).¹⁰

Hence, the search for meaning must go beyond the Code of Professional Responsibility. Indeed, the law of legal ethics itself often incorporates the general law; DR 7-102(A)(7), for example,

6. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter cited as ABA CODE].

7. *Id.* DR 7-102(A).

8. ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY (1979).

9. *In re Sears*, 71 N.J. 175, 176, 364 A.2d 777, 778 (1976) (cited in ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 8, at 321).

10. The Canons of Professional Ethics, promulgated by the American Bar Association from 1908 to 1970, did not directly address the problem. If anything, they assumed that lawyers would maintain higher ground. Canon 32, entitled "The Lawyer's Duty in its Last Analysis," states that: "No client . . . is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are . . ." ABA CANONS OF PROFESSIONAL ETHICS (1948).

expressly invites our attention to general law by using the term "illegal." Although it may seem obvious that interpretation of a lawyer's legal duty frequently requires reference to general law as distinct from the rules of legal ethics, many lawyers seem to assume that the text of the Model Code is an exhaustive statement of the law governing their professional conduct. The Code is not exhaustive, however, for it does not purport to be preemptive.¹¹ On the contrary, the rules of professional ethics presuppose and supplement the law at large, including criminal law, constitutional law, criminal procedure and civil procedure.

The law of legal ethics, for example, specially presupposes the law of torts and of agency. A lawyer in the service of a client is typically an agent. But legal representation is a special kind of agency, involving legally conferred special powers that provide the lawyer with some autonomy from the client in carrying out the agency. For example, DR 7-101(B)(1) provides that "a lawyer may: (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client."¹²

The rule does not address the interesting question of what is meant by "where permissible." It is evident, however, that this rule of professional ethics allows a lawyer as agent to exercise authority normally reserved to the principal. Moreover, DR 7-101(B)(2) provides that "a lawyer may: . . . (2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal."¹³ Whether or not the term "unlawful" in DR 7-101(B)(2) means the same thing as the term "illegal" in DR 7-102(A)(7), it is evident that DR 7-101(B)(2) allows the lawyer to exercise subjective judgment in deciding whether his client's purpose is lawful. That is, the lawyer does not violate his obligation to the client if he balks at assisting the client in conduct that he believes, but does not know, to be illegal.

These special powers to judge the client's purpose surely do not *diminish* the lawyer's responsibility to refrain from aiding a client in "illegal" acts. To the contrary, they render that responsibility more stringent at the margin precisely because DR 7-101(B)(2) specifically empowers the lawyer to disengage from his client's purposes without breaching his obligation to serve the

11. See ABA CODE, *supra* note 6, Preamble and Preliminary Statement.

12. *Id.* DR 7-101(B)(1).

13. *Id.* DR 7-101(B)(2).

client.¹⁴ This should be kept in mind in considering how the law of agency impinges on the question at hand.

In general, the law of agency imposes limits on what an agent may, with legal impunity, do for a principal. Section 343 of the Restatement (Second) of Agency states: "An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted . . . on account of the principal, except where he is exercising . . . a privilege held by him for the protection of the principal's interests" ¹⁵ As explained in Comment b to this section, an agent's act is privileged if "a reasonable belief in the existence of facts causes an act to be privileged, and a command by the principal gives the agent reason to believe in the existence of such facts." ¹⁶ Thus, if a client directs his lawyer to commence criminal proceedings against another, and if the lawyer "has reasonable grounds for believing the other guilty of the crime, the [lawyer] is not guilty of malicious prosecution." ¹⁷

Section 348 of the Restatement is also pertinent to the kinds of transactions in which lawyers can be involved. That section provides that "[a]n agent who fraudulently makes representations, uses duress, or knowingly assists in the commission of tortious fraud or duress by his principal or by others is subject to liability in tort to the injured person" ¹⁸ The comments following sec-

14. *Id.*

15. RESTATEMENT (SECOND) OF AGENCY § 343 (1957).

16. *Id.* Comment b. Comment b states that:

An agent who . . . defames or arrests another, or does any similar act, is not excused by the mere fact that he is acting as an agent. If, however, a reasonable belief in the existence of facts causes an act to be privileged, and a command by the principal gives the agent reason to believe in the existence of such facts, such command gives him a privilege to do the act. Thus, if a principal directs an agent to institute criminal proceedings against another, . . . if from the command the agent has reasonable grounds for believing the other guilty of the crime, the agent is not guilty of malicious prosecution.

The reference to "privilege" in this provision does not refer to a privilege of the agent. It refers to a privilege of the principal, that is, the client. This is clear from RESTATEMENT (SECOND) OF AGENCY §§ 345, 346 (Tent. Draft No. 6, 1979):

§ 345. Agent Exercising Privileges of Principal.

An agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have an agent do it and has authorized the agent to do it.

§ 346. Privilege to Protect Principal's Interests.

An agent is privileged to give such protection to the person or property of his principal as is authorized by the principal to the same extent as the principal is privileged to act in the protection of himself or his property.

17. RESTATEMENT (SECOND) OF AGENCY § 343, Comment b (1957).

18. *Id.* § 348.

tion 348 make it clear that if a lawyer acts for a client in a transaction that the lawyer knows is founded on misrepresentations, the lawyer acts tortiously.¹⁹

These "black-letter" provisions and comments yield many implications. The lawfulness of a lawyer's conduct in aid of a client is determined in the first instance by reference to the client's purposes, not the lawyer's. The law does not inquire whether the actor was an agent and then ask whether he nevertheless should be charged with the purposes of the principal. Instead, it first asks whether the actor was involved in the endeavor. If involvement is found, and if the act is a tort, the actor is liable even though he acted "on account of the principal," unless the act was privileged.²⁰

The vital circumstance under the law of agency is therefore not the fact that the actor is an agent, but the existence of facts that render his actions privileged. Applying the law of agency to lawyers, the vital question is what the lawyer knows about the client's endeavor. Using defamation and false arrest as illustrations, Comment b to section 343 of the Restatement (Second) of Agency observes that *if* "a reasonable belief in the existence of facts causes an act to be privileged," and *if* what the agent (lawyer) is told by the principal (client) "gives the agent reason to believe in the existence of such facts," then the agent (lawyer) has the privilege that is conferred on innocent actors.²¹

But what if the client's endeavor is *not* one that a "reasonable belief in the existence of facts" will cause to be privileged?²² For example, in the tort of conversion it is not a defense that the agent reasonably believes that the property was his principal's. This problem is explicitly addressed in section 349 of the Restatement (Second) of Agency: An agent whose acts "would otherwise constitute trespass to or conversion of a chattel is not relieved from liability by the fact that he acts on account of his principal and rea-

19. Comment a, for example, states: "[A]n agent who enters into transactions with a buyer knowing that the buyer is relying upon the previous misrepresentations by the principal or other agent is liable to the same extent as if he had made the previous misrepresentations." *Id.* Comment a. Comment c adds:

[I]f an agent who has been given misinformation by a principal, on the strength of which he makes statements to a third person, later discovers the untruth and refrains from taking steps to inform the other party, the agent is subject to liability if subsequently the other party completes the transaction with the principal or another agent, relying in part upon the statements of the first agent.

Id. at Comment c.

20. *Id.* § 343.

21. *Id.* Comment b.

22. *Id.*

sonably, although mistakenly, believes that the principal is entitled to possession of the chattels."²³ Under this rule, what is the situation of a lawyer who advises a client to seize property in possession of a debtor?²⁴

The lawyer's knowledge is again the vital question in cases involving misrepresentations in a contract transaction. Under section 348 of the Restatement (Second) of Agency, for example, a lawyer faces liability if he "knowingly assists in the commission of tortious fraud"²⁵ by his client. If the lawyer proceeds "knowing that the buyer is relying upon the previous misrepresentations by the [client]," then the lawyer is "liable to the same extent as if he had made the previous misrepresentations."²⁶ Moreover, if the lawyer "has been given misinformation by a [client], on the strength of which he makes statements to a third person, [and] later discovers the untruth and refrains from taking steps to inform the other party, the [lawyer] is subject to liability if subsequently the other party completes the transaction . . . relying in part upon the statements of the [lawyer]."²⁷ Under these rules, then, a lawyer would be liable if he discovered on the eve of a closing that the other party had relied on statements by the client that the lawyer knew were false or fraudulently misleading.²⁸ Such conduct also would seem to be "illegal" within the meaning of DR 7-102(A)(7).²⁹

23. *Id.* § 349.

24. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) addresses the situation of a lawyer who advises a client about seizing property in the possession of a debtor. It would seem that if the lawyer "assists" the client, and if the seizure turns out not to be legally privileged, then the lawyer, as well as the client, is *prima facie* legally responsible. RESTATEMENT (SECOND) OF AGENCY § 343, Comment d, says that "[T]he act of the agent may play too small a part to render him legally responsible for the result, or the agent's innocence and purpose may create a privilege for him to act." It is hard to see how the lawyer's role in such a situation is "too small" to count. The comment does not indicate the scope of the privilege that could result in immunity.

25. RESTATEMENT (SECOND) OF AGENCY § 348 (1957).

26. *Id.* Comment a.

27. *Id.* Comment c.

28. In *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978), the SEC sought an injunction against numerous defendants, including a corporation's attorneys, on the basis of alleged securities law violations surrounding the merger of two corporations. The attorneys were charged with aiding and abetting a fraudulent transaction by failing to interfere with its closing despite their knowledge of inaccuracies in the corporation's financial reports. The SEC argued that the attorneys should have prevented the closing by impressing upon their clients the ramifications of the adjustments in the financial statements. The court held that the attorney's failure to do so amounted to abetting the fraud, and concluded that the attorneys had "provide[d] knowing substantial assistance to the violation." *Id.* at 713.

29. ABA CODE, *supra* note 6, DR 7-102(A)(7).

The rules of tort law are similar to the rules of agency, but are cast in terms of "persons acting in concert." That agents and principals act "in concert" is clear as a matter of ordinary usage. Section 343, Comment d of the Restatement (Second) of Agency expressly refers to section 876 of the Restatement (Second) of Torts, which is entitled "Persons Acting in Concert." Section 876 provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

- (a) does a tortious act in concert with the other or pursuant to a common design with him, or
- (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself³⁰

Advice to a tortfeasor is equivalent to active participation in the tort if the advisor knows that the contemplated act is tortious, and if the advice is a "substantial factor in causing the resulting tort."³¹

30. RESTATEMENT (SECOND) OF TORTS § 876 (1977).

31. The full text of comment d to § 876 states that:

Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.

Id. Comment d.

The Restatement (Second) of Torts, like the Restatement (Second) of Agency, recognizes that the involvement of an agent in the principal's purposes must rise above some minimum. Comment d to Restatement (Second) of Torts § 876 also provides:

The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other. In determining this, the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered. (See Illustration 9).

Id.

Illustration 9 is as follows:

A is employed by B to carry messages to B's workmen. B directs A to tell B's workmen to tear down a fence that B believes to be on his own land but that in fact, as A knows, is on the land of C. A delivers the message and the workmen tear down the fence. Since A was a servant used merely as a means of communication, his assistance is so slight that he is not liable to C.

Id. Illustration 9.

In the Restatements, the Illustrations generally are clear cases—the ones that the members of the Institute can agree on—and not borderline cases. If Illustration 9 is a clear case of noninvolvement, the implication is that when a person acts as considerably more than a messenger he is rendering "assistance." Lawyers rarely act merely as messengers. *Cf. In re Sears*, 71 N.J. 175, 364 A.2d 777 (1976) (attorney suspended from the practice of law for

The Restatement (Second) of Torts acknowledges that in limited circumstances "a person may be privileged, and hence be committing no breach of duty, in assisting another who is committing or who later commits a tort,"³² but the privileges referred to are those recognized in the law of torts generally, such as the privilege of self-defense.

Nothing in the foregoing rules expressly exempts lawyers. Rather, their import is that a lawyer whose assistance to a client is a "substantial factor" in bringing about conduct that is tortious as to a third party is *prima facie* liable to that party.³³ Agency law, however, will protect a lawyer from liability if "a reasonable belief in the existence of facts causes an act to be privileged, and a command by the [client] gives the [attorney] reason to believe in the existence of such facts"³⁴ And, although the various portions of the Restatements examined thus far do not so provide, certain lawyer conduct may be privileged because of the special nature of the attorney-client relationship and the lawyer's duty to adequately represent his client.³⁵

Finally, one can look to the principles of complicity expressed in the criminal law for guidance. Section 2.06(1) of the Model Penal Code provides that "[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable"³⁶ Section 2.06(2)(c) of the Code provides that a person is legally accountable for the conduct of another person if he is an "accomplice of such other person."³⁷ And section 2.06(3)(a)(ii) provides that an accomplice is one who "aids . . . in planning or committing" the offense "with the purpose of promoting or facilitating the commission of the offense."³⁸ Restating these provisions, a lawyer is guilty of an offense if he aids a client in facilitating conduct that is an offense.³⁹

attempting, on behalf of his client, to influence a Federal Securities and Exchange Commission investigation).

32. RESTATEMENT (SECOND) OF TORTS § 876, Comment e (1977).

33. See RESTATEMENT (SECOND) OF TORTS § 876, Comment d (1977).

34. RESTATEMENT (SECOND) OF AGENCY § 343, Comment b (1957).

35. See ABA CODE, *supra* note 6, Canon 7 (Lawyer's duty to zealously represent clients within bounds of law).

36. MODEL PENAL CODE § 2.06(1) (Proposed Official Draft, 1962).

37. *Id.* § 2.06(2)(c).

38. *Id.* § 2.06(3)(a)(ii).

39. There is very little authority on the degree of lawyer involvement in a client's criminal endeavor that would constitute "aiding." See *Johnson v. Youden*, [1950] 1 K.B. 544, involving a criminal prosecution against a solicitor who effected the conveyance of real property at a price in excess of that permitted by applicable price control regulations. The action

The case law on the question is sparse, but generally consistent with the annotations to the Code of Professional Responsibility.⁴⁰ In most of the cases, the lawyer has overtly assisted his client in accomplishing manifestly illegal purposes. Thus, courts have held that it is improper for a lawyer to give advice as to how to commit a crime or fraud⁴¹ or how to conceal criminal or fraudulent acts.⁴² These cases beget law that is not hard to formulate. There is less guidance when the conduct is less blatant, but there is enough to point the way. One case, for example, states the test for advice that may be given as whether "the lawyer conveyed to the client the idea that by adopting a particular course of action [the client] may successfully [accomplish the illegal purpose]?"⁴³ As to the mode of assistance, courts have held that it is unlawful for a lawyer to negotiate for his client in pursuance of an illegal purpose⁴⁴ or to prepare documents to effectuate it.⁴⁵ As to the extent of knowledge that will result in complicity, the cases say not only that liability results from actual knowledge of the client's illegal purpose, but also that it results from knowledge of facts that reasonably should excite suspicion.⁴⁶

III.

This analysis indicates the dimensions of the lawyer's duty under criminal and civil law to refrain from "assisting" a client in conduct that is "illegal." A lawyer violates that duty if:

- (1) The client is engaged in a course of conduct that violates the criminal law or is an intentional violation of a civil obligation, other than failure to perform a contract or failure to sustain a good faith claim to property;
- (2) The lawyer has knowledge of the facts sufficient to reasonably discern that the client's course of conduct is such a viola-

was dismissed because there was no showing that the solicitor knew about the calculation of the price such that, given his assumed knowledge of the law, he knew that the price violated the law.

40. ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY (1979).

41. *E.g.*, *In re Feltman*, 51 N.J. 27, 237 A.2d 473 (1968).

42. *E.g.*, *Townsend v. State Bar*, 32 Cal. 2d 592, 197 P.2d 326 (1948); *In re Giordano*, 49 N.J. 210, 229 A.2d 524 (1967).

43. *In re Bullowa*, 223 A.D. 593, 602, 229 N.Y.S. 145, 154 (1928). *See also* *Attorney Grievance Comm'n v. Kerpelman*, 288 Md. 241, 420 A.2d 940 (1980).

44. *E.g.*, *In re La Duca*, 62 N.J. 133, 299 A.2d 405 (1973).

45. *E.g.*, *Galbraith v. State Bar*, 218 Cal. 329, 23 P.2d 291 (1933).

46. *E.g.*, *In re Wines*, 370 S.W.2d 328 (Mo. 1963); *State ex rel. Nebraska State Bar v. Holscher*, 193 Neb. 729, 230 N.W.2d 75 (1975); *In re Blatt*, 65 N.J. 539, 324 A.2d 15 (1974).

tion; and

(3) The lawyer facilitates the client's course of conduct either by giving advice that encourages the client to pursue the conduct or indicates how to reduce the risks of detection, or by performing an act that substantially furthers the course of conduct.

It remains to be asked whether there are any policy reasons why a lawyer's conduct involving these elements should not be regarded as a violation of DR 7-102(A)(7) of the Model Code of Professional Responsibility, which provides that a lawyer may not "assist his client in conduct that the lawyer knows to be illegal or fraudulent."⁴⁷ If there are such policy reasons, there are two ways to accommodate them in the law of professional ethics. One is to say that the term "assist" has a peculiar definition when general principles of law are applied to the assistance rendered by a lawyer to a client. That is, the definition of "assistance" in tort and criminal law should not be applied literally to the various kinds of "assistance" the lawyer provides the client.

The alternative, which is more honest and direct as a matter of legal logic and terminology, is to place such a category of assistance within the rubric of privilege.⁴⁸ The question then becomes: Should lawyers have a privilege to provide assistance to clients of a kind that could not lawfully be provided by persons who are not lawyers? Should the license to practice law not only allow lawyers to provide assistance requiring professional legal judgment, but also permit them to provide assistance that otherwise would constitute complicity in an intentional tort or crime? This author thinks not; the inquiry, however, goes on.

47. ABA CODE, *supra* note 6, DR 7-102(A)(7).

48. The privilege involved is a privilege relating to *action* affecting third persons, not the privilege relating to communication with the client. Thus the concept of privileged lawyer conduct is quite distinct from the attorney-client privilege, although like the attorney-client privilege it would be established for the purpose of facilitating service to the client.