Ethics Opinion No. 84-1

Propriety of Advice to a Defendant to Refuse to Submit to a Breathalyzer Test.

This Committee has been requested to address the question of the ethical propriety of a defense attorney advising his client not to submit to a breathalyzer test when under arrest for driving while intoxicated. This Committee concludes that such a recommendation by an attorney is improper without the addition of further advice and discussion as outlined below. An attorney, however, should present legal theories which the attorney in good faith believes might challenge the validity of the statute: advise the defendant concerning the legality of prospective conduct; explain the legal consequences and judicial response to any refusal to take a breathalyzer in light of recent court decisions; and submit his professional opinion of the scope, meaning and validity of the involved laws.

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This request for an Ethics Committee opinion stems from the Alaska District Attorney's Office's observation that it has been encountering a growing number of cases in which defense attorneys expressly tell their clients by phone who are under arrest for driving while intoxicated not to submit to a breathalyzer test. AS 28.35.032(f) provides that refusal to submit to a breathalyzer test when lawfully arrested for D.W.I. constitutes a class A misdemeanor offense.

A request has been lodged for an opinion which might clarify a defense attorney's ethical responsibilities in the above context and which addresses whether or not such attorneys are in violation of Alaska Canon of Professional Responsibility DR 7-102(A)(7) providing:

In his representation of a client, a lawyer shall not . . . counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

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The Ethics Committee views this request as having great importance to both the defense bar and the state prosecutor's office. The situation is of significance to all attorneys and clients involved in the process. Nonetheless, the matter is of first impression within our state and appears guided only by the broadest of ethical considerations. Further, the present question is addressed within the reality that the subject statute (AS 28.35.032(f)) has been the topic of apparent constitutional issues not yet fully resolved by our Alaska State Supreme Court. (see endnote 1) It is within the context of the broad (sometimes competing) ethical consideration and of the legal controversies that this Committee fashions its response.

First, there are those canons of responsibility and ethical considerations which tend to limit professional conduct. It is a basic tenet of professional responsibility that a lawyer shall not violate a Disciplinary Rule [DR 1-102(A)(1)] As such any attorney should seek to maintain the integrity of his or her profession. [Canon 1] On the one hand the legal practitioner in representing his client shall not knowingly advance a claim or defense that is "unwarranted under existing law;" on the other hand the attorney may advance such a claim or defense if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." [DR 7-102(A)(2)] It is within this context that the lawyer is required not to counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent. [DR 7-102(A)(7)]

Second, there are those ethical considerations which seem to lessen the parameters within which the attorney practices. It is commonly understood that a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules [DR 7- 101(A)(1)]. The accepted rule is that within the bounds of the law it is the "duty" of a lawyer to represent his client "zealously." [EC 7-1] "The bounds of the law in a given case are often difficult to ascertain." [EC 7-2] The limits and meaning of a particular law may be made doubtful by changing constitutional interpretations, inadequately expressed statutes or opinions, and developing judicial or public attitudes. *Id*.

The actions of an attorney may depend on whether he is serving as "advocate" or "adviser" particularly where the bounds of law are not certain. [EC 7-3] The advocate may urge "any permissible construction of the law favorable to his client." [EC 7-4] The adviser should give his opinion as to what he believes would "likely be the ultimate decision of the courts." [EC 7-5] Notwithstanding a court's likely decision, a client or his attorney may, in good faith and within the framework of the law, "take steps to test the correctness of a ruling of a tribunal." [EC 7-22]

IV

The consequence of the above canons and considerations is that the legal professional who represents a client accused of D.W.I. may be subject to apparently competing principles. The canons require the attorney to represent his client zealously; but he must do so within the bounds of the law even though those legal parameters may be uncertain. The considerations tell the lawyer he is not to assist his client to violate the law; but he is permitted to test or challenge the law if available arguments for reversal may be made in good faith.

Counsel for an accused is "an essential component" of the administration of criminal justice. ABA Standards, *Prosecution and Defense Function* (1971) S 1.1(a). However, it is within this role that possible dichotomies arise relative to this essential component. On the one hand, the protection of the client's rights may require the attorney "to resist the wishes of the judges" on some matters which may require him "to appear unyielding and uncooperative at times." *Id.* at 173. At the same time, the lawyer is not the alter ego of his client. The counselor should maintain the proper professional detachment and conduct himself according to professional standards. *Id.* at 174.

Upon the present question, the defense attorney's role in defining his component of criminal justice is a complex issue. Defense counsel may believe that the protection of his client's rights require him to appear unyielding in his challenge to the validity of AS 28.35.03(f) and thereby seem uncooperative if he in good faith seeks reversal of the present law. However, the lawyer must maintain his professional independence and objectivity. The counselor should not obstruct justice, and should advise his client of the likely decision of a court and practical effect if the statute is violated particularly in light of the *Jensen v. State* decision. But, as an advocate, he may present any permissible construction of the law favorable to such a good faith test of the correctness of the statute.

The attorney's role during advice and service on anticipated illegal conduct is further fraught with complexity. It is a lawyer's duty to advise his client to comply with the law, but this same attorney may advise concerning "the meaning, scope and validity of a law." ABA Standards, Prosecution and Defense Function (1971) S 3.7(a). The lawyer is cautioned that it is unprofessional to counsel his client in or knowingly assist his client to engage in conduct which he believes to be illegal. *Id.* S 3.7(b). Indeed, the commentary to section 3.7(b) continues to define the exact nature of its limitations. The lawyer must perform his function "within the law" and is not immune from responsibility if he "aids and abets" the commission of a crime. Id. at 220. However, justice requires that citizens be entitled to advice concerning the legality of prospective conduct. Therefore, an attorney properly may give his "candid opinion on the interpretation" which may be given to any provision of law, as well as his "opinion on its validity." Id. at 220 citing EC 7-1 to 7-3. It seems clear that the lawyer is not assisting in illegal conduct nor performing outside the law, when he advises his client on the legality of possible conduct and submits his opinion concerning the validity of the law at issue.

In the instant matter, the professional duties may partially depend on how the attorneys role is viewed. The counselor as an "adviser" should not simply tell his client to refuse a breathalyzer, but rather may discuss the likely court decision and legal consequences of such a decision, as well as his opinion on the validity of AS 28.35.032(f). The counselor as "advocate" should not actively aid his client in any refusal of the breathalyzer, but in representing his client's interest within the bounds of the law may in good faith test the validity of the newly enacted statute by seeking its modification or reversal. Any challenge to AS 28.35.032(f) may have been made more difficult by the Appellate Court's holding in *Jensen v. State*. Nonetheless, it is possible that an imaginative attorney as a zealous advocate may still in good faith believe the statute is subject to some conceivable attack.

An attorney should not simply direct his client to refuse the breathalyzer without further discussion of the nature and consequences of such a refusal. Both the Alaska Court of Appeals and the Supreme Court have held that a defendant has no constitutional right to refuse to submit to a breathalyzer exam. (*Graham v. State*, 633 P.2d 211, 214 (Alaska 1981); *Palmer v. State*, 604 P.2d 1106, 1110 (Alaska 1979); *Coleman v. State*, 658 P.2d 1364, 1365-1366 (Alaska App. 1983). AS 28.35.032(f) was recently upheld against constitutional challenge by the Alaska Court of Appeals. (*Jensen v. State*, 667 P.2d 188, (Alaska App., 1983)).

However, the Alaska Court of Appeals has recognized the right of a defendant to a reasonable attempt to communicate the consequences of a failure to take the breathalyzer exam in order for such refusal to be admitted as evidence. (AS 28.35.032(e), *Williford v. State*, 653 P.2d 339, 342-343 (Alaska App. 1983)).

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In summary, the attorney's professional responsibilities in this area include the following: to not obstruct justice; to not aid or abet through any overt assistance a refusal to submit to a breathalyzer; to not advance an unwarranted theory to the client except a claim or defense to the statute which the attorney in good faith believes is supported by an extension or reversal of existing legal theories; to not merely tell his client not to take the breathalyzer test without further advice and discussion; to represent his client zealously; to advocate permissible legal theories which the attorney believes challenge the validity of the statute; to advise the client on the legal consequences and judicial response to any refusal to take a breathalyzer; to submit advice on the scope and meaning of the statute; and to submit his interpretation or opinion on the validity of the applicable provisions of AS 28.35.030, et seg., ch. 117 S.L.A. 1982. In other words, the attorney should not unilaterally direct his client to refuse a breath test. Rather, the decision to submit to a breathalyzer should ultimately be made by the client after receiving the attorney's advice and counsel on the subject. It is only after such a process that the attorney can fulfill both the role of advisor and advocate.

Adopted by the Alaska Bar Association Ethics Committee on October 6, 1983.

Approved by the Board of Governors on January 13, 1984.

Endnote 1:

The Committee notes that our Appellate Court has held AS 28.35.032(f) does not violate substantive due process. *See Jensen v. State*, 667 P.2d 188 (Alaska App. 1983). It may still be possible that some practitioners may wish in good faith to challenge the validity of AS 28.35.030 *et seq.*, and seek its modification or reversal. The merits of any such controversy shall not be addressed herein; however, the existence of such legal issues are of significance to the present ethical question.