

ADVISORY ETHICS OPINION 97-06

SYNOPSIS:

Newly enacted H.70 criminalizes the refusal of a motor vehicle operator to take an evidentiary test for alcohol in specified circumstances. Counsel for such an operator may not advise the client to refuse to take the evidentiary test, but may advise the client of the legal consequences of taking or refusing the evidentiary test and any good faith argument for contesting the validity of the law.

FACTS:

Newly enacted H.70 criminalizes a person's refusal to take an evidentiary test for alcohol "if the person has previously been convicted of a violation of section 1201 of this title or is involved in an accident or collision resulting in serious bodily injury or death to another..."

An attorney engaged in criminal defense practice seeks an "opinion regarding the ethical and legal constraints placed upon attorneys who might be required to provide legal advice to DUI suspects regarding taking an evidentiary test" after H.70 becomes effective. For the purpose of this opinion, it is assumed that the statutory preconditions for subjecting the client to a request for an evidentiary test are present.

QUESTION(S):

The legal constraints are beyond the scope of the Committee's jurisdiction. However, we do note that an accessory before the fact, including any person who counsels the commission of a criminal offense, is punishable as a principal offender.¹

The ethical constraints for defense counsel are addressed in our current Code of Professional Responsibility and the proposed Vermont Rules of Professional Conduct based on the ABA Model Rules of Professional Conduct. There are two issues:

- (1) May defense counsel advise the client to refuse to take an evidentiary test?
- (2) May defense counsel advise the client of the legal consequences of taking or refusing an evidentiary test?

DISCUSSION:

As to the first question, defense counsel, as a matter of professional ethics, may not advise the client to refuse to take an evidentiary test. The present and prospective disciplinary rules are clear on this point.

DR 7-102(A)(7) provides that in his representation of a client a lawyer shall not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal . . .". Model Rule 1.2(d) provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal...". These provisions are virtually identical.

As to the second question, defense counsel, as a matter of professional ethics, may advise the client of the legal consequences of taking or refusing an evidentiary test, provided that the applicable limit for contesting the new law is not exceeded.

The current limit for contesting the validity of the new law is contained in DR 7-102(A)(2), which provides that in his representation of a client a lawyer shall not:

Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

This is primarily a subjective test.

A more stringent test is contained in Model Rule 3.1 which provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

¹ 13 V.S.A. §4.

Good faith is not sufficient; the argument also must meet an objective test of not being frivolous.²

The sole precedent in point which has come to our attention is Ethics Opinion 84-1 of the Ethics Committee of the Alaska Bar Association. It is consistent with our opinion.

CONCLUSION:

Newly enacted H.70 criminalizes the refusal of a motor vehicle operator to take an evidentiary test for alcohol in specified circumstances. Counsel for such an operator may not advise the client to refuse to take the evidentiary test, but may advise the client of the legal consequences of taking or refusing the evidentiary test and any good faith argument for contesting the validity of the law.

² See Reporter's Note to proposed Rule 3.1 of Vermont Rules of Professional Conduct (Final Report of Study Committee, Nov. 22, 1996).