

LEGAL ADVICE TOWARD ILLEGAL ENDS

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I. INTRODUCTION

Suppose you discovered a wonderful fishing hole hidden on some public lands. Would you be obligated to tell others about it? Of course not. But, could you go out of your way to hide its existence? Of course not—especially not from your friends.¹

Lawyers, as a group, know many things which, practically speaking, are hidden from others. For example, they know how best to manage one's affairs so as to minimize tax liability. To some, even a fair loophole would beat a great fishing hole any time. Must lawyers tell everyone? Certainly, they can require payment first; even lawyers have to make a living. Assuming, however, that a lawyer does not need the money, can she go out of her way to hide this information from her clients?² One would think not.

What if the lawyer's special information were information which could be used to break the law? Suppose, for example, that a client asked a lawyer to furnish her with a list of countries which do not have extradition treaties with the United States. There might be legitimate reasons for such a request, but the most likely reason would be a desire to avoid prosecution for a committed crime. Should the lawyer comply?

Complying with the client's request could possibly further a criminal endeavor. However, all that the client is requesting is information on the law, which may well be too complex for the

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1. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

2. Some argue that lawyers do so, by lobbying for laws so complex that only they can understand them. That is a separate issue.

client to discover herself. Did not Lon Fuller say that it is a matter of the law's internal morality that it be promulgated in such a way that people know what it is?³

If a lawyer were seeking to avoid prosecution, she would have access to knowledge about extradition treaties. It would be her sole decision to use that knowledge, for good or ill. Why is it that a nonlawyer, when faced with the weight of the criminal prosecution powers of the state, should have fewer options, moral or immoral, than lawyers do?⁴

The conclusion to which this argument leads is that a lawyer must tell her clients everything about the law that may be helpful to them. Certainly, giving advice about the law is central to what lawyers do, and it is crucial to their social worth. However, if the lawyer goes beyond advice, and actively assists the client in criminal activity, then she is guilty of aiding and abetting. Neither the status of "lawyer" nor the obligation to provide access to the law should exempt lawyers from the criminal liabilities which face everyone else. Therefore, lawyers must be encouraged to give advice, but they must be very careful as to how they give it.

Lawyer advice is currently regulated by two sets of laws. First, it is regulated by the lawyer ethics laws. Second, it is regulated by the substantive laws of criminal aiding and abetting, criminal conspiracy, and their civil counterparts. Under the substantive law, lawyers are not liable unless they do something more active than merely furnishing advice.⁵ Generally, the ethics laws are consistent with the substantive law.⁶ However, some of the ethics cases and much of the commentary would discipline lawyers for mere passive advice.⁷

3. LON L. FULLER, *THE MORALITY OF LAW* 49-51 (rev. ed. 1969).

4. *Contra* MARVIN E. FRANKEL, *PARTISAN JUSTICE* 65-66 (1980); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* 52-53 (2d ed. 1991). Should we attempt to ban this knowledge from those who do not already have it for fear that they will misuse it? Of course, we cannot prevent those who are both sophisticated and unscrupulous from obtaining such knowledge and using it to their advantage. Therefore, the only ones who would be affected by the ban would be those who are relatively innocent and unsophisticated. Then, we must face the analogy of the argument that, "If guns are outlawed, then only outlaws will have guns."

5. See *infra* notes 48, 50.

6. See *infra* note 51.

7. See *infra* notes 45, 46, 58, 60, 86 and accompanying text.

This article argues that lawyer advice should be regulated only by the substantive law and not by the lawyer ethics laws. Lawyer advice, then, would only get the lawyer in trouble if the lawyer actively assisted in lawbreaking. The article discusses the Model Rules of Professional Conduct, including what they say and how they have been interpreted. It also discusses the case law, both under the ethics laws and under the substantive law.

II. THE MODEL RULES

The attempt to deal with the subject of lawyer advice in the ethics laws has led to confusion. Model Rules of Professional Conduct 1.2(d) provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.⁸

The Rule appears to contemplate three situations: (1) counseling or assisting clients in criminal or fraudulent conduct; (2) discussing the legal consequences of proposed conduct; and, (3) test cases. The test case situation is beyond the scope of this article. As to the other two, it is obvious that lawyers cannot encourage their clients to commit crimes and frauds. It is equally obvious that lawyers must be able to discuss with clients the legal consequences of proposed courses of conduct. If that is not what lawyers do, what is? Yet, these two obvious premises appear to be contradictory.

Comment 6 to Rule 1.2 provides:

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of

8. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983).

itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.⁹

The problem is that the client may well use that "analysis of legal aspects of questionable conduct" to determine the "means by which a crime or fraud might be committed with impunity." If there is a "critical distinction," where is it?¹⁰

It is clear from the second sentence of the comment that illegal outcomes from lawyer advice do not automatically mean that the advice was improper. If the outcome is not dispositive, then the "critical distinction" must be found in the advice itself. The Rule contrasts "counsel" and "assist" with "discuss." In parallel fashion, the fourth sentence of the comment contrasts "presenting an analysis" with "recommending means." These dichotomies suggest an active-passive distinction, a consideration of purpose,¹¹ but mostly an emphasis on the words used by the lawyer.

Model Rule 1.2(d), then, is a rule of syntax.¹² If the lawyer

9. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 6 (1983). The succeeding Comment 7 deals with the problem of a client whose illegal or criminal conduct has already begun and is continuing when she consults the lawyer. I propose to limit this discussion to illegal or criminal conduct which has not yet begun when the lawyer is brought in. As to the extradition question, a crime has been committed, but the additional crime of fleeing the country to escape prosecution has not.

10. In an earlier draft, a proposed Rule 2.3 would have prohibited a lawyer from giving advice which would further an illegal course of conduct. MODEL RULES OF PROFESSIONAL CONDUCT RULE 2.3 (Discussion Draft 1980). The Kutak Commission Journal comments: "The distinction between providing advice and providing information about the law was explored, and it was concluded, though not agreed, that there was no distinction of substantive merit." *Journal of the Kutak Commission*, 31 (Nov. 21-22, 1980). The distinction between advice and information is not quite the same as the "critical distinction" mentioned by the current Comment in the Model Rules. However, the journals of the drafters raise some doubt about their ability to make either distinction.

11. See *infra* note 37 and accompanying text.

12. Any rule which relies on the exact words used by lawyers when talking with clients must be considered in light of the fact that most lawyers are in a position of power and superior knowledge in relation to their clients. This inequality of power and knowledge makes it very difficult for real communication to occur, no matter how carefully the lawyer chooses her words. See *generally* Austin Sarat & William L.F.

uses the command form of the verb, then the lawyer is "counseling or assisting a criminal act" and should be disciplined. On the other hand, if the lawyer merely answers the client's questions, then she is "discussing the consequences of a proposed course of conduct" and should not be disciplined.

Consider the following easy case; the actual transcript of a conversation overheard by an eavesdropping telephone operator:

The appellant: ". . . I killed her."

The voice in Dallas: "Did you get rid of the weapon?"

The appellant: "No, I still got the weapon."

The voice in Dallas: "Get rid of the weapon and sit tight and don't talk to anyone, and I will fly down in the morning."¹³

Of course, the "voice in Dallas" (which belonged to a lawyer) was violating Model Rule 1.2(d). The fatal error was the use of the command: "Get rid of the weapon." What if the conversation had been as follows:

Appellant: What would happen if I got rid of the weapon?

The voice in Dallas: If you got rid of the weapon, it would be harder to convict you.

It is likely that the consequence of that conversation would have been the same as the consequence of the real one—that the appellant would get rid of the weapon. However, while the actual conversation was a clear violation of Rule 1.2(d), the alternative conversation would have been an appropriate discussion of the legal consequences of a proposed course of action.

Imagine further, a conversation between Client and Lawyer:

Client: I have committed a crime and do not want to go to jail.

Lawyer: Go to Vietnam. They have no extradition treaty with us, and they are unlikely to send you back voluntarily.¹⁴

Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989).

13. *Clark v. State*, 261 S.W.2d 339, 341 (Tex. 1953), *cert. denied*, 346 U.S. 855 (1953) (concerning the admissibility of the conversation). There is no indication that the lawyer in Dallas was ever disciplined.

14. Vietnam is not listed under "Extradition" in UNITED STATES TREATY INDEX:

Again, the lawyer is counseling or assisting a criminal act in violation of Model Rule 1.2(d). Now consider this one:

Client: I have committed a crime and do not want to go to jail. What would happen if I went to Vietnam?

Lawyer: We have no extradition treaty with Vietnam. Therefore, the United States could not force you to come back. Vietnam is unlikely to extradite you voluntarily.

The above lawyer is discussing the consequences of a proposed course of conduct. If Model Rule 1.2(d) means what it says, then the lawyer's conduct is proper.

According to the Model Rules, the command form of the verb is dangerous to lawyers, while answering questions is not. However, there are other variations in the dialogue which might fall between the cracks. For example, does it matter if the "proposed course of conduct" is proposed by the client or the lawyer? What if the lawyer suggests to the client that the lawyer cannot give direct advice, but can answer any question which the client poses? What about leading questions? None of these permutations should get lawyers into trouble.

A. *Client Initiative vs. Lawyer Initiative*

Consider the following two interview transcripts from Kenneth Mann's *Defending White Collar Crime*:

Transcript #1

Lawyer: Mr. A was referred to me by his accountant. He came to me and said, in a nutshell, "I've got \$25,000 in cash on which I have not paid taxes. How can I deposit it in a bank without creating a mess for myself?" He didn't tell me where he got the money and I didn't ask. I suppose this is the type of situation you are talking about First, I told him he had to report the income, what I said to him was, "Mr. A, it's my obligation to tell you, you have to report that income." He said to me, "Well, of course, but that's my decision, which I'll make, but first I want some answers to a few questions." And then he asked me, "What

if I put it in the bank?" and I answered his question. And then he asked, "What if I buy stock with it?" and so forth I told him what happens when he does this or that; I don't see anything wrong with that, do you?¹⁵

Transcript #2

Client: Several years ago, before the SEC started cracking down on overseas payments by corporations to foreign government officials, we created a fund, which is now held by a bank in Switzerland, in the name of a company which is owned by us, though the fact of ownership is not public record. The fund was created through large yearly business expense writeoffs for equipment that was never actually purchased by us or any of our subsidiaries. We are stuck in a strange position. Due to the SEC enforcement policy we feel it is imperative that we liquidate the fund, which now holds over four million dollars. It appears to us that any way we go about liquidating the fund other than continuing to pay out in the way we did in the past will eventually show up as a large expenditure by us for which we will have no legitimate record. Our question is this: how can we repatriate the fund without waving a red flag?

Lawyer: [after various questions about the fund and some extraneous conversation] It would appear to us that the way to handle this matter is for you to propose various programs which you have developed for repatriating or otherwise disposing of the funds. We would then be able to tell you what we would expect the consequences of such a program to be.

Client: What do you mean by consequences?

Lawyer: For instance, if you plan on reporting four million as profit from a particular foreign subsidiary we would be able to provide you with some sense of how likely—in the context of a particular subsidiary and its history—how likely it is that the report would become a red flag for a government auditor.¹⁶

15. KENNETH MANN, DEFENDING WHITE COLLAR CRIME 116 (1985).

16. *Id.*

In Transcript #1, the client asks questions, and the lawyer answers. In Transcript #2, the lawyer goes a step further and suggests to the client that she ask questions, which the lawyer will then answer. Is there anything wrong in either situation?

In *In re Bullowa*,¹⁷ a New York judge made the following comment:

The effort to distinguish between a "suggestion of a possible course of action" given by a lawyer to a client, and "advice or counsel" given by the former to the latter, is without force or basis. The precise form of words in which the advice is couched is immaterial. The question is: Has the lawyer conveyed to the client the idea that by adopting a particular course of action he may successfully defraud someone or impede the administration of justice? If a bank official, who had proved unfaithful to his trust and robbed his bank, should call upon a lawyer, tell him what he had done, and ask for his suggestion as to what he should do, could the lawyer escape responsibility by saying to his client, "Have you thought about stealing as much more from your bank and then going to the southern part of the Argentina, where you are not likely to be traced for a long time?" instead of saying directly, "I advise you to steal twice as much and run away?" In my opinion the precise language used by a lawyer to his client is immaterial, if its effect is, not only to advise or counsel, but even to suggest or indicate, a course of action which will enable the client to defraud another, or to set the due processes of law at defiance, or to evade or circumvent them by trickery or fraud.¹⁸

The judge apparently believed that, if direct advice is a violation, then so is indirect advice. However, the judge was writing long before the enactment of the Model Rules. There is nothing in the Model Rules nor in the predecessor Model Code, which would suggest that it would matter if it was the lawyer, and not the client, who had the idea or initiated the discussion.¹⁹

17. 229 N.Y.S. 145 (1928).

18. *Id.* at 154.

19. MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 146 (1990).

B. *Leading Questions*

Consider the following scenario:

A subpoena is issued by a court calling for the client to produce all documents related to a certain transaction. Upon receipt, the client takes the subpoena to an attorney and asks, "How do I proceed?" In the characteristic case of avoidance, the attorney begins by explaining to the client what is called for by the subpoena and what significance certain types of documents would have for the course of the investigation. He will not blandly ask the client what documents currently exist but will explain to the client what the subpoena indicates about the subject and scope of the investigation. Some attorneys go one step further and explain to the client what kinds of documents could be used against the client "if they exist." For example, the attorney says, "The government is trying to establish that officers in the corporation had knowledge of the improper evaluation of assets before the public distribution of the prospectus; if there are any documents which show such knowledge, these may be used by the prosecution as evidence for an indictment. Or if there is any document which indicates that an officer requested certain financial analyses that were not made, this may also be problematic." In this fashion, an attorney educates a client as to what constitutes a potentially adverse document. Subsequently, the client takes several weeks to conduct an independent search.

In many instances, such a discussion is the last detailed consideration of the type and possible existence of the requested documents. The client is later asked to report to the attorney whether any such documents were found. And then he is instructed how to make a formal reply on the date of appearance before the prosecutor to answer the subpoena. An attorney who is avoiding inquiry will not ask, "Did such documents ever exist?" or "Was document X or document Y found?" His interaction with the client is likely to be limited to a narrower question: "Do you have anything to present in response to the subpoena?" An attorney who was preparing to accompany his client to a U.S. Attorney's office to make a formal response to a subpoena explained his mission in the following way.

The client's going to meet me here and then we are going down to Foley Square [location of U.S.

Attorney's office in the Southern District of New York]. I'm not going to ask him whether he has all the books and records that have been requested. The assistant [U.S. Attorney] will do the asking. The only thing I'm going to do is to warn him about—explain to him—the dangers of a perjury charge. It's then up to him to handle the response.

In fact, the attorney explained to the client in detail how to answer the prosecutor's oral questions testing compliance with the subpoena, *after* the client said that he did not have anything to present. "You do not," said the attorney, "state anything more than 'the documents do not exist.' You do not say what kind of a search you made, or how you defined the nature of the documents you were looking for. All you have to say is that you read the subpoena and did not find anything that was described therein."²⁰

There is no difference between other advice, which could be used to break the law and the sort of leading questions used here. If the lawyer commanded the client to destroy incriminating documents, the lawyer would be in violation of the Model Rules. However, if the client asked about the legal consequences of tendering certain documents in compliance with the subpoena, the lawyer could properly answer the question.²¹

20. MANN, *supra* note 15, at 109-10; see also Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1479-80, 1481-82 (1966); FREEDMAN, *supra* note 19, at ch. 7.

The American Academy of Matrimonial Lawyers, in its *Bounds of Advocacy* Rule 2.13 (1991), take the position that lawyers should never encourage clients to hide assets.

21. Freedman argues that the "lecture" in the film, "Anatomy of a Murder" is an example of falsifying evidence, a violation of Model Rule 3.4(b). FRIEDMAN, *supra* note 19, at 156-57. The "lecture" states in part: "If the facts are as you have stated them, you have no legal defense, and you will probably be electrocuted. On the other hand, if you acted in a blind rage, there is a possibility of saving your life. Think it over, and we'll talk about it tomorrow." FREEDMAN, at 156-157.

This author submits that falsifying evidence is simply a subset of "counseling or assisting illegal conduct," which is a violation of Model Rule 1.2(d), *unless* it is couched as discussing the consequences of a proposed course of conduct, which is perfectly all right under the same rule.

C. Applying the Rule—Evidentiary Problems

The analysis of Model Rule 1.2(d) suggests that everything turns upon the exact words used. Such a rule is difficult to apply, since evidence of the exact words is rarely available. Verbatim transcripts have, however, appeared in reported cases on occasion. In *In re Bullowa*,²² the lawyer was imprudent enough to put his advice in the form of a letter. In other cases, the conversation was reported by an eavesdropping telephone operator,²³ or one of the participants was wired.²⁴ Reasonably reliable reports of conversations have also appeared when the client later sued the lawyer for malpractice based upon the advice.²⁵

Only one case, *In re Matter of Mintz*,²⁶ has been found in which a lawyer actually advised a client on extradition treaties. Unfortunately, the facts of that case are so bizarre that the opinion gives little guidance as to the broader issue.

In *Mintz*, Cappolla, a police informer, consulted Mintz, a lawyer, about a commercial matter. Believing Cappolla to be a murderer, Mintz hinted that he might need to hire a contract killer. Cappolla informed the police and was outfitted with a body recorder for his next consultation.²⁷

In the next conference, Mintz talked further about the contract killing. He also claimed that he had arranged for a cocaine sale for some Colombian clients, but had not gone through with it. Cappolla asked if Mintz could sell ten ounces of cocaine for him; Mintz replied that he could.²⁸

22. 229 N.Y.S. 145, 147, 149 (1928).

23. *Clark v. State*, 261 S.W.2d 339 (Tex. 1953), *cert. denied*, 346 U.S. 855 (1953).

24. *In re Matter of Edson*, 530 A.2d 1246 (N.J. 1987); *In re Matter of Mintz*, 503 A.2d 290 (N.J. 1986).

25. *Carr v. Anding*, 793 S.W.2d 148 (Mo. 1990); *Pantely v. Garris, Garris & Garris, P.C.*, 447 N.W.2d 864 (Mich. 1989); see Janet Fairchild, Annotation, *Legal Malpractice Liability for Advising Client to Commit Crime or Unlawful Act*, 51 A.L.R. 4th 1227 (1987).

26. 503 A.2d 290 (N.J. 1986).

27. *Id.* at 292.

28. *Id.* at 293.

Mintz also advised Cappolla to see a doctor to obtain a medical excuse to avoid standing trial for a criminal charge, and suggested which illnesses he should claim. In addition, Mintz counselled Cappolla that if he were to jump bail he should avoid all contact with his family, as bail-jumpers are often caught when they re-establish contact with their family. Finally, he told Cappolla that the United States had no extradition treaty with Brazil.²⁹

The taped conversation was eventually turned over to the Ethics Committee in New Jersey. In the disciplinary hearing, Mintz's psychiatrist testified that Mintz's statements were a form of fantasizing, and that he really had not meant what he said.³⁰

The court apparently believed the psychiatrist, but noted that the client might not have known that Mintz was fantasizing. It said that it is what the client hears, not what the lawyer intended, that counts.³¹

The court held that Mintz's comments about contract killers, and his advice regarding faking illnesses and jumping bail, violated the ethics code.³² Mintz was suspended from the practice for two years and his return to practice was conditioned upon a clean bill of health as to his personal fitness.³³

Unfortunately, the court did not mention Mintz's advice about extradition treaties specifically in its discussion of violations and penalties. Even if the court had, it would have been difficult to separate the extradition advice, or even the bail-jumping advice, from the clearly inappropriate conversations about hired killers and drug deals.

29. *Id.*

30. *Id.* at 294.

31. *Id.*

32. *Id.* at 294-95.

33. *Id.* at 296.

III. LEGISLATIVE HISTORY AND SECONDARY AUTHORITIES

A. *Legislative History of the Model Rules*

The legislative history of the Model Rules of Professional Conduct, such as it is, supports the reading of the Model Rules suggested above. In an earlier draft, a rule was proposed which would have prohibited a lawyer from giving advice which would be used to break the law.³⁴ This rule was not passed. Therefore, the drafters must have intended that such advice would be allowed.

B. *The American Law Institute Restatement*

The American Law Institute Restatement of the Law Governing Lawyers covers both lawyer ethics and substantive law.³⁵ Section 192 provides:

(1) A lawyer may advise a client concerning the applicability of law to the client's intended conduct, so long as the lawyer does not go further and engage in activities described in subsection (2).

(2) A lawyer must not assist the client when doing so would incur liability on the part of the lawyer.

(3) A lawyer may assist a client in an open, good faith effort to determine the applicability or validity of a law or court order.³⁶

Comment (i) provides:

The fact that a client intends to commit criminal or otherwise illegal acts does not by itself entail that a lawyer must not provide legal advice to the client. A lawyer may provide such advice for the purpose of indicating to the client the illegal nature of the activity. A lawyer must not, however, provide such assistance with the purpose of crimi-

34. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3 (Discussion Draft 1980).

35. See, Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195 (1987).

36. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 192 (Preliminary Draft No. 8, 1992). Author's Note: Preliminary Drafts are subject to revision and are not the formal position of the American Law Institute.

nally or otherwise illegally assisting the client in the activity. Under applicable substantive law, the line between permissible and impermissible lawyer counseling in such a situation may turn on circumstances indicating the lawyer's purpose. Those circumstances may include subtleties of expression, inflection, or the like on the part of the lawyer that would warrant a fact finder in concluding that the lawyer's purpose was wrongful. Providing information to a client concerning how to shield illegal activities from detection or how to secure or increase the advantages of illegal activity would in almost all instances constitute unlawful assistance.³⁷

Admittedly, the Institute's focus on the lawyer's purpose is somewhat different from the apparent emphasis of Model Rule 1.2(d) on syntax, but the emphasis on subtleties of expression is the same and clearly malleable by the unscrupulous lawyer. Further, the type of evidence mentioned by the ALI Reporter as relevant to purpose would be just as difficult to produce as the verbatim transcripts needed in order to apply the Model Rules. In any event, the last sentence of the Comment goes much too far.

C. *Secondary Authorities*

Of three major commentators, only Monroe Freedman appears to argue that there should be no difference between the ethics rules and the substantive law.³⁸ The other two, Geoffrey Hazard and Charles Wolfram, appear to argue that mere advice can lead to a disciplinary violation, even if it does not violate the substantive law.³⁹ Freedman argues that, in the comparable provision in the Model Code, "the words 'counsel or assist' refer to an active kind of participation in the client's illegal act, going beyond merely giving advice about the law."⁴⁰ In fact, he

37. *Id.* § 192 cmt. i.

38. See generally MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 60 (1975); FREEDMAN, *supra* note 19.

39. See generally GEOFFREY C. HAZARD & WILLIAM HODES, *THE LAW OF LAWYERING* §§ 1.2:500 to :511 (2d ed. 1991); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 694 (1986); Geoffrey C. Hazard, Jr., *How Far May a Lawyer go in Assisting a Client in Legally Wrongful Conduct?* 35 U. MIAMI L. REV. 669 (1981).

40. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARIAL SYSTEM*, *supra* note 39, at

supports this point by a reference to a case on aiding or abetting a crime.⁴¹ He argues in a later work that the Model Rules are more liberal than the Model Code. Thus, they are even more favorable toward mere advice.⁴²

Geoffrey Hazard sees a difference between pure, unsuggestive advice and pure, instrumental encouragement: "The law clearly sanctions providing assistance at the least instrumental end of this spectrum. The law clearly prohibits conduct at the other end."⁴³ One would think that Hazard sees a middle ground in which a colorable argument can be made that the advice, although somewhat instrumental, is still proper. However, in a later treatise, all of his illustrative applications of Rule 1.2(d) seem to be violations, suggesting that there is no middle ground at all.⁴⁴ Charles Wolfram concedes that it is possible to read Rule 1.2(d) as sanctioning legal advice about methods of criminal activity, though he characterizes that possibility as shocking and probably inadvertent.⁴⁵

IV. CASE LAW

Model Rule 1.2(d), by its language, would allow lawyer advice which could be used to break the law, as long as the advice is couched in the right words. However, most commentators do not read it that way. The result is confusion and anxiety for lawyers.

The courts could solve the problem by presenting a definitive interpretation. The substantive law cases are helpful, in that they require something more than advice before a lawyer is held liable. Therefore, they support the interpretation of Model Rule 1.2(d) suggested above. In addition, most of the ethics cases agree, although there are some cases in the divorce area that are troublesome.

60.

41. *Id.* (citing *United States v. Falcone*, 109 F.2d 579 (2d Cir. 1940)).

42. FREEDMAN, *supra* note 19, at 144-46 (1990).

43. HAZARD, *supra* note 39, at 671.

44. HAZARD & HODES, *supra* note 4, §§ 1.2:500 to :511. This treatise appears to deal with substantive law as well as lawyer ethics.

45. WOLFRAM, *supra* note 39.

A. General

There can be no doubt that if a lawyer commits a crime she will be subject to prosecution. Similarly, if a lawyer in concert with a client commits a crime, with active participation on the part of the lawyer such as lying to authorities, filing false documents, and the like, the lawyer can be disciplined⁴⁶ and criminally prosecuted.⁴⁷ It does not help the lawyer in either type of case if she first advises the client not to break the law, and then actively helps the client to break it.⁴⁸

46. *In re Matter of Nulle*, 620 P.2d 214 (Ariz. 1980); *In re Blatt*, 324 A.2d 15 (N.J. 1974).

47. *United States v. Sarantos*, 455 F.2d 877 (2d Cir. 1972).

48. In *Albright v. Burns*, 503 A.2d 386 (N.J. 1986), a substantive law case, the decedent executed a power of attorney in favor of his nephew. The nephew obtained the decedent's consent to sell the decedent's A.T.& T. stock, which constituted a substantial portion of the decedent's property. The nephew then proposed to use the proceeds of the stock sale in his own business, giving the decedent an unsecured note in return. The nephew's lawyer advised him against the stock sale and the loan, but the nephew did both anyway. The lawyer prepared the note and endorsed the check. The court reversed summary judgment and held that a valid cause of action lay against the lawyer.

In *S.E.C. v. Universal Major Industries Corp.*, 546 F.2d 1044 (2d Cir. 1976), *cert. denied sub nom. Homans v. S.E.C.*, 434 U.S. 834 (1977), a substantive law case, the lawyer advised the client that there were too many transferees in a proposed offering to do an unregistered private placement. He told them to register, but they did not. The lawyer wrote an opinion letter anyway. The court held that, even though the lawyer had advised against an unregistered offering, and even though the purported opinion letter did not, in truth, opine anything, the lawyer had still aided and abetted the clients in a violation of the securities laws.

In *Attorney Grievance Commission v. Rohrback*, 591 A.2d 488 (Md. 1991), a lawyer ethics case, the lawyer was retained to represent the client on a DUI charge. When he learned that the client had given a false name to the arresting officer, the lawyer told him that he would have to inform the bail bondsman of the false name, which he did. When bail was set before a Commissioner, the client used a false name and the lawyer remained silent, standing somewhat apart from his client. Following the release on bail, the lawyer repeatedly asked his client to reveal the false name and unsuccessfully sought advice from his fellow lawyers. The lawyer refused to represent the client at the trial. At the trial, the judge, believing that the defendant was a first offender, imposed a lenient penalty, but noticing the Florida address, ordered a presentence report.

At a trial for a previous DUI, the lawyer in question appeared as counsel. The judge did not know of the subsequent DUI under a false name, did not ask, and the lawyer did not tell him.

At a subsequent meeting with a probation officer for the presentence investigation, the lawyer accompanied the client. The client continued to use a false name and the lawyer did nothing to disabuse the probation officer. The court held that,

In substantive law cases, courts have struggled to draw the line between mere advice, which does not involve the lawyer in criminal activity and liability, and some further, active participation, which does.⁴⁹ The lawyer ethics cases do not put a similar emphasis on the difference between passive advice and more active assistance. However, in most of the cases in which lawyers were disciplined, it would appear that the advice was in the form of a direct command to break the law.⁵⁰

since it is unusual for lawyers to accompany clients to such meetings, this lawyer's very presence at the meeting affirmed the fraud, and was a disciplinary violation, even though none of the lawyer's previous actions were inappropriate.

49. The following cases held that, for the purposes of criminal or civil liability, the lawyer had not crossed the line from passive advice to active participation: *Brown v. Donco Enterprises*, 783 F.2d 644 (6th Cir. 1986); *Invictus Records, Inc. v. American Broadcasting Companies, Inc.*, 98 F.R.D. 419 (E.D. Mich. 1982); *Worldwide Marine Trading Corp. v. Marine Transport Service, Inc.*, 527 F. Supp. 581 (E.D. Pa. 1981); *Tillamook Cheese & Dairy Assoc. v. Tillamook County Creamery Assoc.*, 358 F.2d 115 (9th Cir. 1966); *Pierce v. Lyman*, 3 Cal. Rptr. 2d 236 (Cal. Ct. App. 1991); *State ex rel. Miller v. Rahmani*, 472 N.W.2d 254 (Iowa 1991).

The MODEL PENAL CODE § 242.3 cmt. 4 (1980) provides, "it is plainly improper to provide criminal sanctions for a lawyer who advises his client on the law of extradition."

The ALI RESTATEMENT OF THE LAW GOVERNING LAWYERS notes:

A private lawyer representing a client . . . could under certain circumstances be liable for malicious prosecution. To establish such liability, it is necessary that the lawyer procured the initiation of criminal proceedings, for example by advising the client to institute them, as opposed to informing the client of available legal options.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 78 cmt. e (Preliminary Draft No. 9, 1993).

The following cases held that the lawyer was guilty of a violation of law: *United States v. Zimmerman*, 943 F.2d 1204 (10th Cir. 1991) (addressing criminal conspiracy to defraud U.S. in bankruptcy matters); *FDIC v. Mmahat*, 907 F.2d 546 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1387 (1991) (lawyer as general counsel of savings and loan "directed" that the bank make loans in violation of law, apparently to increase the law firm's fees); *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) (law firm's argument that it had merely given legal advice was rejected, and the firm was held liable for a violation of the securities laws); *United States v. Perlstein*, 126 F.2d 789 (3d Cir. 1942), *cert. denied*, 316 U.S. 678 (1942) (two lawyers found guilty of criminal conspiracy by advising their clients to hinder the government in its investigation of an illegal still).

50. *In re Edson*, 530 A.2d 1246 (N.J. 1987) (advising client to lie about quantity of alcohol consumed); *In re Mitchell*, 262 S.E.2d 89 (Ga. 1979) (telling or encouraging witnesses to testify falsely); *Townsend v. State Bar of California*, 197 P.2d 326 (Cal. 1948) (advising client to convey property to defraud judgment creditors). See generally Jay Zitter, Annotation, *Soliciting Client to Commit Illegal or Immoral Act as Ground for Discipline of Attorney*, 85 A.L.R. 4th 567 (1991).

B. *Divorce Cases*

The divorce cases present special problems, perhaps due to the unique history of divorce law. When divorce laws were less liberal than they are now, divorces were difficult to obtain. Clients often entered into collusive arrangements to manufacture the evidence necessary to create grounds for divorce in their home states. Alternatively, they went to "divorce mill" states and foreign countries where divorces were easier to obtain.⁵¹ Clients would do whatever was necessary to invoke the jurisdiction of such a state, even if it involved defrauding the court. These collusive and migratory divorces raised significant issues for those giving legal advice.⁵² Other issues involving custody and visitation rights also come up. In migratory divorce and custody cases, there are instances of mere, passive advice which were held to be violations of the ethics laws.

1. Collusive and Migratory Divorce

a. Collusive Divorce

Lawyers often participated in collusive divorces.⁵³ Usually, the scheme involved manufacturing evidence of adultery. Sometimes the lawyer actually hired the correspondent who would be "caught" in the compromising position, as well as the photographer. Occasionally, the lawyer himself witnessed the event and testified about it.⁵⁴ In other cases, the lawyer merely represented a client in the divorce proceeding, without further

51. See Rollo Bergeson, *The Divorce Mill Advertises*, 2 LAW & CONTEMP. PROBS. 348 (1935); Frank W. Ingram & G.A. Ballard, *The Business of Migratory Divorce in Nevada*, 2 LAW & CONTEMP. PROBS. 302 (1935); Peter N. Swisher, *Foreign Migratory Divorces: A Reappraisal*, 21 J. FAM. L. 9 (1982-1983).

52. FREEDMAN, *supra* note 38 at 61; JAMES A. PIKE, BEYOND THE LAW 44-55 (1973); Philip Adams & Stephen Adams, *Ethical Problems in Advising Migratory Divorce*, 16 HASTINGS L.J. 60 (1964); Nathan M. Crystal, *Ethical Problems in Marital Practice*, 30 S.C.L. REV. 321, 340-348 (1979); Henry Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 HARV. L. REV. 443 (1953). L.C. Di Stasi, Jr., Annotation, *Participation in Allegedly Collusive or Connived Divorce Proceedings as Subjecting Attorney to Disciplinary Action*, 13 ALR 3d 1010 (1967).

53. See Di Stasi, *supra* note 52; THE GAY DIVORCEE (RKO 1934).

54. *State v. Woodville*, 108 So. 309 (La. 1926); *In re Forrester*, 155 N.Y.S. 420 (1915).

participation, or even knowledge, in the manufacture of false evidence.

Lawyers who participated actively in the collusion were routinely disbarred.⁵⁵ As to those lawyers who passively acquiesced in presenting evidence which had been manufactured by others, the discipline was less harsh.⁵⁶

There were no cases found in which lawyers merely advised their clients about collusive divorces, without any further participation. Therefore, the issue of lawyer discipline for mere advice did not arise.

b. Migratory Divorce

Early migratory divorce opinions and case law prohibited mere advice. Some later authorities, however, are less restrictive. In ABA Formal Opinion 84,⁵⁷ it was inquired whether a lawyer could properly advise a client to establish residence in another state solely for purposes of procuring a divorce. The ABA Committee on Professional Ethics and Grievances felt that "residence," when statutorily required for filing an action for divorce in a particular state, must be construed as "bona fide residence."⁵⁸ The residence contemplated by the question was not bona fide and would be a fraud upon the court. The Committee opined that a lawyer could not properly counsel his client to establish such a residence.

In *In re Anonymous*,⁵⁹ a lawyer accepted a retainer to procure a Mexican "mail order" divorce for his New York resident client. The lawyer knew that neither spouse was a resident of Mexico and that neither had any intention of going there.⁶⁰ He advised the client that such divorces were invalid under the

55. *In re Durant*, 67 A. 497 (Conn. 1907); *State v. Woodville*, 108 So. 309 (La. 1926); *In re Herrmann*, 161 N.Y.S. 977 (1916); *In re Forrester*, 155 N.Y.S. 420 (1915); *In re Bayles*, 141 N.Y.S. 1052 (1913); *Tennessee Bar Ass'n v. Freemon*, 362 S.W.2d 828 (Tenn. Ct. App. 1961).

56. *Florida Bar v. McCaghren*, 171 So.2d 371 (1965); *In re Cahill*, 50 A. 119 (1901).

57. ABA Comm. on Professional Ethics and Grievances, Formal Op. 84 (1932).

58. *Id.*

59. 80 N.Y.S.2d 75 (1948).

60. *Id.* at 76.

then current New York decisions. However, he did arrange for a Mexican lawyer with offices in New York to set the proceeding in motion.⁶¹

The lawyer argued that, in the absence of an express prohibition under New York law, he had committed no violation. The court disagreed, but, since it was a case of first impression, declined to find the lawyer guilty of misconduct.⁶² The court did, however, state that the next lawyer who did the same thing would be disciplined.⁶³

In *In re Feltman*,⁶⁴ a lawyer told his New Jersey client that although he had no ground for divorce in New Jersey, an Alabama divorce might be possible.⁶⁵ The lawyer described the Alabama residence requirement. The client responded that he thought that he could get work as a trucker in Alabama so that the residency requirement would not be a problem.⁶⁶

The lawyer sent the client a document which purported to submit him to the jurisdiction of the Alabama court, and acknowledged receipt of a copy of a divorce complaint. Since no such complaint had been received, or even prepared, the receipt was a blatant falsehood.⁶⁷

The court reprimanded the lawyer for the attempted deceit. As to the advice, however, it commented as follows:

We agree with counsel for both sides that the applicable ethics standard in a case such as this is set forth in *Nappe v. Nappe*, 20 N.J. 337, 120 A.2d 31 (1956). We therein indicated that an attorney could properly advise his client concerning the requirements for divorce in other states, and concerning the client's ability to meet those requirements. The attorney should also inform his client that any action in another jurisdiction would be the client's responsibility and that he might be bound by the judgment of an out-of-state court. *Nappe* stated (at 346, 120 A.2d at 36):

61. *Id.*

62. *Id.*

63. *Id.*

64. 237 A.2d 473 (N.J. 1968).

65. *Id.* at 473.

66. *Id.*

67. *Id.*

Once an attorney has done this and leaves it to the voluntary decision of the client as to whether such a proceeding is to be instituted by the client in a foreign jurisdiction, counsel may suggest the name of a reputable attorney in such other state so that his client may be advised by such lawyer who has the competence to give the necessary legal advice with reference to the contemplated action. We deem it advisable to state this warning, however, that at that point the attorney should terminate the relationship of attorney and client, present his bill and be paid for his services. Any participation thereafter in the divorce proceeding in the foreign state may form a foundation of a charge that the New Jersey attorney is *particeps criminis* when subsequently a fraud is perpetrated upon the courts of the foreign state.⁶⁸

In *Disciplinary Proceedings Against Krueger*,⁶⁹ the client, a resident of Illinois, retained the lawyer to obtain a Wisconsin divorce.⁷⁰ The lawyer advised him to rent a room in Wisconsin. When the client had been in Wisconsin for two weeks, the lawyer filed a divorce petition, which alleged that the client had been a resident of Wisconsin for more than six months and of Rock County for more than thirty days prior to the commencement of the action. Subsequently, the client retained other counsel and testified truthfully about his residency. His divorce petition was dismissed for failure to meet the residency requirements.⁷¹ In the disciplinary hearing, the parties stipulated that the first lawyer's conduct consisted of dishonesty, fraud, deceit, or misrepresentation, in violation of Wisconsin 20.04(4).⁷² The referee recommended a public reprimand. Harsher sanctions were rejected because there was doubt as to whether the lawyer had knowingly counseled his client to lie, or whether the lawyer had been merely negligent in monitoring his client's residency.⁷³ The matter was remanded, due to an

68. *Id.* at 473-74.

69. 307 N.W.2d 184 (Wis. 1981).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 185.

apparent conflict between the parties' briefs and the referee's report.

After further hearings, it was concluded that the lawyer had reasonably believed that the client could meet the statutory residency requirements under Wisconsin law. The lawyer had not advised his client to testify falsely, but had listed some of the ways to prove the required residency intention.⁷⁴ The court accepted the referee's recommendation to give the lawyer a public reprimand, but declined to hold that the lawyer's conduct had constituted dishonesty, fraud, deceit, or misrepresentation.⁷⁵

In the recent case of *In re Nash*,⁷⁶ a lawyer prepared, notarized, and backdated documents which falsely stated that his client was a resident of New York. The lawyer apparently believed that a New York divorce would be quicker and quieter than the available alternatives.⁷⁷ The lawyer was disciplined.

ABA Opinion 84 and *In re Anonymous* take the unduly harsh position that offering advice about foreign divorces, or finding a foreign lawyer, without more, can be a violation. *Feltman's* holding—that mere advice about foreign divorces and their consequences, and a referral to foreign lawyers, is unobjectionable—makes much more sense. Whether one needs to wash one's hands of the matter as thoroughly as was suggested in the older New Jersey opinion seems doubtful.

Feltman, *Nash*, and *Krueger* seem perfectly appropriate, in that the lawyer certainly lied in *Feltman* and *Nash*, and probably lied in *Krueger*, thus crossing the line from passive advice to active malfeasance.

2. Custody and Visitation Issues

The secondary authorities seem to be unanimous that counseling a client to violate a court order in a custody dispute,

74. *Id.*

75. *Id.*

76. 568 N.Y.S.2d 936 (1991).

77. *Id.* at 937.

especially through childnapping, is a disciplinary violation.⁷⁸ The case law and opinion authorities, however, are more varied.

In a North Carolina ethics opinion, a husband and wife were separated, and the custody of the two children was yet to be decided. The wife asked her lawyer if she could have an open relationship with another man, in view of the effect that it might have on the custody decision. The lawyer wanted to advise that when the relationship is stable and monogamous, and the other man's relationship with the children is good, courts around the country have awarded the woman custody despite the relationship. The question was whether or not such advice would be tantamount to encouraging the woman to commit the crime of cohabitation. The opinion states that, as long as the lawyer gives a balanced view, and points out the possible adverse consequences and the criminal nature of the relationship, the lawyer can give that advice.⁷⁹

In *Attorney Grievance Commission of Maryland v. Kerpelman*,⁸⁰ the client believed that his estranged spouse had moved out of state and was living with a criminal. The lawyer advised him to physically snatch the child from the spouse's premises, "but not to say anything to anybody about it because it was not the procedure of attorneys."⁸¹ The lawyer advised him "to try to get in without breaking the door down . . ."⁸² and that, if the client were successful, "we might get a faster response from the court."⁸³

The court accepted the trial judge's findings that the client had acted upon the lawyer's suggestion in snatching the child,

78. See Donald Tye, *How Do You Protect the Child?* FAM. ADVOC. 20, 22 (Winter 1987); ANN M. HARALAMBIE, HANDLING CHILD CUSTODY CASES § 9.23 (1983); PATRICIA HOFF ET. AL., INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW 16-15 to -16 (1982).

79. North Carolina State Bar, Op. CPR 285 (Oct. 15, 1980); see also AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, BOUNDS OF ADVOCACY Standard 2.14 (1991) (stating that an attorney must counsel her client regarding the legal ramification and the potential effect on custody of her actions).

80. 420 A.2d 940 (Md. 1980), cert. denied, 450 U.S. 970 (1981).

81. *Id.* at 966.

82. *Id.*

83. *Id.*

not upon his own initiative. For these violations and others, the lawyer's two-year suspension was upheld.⁸⁴

In *In re Rosenfeld*,⁸⁵ the client was given temporary custody of her daughter, but the father was given visitation rights on weekends. Concerned that the father had been sexually abusing the child, the client filed a relief-from-abuse petition to prevent the father from further visits.⁸⁶ The court consolidated the relief-from-abuse petition with the permanent custody hearing and refused to prohibit the father from visiting his daughter on the one weekend remaining before the hearing.⁸⁷

The lawyer told the mother that he could not advise her to violate the court order granting the father visitation rights. However, "he told her that he did not think that the judge would hold it against her if she denied visitation."⁸⁸ He suggested that if she planned to violate the court order, she and her daughter should leave home for the weekend. This tactic would allow her to avoid a direct confrontation with her ex-husband. The lawyer believed that the client would deny visitation on the one remaining weekend, and he was right.⁸⁹

The court referred the matter to a fact-finding committee. The committee noted that "similar situations arose often in family practice and many attorneys 'choose to assure the safety of the child over the sanctity of the court order.'"⁹⁰ In view of "the jeopardy his client perceived in granting visitation, the inability to place the matter before the court prior to the weekend visit, the loss of only one weekend visit, and the short time prior to the court hearing,"⁹¹ the committee found no violation. The chairman of the committee dissented and criticized the application of a different standard for divorce law practitioners.⁹²

84. *Id.* at 945-47.

85. 601 A.2d 972 (Vt. 1991), *cert. denied*, *Rosenfeld v. Vermont*, 112 S. Ct. 1968 (1992).

86. *Id.* at 975.

87. *Id.* at 975-76.

88. *Id.* at 975.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

The court rejected the committee report. It concluded that the factors relied upon by the committee could be used to mitigate punishment, but not to ignore the violation. The court agreed with the dissenting chairman, and suggested that a more rigorous standard should be set for family law attorneys.⁹³ For this violation and others, the lawyer was suspended for six months, with his reinstatement conditioned upon a passing score on a professional responsibility exam and a demonstration of improved office management skills.⁹⁴

Two out of three custody and visitation cases were correctly decided. The North Carolina ethics opinion properly allows the lawyer to give advice, even though that advice might be used to break an old law. In *Kerpelman*, the lawyer went beyond mere advice. A reading of the remainder of that opinion would suggest that the lawyer would have been disbarred even if that particular issue had been decided the other way.

In *Rosenfeld*, the court was correct that once a court had weighed the issue of the child's safety over the father's visitation rights, it was not proper for the lawyer and client to make an independent judgment. However, it seems that the lawyer's statements were much closer to a discussion of the consequences of proposed conduct than they were to encouraging illegal activity. Accordingly, the lawyer's advice should not have been a violation.

V. CONCLUSION

Kenneth Mann decries the vagueness of the ethics rules on the question of legal advice. He fears that with the existing ambiguity "the well-intentioned attorney is ineffectively guided, the wavering attorney is ineffectively warned, and the cynical, devious attorney is provided with excuses."⁹⁵ Still, lawyer ethics codes must be vague. Given the staggering variations in lawyers, clients, and situations, no code could ever provide

93. *Id.* at 976.

94. *Id.* at 978.

95. MANN, *supra* note 15, at 248. Mann is discussing the Model Code of Professional Responsibility, but his remarks would apply equally to the Model Rules.

precise guidance in all situations. Too much precision would necessarily convict the innocent or free the guilty.

Vague lawyer ethics guidelines are inevitable. Moreover, they have two very helpful attributes. First, they make it very difficult for lawyers to be prosecuted unless their conduct is egregious. Second, they make all lawyers nervous, all of the time. That is a good way for lawyers to be.

Vagueness is particularly inevitable when it comes to the regulation of lawyer advice. There are two conflicting goals. Lawyers should not *encourage* their clients to break the law. However, lawyers must be free to tell their clients what the law is, and how it would apply to their proposed conduct. There is no way for an ethics code to reconcile these two worthwhile goals without being ambiguous. Moreover, it will be the rare case in which we can be sure *what* the lawyer's advice to the client was, and *how* it was communicated.

In view of the inevitable ambiguity and near impossibility of discerning the relevant facts, there are two possible responses. Either all lawyers should be guilty—or none. To say that all lawyers are guilty is to say that any lawyer who ever advises a client in any way which might be construed as encouraging illegal activity is guilty of violating the ethics rules.

The proper response is that no lawyers are guilty. As a matter of legal ethics, it is simply too difficult to distinguish proper from improper legal advice, even if all the facts are known. Additionally, the facts will almost never be known. The ethics rules should leave the matter of lawyer advice alone and let the substantive law take care of it.

Subjecting lawyer advice to both the substantive law and the ethics laws risks confusion, improper standards, and a chilling effect on a necessary function of lawyers. Lawyers are anxious enough about giving advice under the constraints of substantive law. There is no need to add to their peril.

Society is protected from the harm that improper advice can cause in a number of ways. First, the one who would actually break the law is the client. If the client breaks the law and is caught, the client will be punished. Second, if the lawyer goes

too far in giving improper advice, the lawyer can be liable for breaking the law himself.⁹⁶

So much for what the lawyer can and cannot do. Now, what should the lawyer do? As a general matter, lawyers should ensure that clients, as citizens, have access to the law so that they can make their own decisions as to how to behave. Lawyers lack moral authority to make those decisions for them.

Should the lawyer only give questionable advice if the client asks for it in the right way? Should the lawyer answer questions only when asked and never make suggestions? Such a tactic would effectively deny access to the law to those who need it most and grant it only to those who were already quite sophisticated before they walked into the law office. Naive clients, as well as those who are more sophisticated, have the right to make their own decisions.

What if it seems clear that the client seeks to use the lawyer's advice in a way which the lawyer finds repugnant? A balance must be struck between the client's autonomy and the lawyer's unwillingness to take part in a wrong. Clearly, under the Model Rules, the lawyer can withdraw.⁹⁷ When should she do so?

On this question, Monroe Freedman's formulation should be combined with Kenneth Mann's. Freedman argues that the lawyer should not give advice when that advice will be used to do harm.⁹⁸ On that basis, advice on migratory divorce is harm-

96. The ethics code can bootstrap the surrounding law through the MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (1983), which states that "[I]t is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Model Rule 8.4(c) states that "[I]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROFESSIONAL CONDUCT RULE 8.4(C)(1983).

Substantive laws are difficult to administer, due to similar evidentiary problems. Perhaps they are especially troublesome when applied to lawyers. The driver of a getaway car is much more involved than the lawyer on the sidelines, no matter how active her encouragement. However, exempting lawyers from liability which pertains to everyone else would be putting lawyers above the law. That is the last thing that should be done.

97. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b)(2)-(3) (1983). See ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (discussing the question of noisy withdrawal).

98. FREEDMAN, *supra* note 19, at 146-47.

less and appropriate, while advice on childnapping is harmful and inappropriate.

When, however, do you know that your client intends to commit harm? Lawyers are allowed to presume that their clients intend to obey the law.⁹⁹ This presumption is necessary if lawyers and clients are to have any relationship of trust. Kenneth Mann suggests that, when the client has made it obvious to the lawyer that the client intends to use the lawyer's advice to break the law, then the lawyer should not give that advice.¹⁰⁰ Mann's formulation on knowledge should be combined with Freedman's formulation on harm. When the client has made it obvious that she intends to use the lawyer's advice to harm others, then the lawyer should not give that advice.

Lawyers should not be hired guns, but they should also not be cops. They might even be their clients' friends. If lawyers are actively involved in lawbreaking, they should be punished, just like anyone else—no more, no less. Short of violations of the substantive law, however, lawyers should be free to advise their clients so that the clients have access to the law, and the choice as to how to make use of it.

99. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 192 cmt. h (Preliminary Draft No. 8, 1992).

100. MANN, *supra* note 15, at 247.