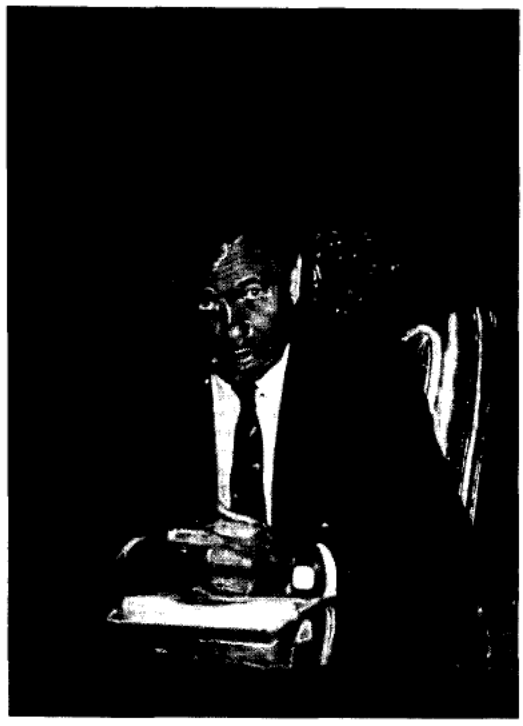
# *Criminal Liability of Professional Advisers*

*Speaking at the A.B.A. Conference in Townsville, R.V. Gyles Q.C. examined the fine line between legal advice and legal impropriety.*

In recent years a number of professional advisers have been charged with criminal offences. Solicitors, accountants and a barrister have been charged with criminal offences in relation to income tax and sales tax schemes and a number have been convicted. A barrister has been convicted of conspiring with drug dealers. A solicitor was charged with conspiring with clients to evade immigration laws. Another solicitor was charged with conspiring with clients to evade taxes on interstate hauliers. These are only some of the examples. Whereas, upon closer examination, a number of these cases do not relate to the consequences of giving professional advice, they have occasioned concern amongst professionals, and there is a perception that a new and unwelcome hazard has been added to professional practice.



The case which has undoubtedly caused the greatest controversy in the legal profession is the prosecution of a leading Victorian silk in connection with advice he gave concerning a tax scheme. [1.] As the case is unresolved great discretion is called for in commenting upon it, but it has been the subject of judgments by the Federal Court and findings by the magistrate hearing committal proceedings and it is impossible to discuss this topic without some reference to it.

I propose to deal with professional advice given before or during the transactions giving rise to the allegation of breach of the law. I will not deal with the different problems which a lawyer faces when advising a client who has already done something which might constitute a breach of the law.

As Government regulation of the community inexorably increases with more and more statutes making conduct illegal, those affected - particularly those whose livelihood depends upon it - require and demand advice as to how best to regulate their affairs in the light of these statutes. The topic is by no means confined to lawyers. The accountant advising upon tax schemes or the form of company accounts, the merchant banker advising on a takeover, the stockbroker advising promoters of a public company floation, the architect, engineer or town planner advising as to town planning and building regulations, the valuer or other expert providing an opinion for inclusion in a prospectus are just some illustrations.

Indeed, if, as seems possible, the National Companies and Securities Commission (or its successor) and the Trade Practices Commission decide to place more emphasis on actually enforcing the laws which they administer than hitherto, the problems will become more acute - particularly perhaps for those advisers not bound by a clear set of professional ethics who charge on results rather than on a time basis.

As I shall seek to demonstrate later, the Courts have said time and again that a client is entitled to order its affairs to its best advantage having regard to the law as it stands. If that is correct then lawyers and other advisers have a legitimate role in assisting the client to do so. The ethics of doing so may be debated, as they have been, but the lawfulness of so doing should not. What, then, are the problems?

The most obvious is the danger of the adviser becoming or being seen to become a participant in the transactions - to be one of the organisers or entrepreneurs. The degree of participation can vary. It is most obvious when the adviser becomes an actual "equity" principal or partner in the activity, taking a share of the proceeds. It may be by acting as a lieutenant in taking active steps going beyond advice to assist the activities and reap consequent rewards. Examples could include the referring of clients in return for secret commissions, the provision of a respectable front through the provision of offices and other services, by "warehousing" a parcel of shares on behalf of a client to give a false appearance to a transaction; utilising a trust account as the "bank" for the illegal activity; the creation of a set of false and misleading documents or records; or actually making corrupt approaches to officials. [2]

Brennan J. in Leary v. Federal Commissioner of Taxation (1980) 32 A.L.R. 221 at 239-40 said:

> "The evidence in this case suggests that the scheme was promoted by members of the legal and accounting professions, who assumed the mantle of entrepreneurs. — it has not been material to consider whether it is possible for the role of a professional adviser and the role of an entrepreneur properly to coincide or overlap, but the apearance of solicitors performing these respective roles in the present case leads me to invite attention to significant differences between the two functions. These differences do not arise out of any judicial view as to the lawfulness or morality of tax avoidance —. They arise because the field of professional activity is co-extensive with the lawyer's professional duty. That duty is to give advice as to the meaning and operation of the law and to render proper professional assistance in furtherance of the

1. O'Donovan v. Forsyth (1988) 76 A.L.R. 97

2. R. v. Ryan (1984) 55 A.L.R. 408

client's interests within the terms of the client's retainer. It is a duty which is cast upon a lawyer as a member of an independent profession, whether his services are sought with respect to the operation of taxing statutes, the provisions of the contract, charges under the criminal law or any other of the varied fields of professional concern. It is a duty which arises out of the relationship of lawyer and client.

But activities of an entrepreneur and the promotion of a scheme in which taxpayers will be encouraged to participate falls outside the field of professional activity; those activities are not pursued in discharge of some antecedent professional duty. Entrepreneurial activity does not attract the same privilege or the same protection as protect professional activity; and the promotion of a scheme in which particular clients may be advised to participate is pregnant with the possibility of conflict of entrepreneurial interest with professional duty."

If the activity is in fact illegal then the adviser who participates becomes liable either as a "common purpose" principal in the substantive offence or as a co-conspirator.

In my view the giving of advice known to be false or misleading to the participants in an illegal action in order that it may be used by the participants to be shown to third parties in furtherance of the activity, or by providing such advice directly to third parties at the request of the participants would be quite sufficient to render the party giving it a participant in the transaction for the purposes of the criminal law. It may also, of course, be in itself a substantive offence. Examples which come to mind are lawyers' opinions as to validity, architects or engineers' certificates, auditors' certificates, and expert's reports for inclusion in a prospectus.

What then of some evidence which emerged in a trial of, inter alia, an accountant and a solicitor charged with conspiring to defraud the Commonwealth by promoting and implementing a scheme to evade sales tax. [3.] The person who devised the scheme (a former Commonwealth Taxation Office employee) obtained an opinion from senior counsel to the effect that if the scheme were implemented neither wholesalers nor retailers who entered the scheme would incur a liability for sales tax. This was apparently what was known as a "marketing" opinion deliberately given in order that it be used to "sell" the scheme by promoters to wholesalers and retailers. On the same day the same senior counsel gave a second or "internal" opinion to the deviser of the scheme headed "Supplementary Advice", the effect of which was that he was not optimistic about the success of the scheme at least so far as the promoters' entities were concerned.

A barrister was called to give evidence on behalf of the solicitor. He was asked whether he was aware of a practice that had grown up whereby counsel gave two opinions in respect of a tax avoidance scheme. The question was objected to as irrelevant, but it was said to be the foundation for further questions as to whether it would be regarded as proper for counsel to advise in the "marketing" opinion that a scheme was effective, and in another opinion to express a different view. The trial judge refused to allow the witness to give his view of the propriety of the suggested course, but said that evidence of the practice of giving a "marketing" and "internal" opinion might be adduced. This ruling was upheld in the Court of Criminal Appeal.

What answer would the barrister have given? It is possible that counsel could genuinely hold the opinion that a tax scheme would be effective for those third parties who "entered into" it, even though the "scheme" might not avoid tax being levied upon one of the promoters' entities. It might also be possible for the marketing opinion to be bona fide without any qualification. As the text of the two opinions are not reproduced in the report it is not possible to express any view about the particular case. However, if, looking at all of the circumstances, a jury came to the conclusion that it was false or misleading to promulgate the unqualified "marketing" opinion knowing it would be used as such, then they would in my view be entitled to regard the counsel concerned as a party to the activities of the promoters of the scheme.

The next area of jeopardy is where the professional adviser restricts himself to giving advice which he genuinely believes, and only charges his normal fee for doing so, but gives advice designed actually and directly to assist a client in a client's disclosed illegal purpose or in concocting the criminal activity.

A lawyer who coaches drug couriers on a story that they should tell in the event of apprehension, [4.] advises as to extradition arrangements, gives guidance as to the covering up or destroying of evidence, counsels the construction of sham transactions or documents, or outlines the best means of corruption of public officials without being detected and so on is plainly implicated.

The most illuminating discussion of this topic is in R. v. Cox and Railton (1884) 14 Q.B.D. 153. The decision turned upon the existence or otherwise of legal professional privilege, but the reasoning is relevant. Some of the relevant passages are as follows:

"In order that the rule (legal professional privilege) may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not

3. R. v. Edwards and Collie Court of Criminal Appeal (Victoria) 6.7.87

4. R. v. Lawrence (1981) 38 A.L.R. 1

avow his object he reposes no confidence for the state of the facts which is the foundation of the supposed confidence, does not exist."

"Where a solicitor is party to a fraud no privilege attaches to the communication with him upon the subject, because the contriving of the fraud is no part of his duty as a solicitor; I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law."

"The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, the protection of such communications cannot possibly be otherwise than injurious to the interest of justice and to those of the administration of justice. Nor do such communications fall within the terms of the rules. A communication in furtherance of the criminal purpose does not "come into the ordinary scope of professional employment". "

"The only thing which we feel authorised to say upon this matter is, that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probably that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence."

(See also: O'Rourke v. Darbishire 1920 A.C. 581 at 613,621)

All of that is relatively straightforward when what is planned is a murder or a rape or a bank robbery or a drug importation. If the disclosed object is to defraud creditors, or the revenue, or investors, whilst the advice may be more sophisticated, the criminality is just as plain. The lawyer, or other adviser concerned, has become a party to the criminality.

The real difficulty exists where no overt criminal purpose is disclosed by the client, but a course of conduct is posed or devised which may be a breach of the law. The client may propose the scheme and seek advice as to its legality; the client may propose his objectives and seek advice as to the best manner of effecting them; or there may be a joint consideration of the problem by adviser and client arriving at a joint solution. If it turns out that the scheme or conduct is illegal what is the position of the adviser?

Usually, the "borderline" cases will involve potential breaches of a statute or allegations of evasion of statutory duty. In Bullivant v. Attorney General (Victoria) [1901] A.C. 196, 207 Lord Lindley said:

"As I have said, there are two ways of construing the word 'evade': One is, that a person may go to a solicitor and ask him how to keep out of any Act of Parliament - how to do something which does not bring him within the scope of it. That is evading in one sense, but there is nothing illegal in it. The other is, when he goes to the solicitor and says, 'tell me how to escape from the consequence of the Act of Parliament, although I am brought within it.' That is an act of quite a different character."

This passage was adopted by Gibbs C.J. in Attorney General (N.T.) v. Kearney (1985) 158 C.L.R. 500, 513-4. The same principle would apply to breaches of the general criminal law. The passage I cited from Brennan J., and the authorities to which he referred are to the same effect. [5.]

**"The client must either conspire with his solicitor or deceive him."**

Applying this principle, in my opinion there should be no jeopardy in a lawyer giving bona fide advice that a proposed course of action would not be a breach of the law, even if that opinion is incorrect.

However, one learned commentator has recently expressed the view that in these circumstances it would be open to a jury to conclude that the client was relying on the lawyer's advice and was encouraged to carry out the prohibited conduct by reason of it and that thus the lawyer was an accessory before the fact of the principal's offence and liable to prosecution. [6.]

This proposition is both novel and startling, and, if correct, would have extraordinary consequences. It would mean that no citizen could obtain guidance from those qualified to give it as to the lawfulness of a proposed course of action. It would give rise to criminal liability in the adviser in circumstances where there may well be no civil liability if there was no negligence in forming the incorrect opinion.

The same learned commentator expresses the view that when the lawyer, having knowledge of relevant facts, draws such documents as are necessary to give effect to the advice, that act constitutes aiding and abetting any offence which is committed. This is apparently upon the view that by going "beyond advice" the lawyer or the adviser necessarily "aids" the

5. Baker v. Campbell; see also Bullivant v. Attorney General (Vic.) (1901) A.C.

commission of the offence.

As a proposition it is similarly novel and startling. It is a proper function and duty of a lawyer to draft documents to effect transactions. If a lawyer is asked to advise upon the legality of proposed transactions, and, if in the affirmative, to draft the necessary documents, it does not seem to me, with respect, that drafting the documents adds anything to the substance of the matter. In drafting the documents the lawyer certainly does not step outside his proper professional role. That role is not restricted to the giving of advice. In any event the documents add nothing to the effect of the advice.

Pincus J. neatly made the point when he said in O'Donovan v. Forsyth 76 A.L.R. 97, at 120:

> "There is an 'underlying principle of the common law that — a person should be entitled to seek and obtain legal advice in the conduct of his affairs — without the apprehension of being thereby prejudiced.' Baker v. Campbell (1983) 153 C.L.R. 52 at 114 per Deane J. That principle must be weakened if the entitlement is to consult lawyers who are under threat of prosecution if their advice turns out to be wrong and the external reliance on the advice unlawful. In Baker v. Campbell concern was expressed that the proper functioning of the legal system might be inhibited by compulsory disclosure of legal advice: See in particular per Dawson J. (C.L.R. at 127, 128). The prospect of imprisonment for giving advice held to be erroneous would no doubt be an even more potent inhibition."

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6. Mr. Justice McHugh "Jeopardy of Lawyers and Accountants in Acting on Commercial Transactions." Taxation in Australia April 1988 p.542.

   cf: R. Merkell Q.C. "The Lawyer as a Client" Aust. Business Lawyer Vol. 1 No. 2 p.11

   J. Rapke "Aiding and Abetting, Inciting and Encouraging Criminal Acts" Papers of Lectures Centre for Commercial Law. Faculty of Law, Monash University October 1985.

7. See also R. v. Tannous (1987) 10 N.S.W.L.R.303; Gollan v. Nugent (1987) 5 N.S.W.L.R. 166; Gillick v. West Norfolk A.H.A. (1986) 1 A.C. 112 particularly Lord Scarman 190:

   " The bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse."

The answer surely lies in an analysis of the necessary ingredients to be found before a person can be implicated as an accessory - whether it be aiding, abetting, counselling or procuring or any of the synonyms which express those meanings.

In Giorgianni v. R. (1984-85) 156 C.L.R. 473 at 479-480 Gibbs C.J. adopted the following passage from Judge Learned Hand in United States v. Peoni (1938) 100 F. 2d 401 at 402) ).

> "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessories conduct; and (that) they all demand that he in some way associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used - even the most colourless 'abet' - carry an implication of purposive attitude towards it."

His Honour also adopted a statement by Cussen A.C.J. in R. v. Russell (1933) V.L.R. 59 at 67, (the same passage being cited by Mason J. at 493):

> "All the words abovementioned are, I think, instances of one general idea, that the person charged as a principal in the second degree is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission." [7.]

As in my view the authorities establish that a lawyer has a proper professional role in advising clients as to the lawfulness or otherwise of proposed action, and in drafting documents to effect transactions regarded as lawful, the exercise of that professional function cannot, without more, amount to any purposive association or any evidence of it. The simplistic argument that says that the client would not proceed if the lawyer advised that the course of action was unlawful, and that therefore a lawyer's advice that it is not unlawful is a cause of the client's actions and thus associates the giver of advice in purpose with the client is, it is submitted, both bad in logic and in law. In short, a lawyer giving bona fide advice, and drafting documents to give effect to that advice, does not in any relevant sense cause the client to act in accordance with the advice.

It is necessary to look to the authorities relied upon in support of the proposition being examined.

In National Coal Board v. Gamble, [1959] Q.B.11 a weighbridge operator, employed by the Coal Board, was held guilty of aiding and abetting the driving of an overloaded lorry on the highway when, knowing of the overload, he completed the sale by handing the weight ticket to the driver to give to the purchaser of the coal. Whilst it is true that there was no suggestion that he was inciting, urging or encouraging the driver of the vehicle, he did an act which actually facilitated the offence before it took place which he had no duty to do, and indeed a

positive duty not to do.

In R. v. De Marny [1907] 1 K.B. 385 the conviction of an editor for aiding and abetting the sale of obscene books by publishing advertisements relating to the sale of those books was upheld. Again, whilst there was no evidence of actual incitement or encouragement, a positive act was done which actually encouraged the offence in circumstances where there was no proper role or function to do so.

In Wilcox v. Jeffrey [1951] 1 A11 E.R.464, a musician was allowed to enter England on condition that he did not take employment. However, he performed at a concert at which the appellant was present, and the latter wrote a laudatory article about performance. The appellant was aware of the terms of the musician's entry into England. It was held that the conduct of the appellant in going to the concert and writing an article about it was evidence from which the magistrate could find that the appellant's presence at the concert had aided and abetted a breach by the musician of the Aliens Order, 1920. Even if the decision be correct (a difficult assumption to make) it relates to voluntary actions by the journalist not in the performance of any function or duty.

**"....the gravamen of the decision was that the solicitor had actually taken part in the transaction..and was thereby implicated."**

The decision in Johnson v. Youden [1950] 1 K.B. 544 requires closer examination. The Building Materials & Housing Act 1945 (United Kingdom) provided:

> (1) "where a house is being constructed under the authority of a licence granted for the purposes of a Defence Regulation ... and the licence ... has been granted subject to any condition limiting the price at which the house may be sold ... any person who, during the period of four years beginning with the passing of this Act, sells or offers to sell the house for a greater price than the price so limited ... shall be liable on summary conviction to a fine ... or to imprisonment....
> (5) In determining for the purposes of this section the consideration for which a house has been sold or let, the Court shall have regard to any transaction with which the sale or letting is associated — ."

A builder offered a house for sale, and obtained from the purchaser 250 pounds which was to be in addition to the price permitted by law. The builder instructed a firm of solicitors to act for him in the sale. Two of the partners did not know that the builder had received the extra 250 pounds; just before completion the third partner heard about that payment. He called upon the builder for explanation, read the Act, formed the opinion that the receipt of the extra 250 pounds was in the circumstances lawful, and called on the purchaser to complete. The builder was convicted of offering the house for sale at a price in excess of that permitted. The three partners were charged with aiding and abetting in the commission of that offence. The two partners who did not know of the facts were held to be not guilty because they did not know the essential matters which constituted the offence. The case is commonly cited for that proposition. It is worth setting out the whole of the judgment in relation to the third partner.

> "With regard to their partner, the third defendant, a different state of affairs arises. His client, the builder, told him a story which, even if it were true, was on the face of it obviously a colourable evasion of the Act. The builder told him that he had received another 250 pounds, that he had placed the sum in a separate deposit account, "and that it was to be spent on 'payment for work as and when he, the builder, would be lawfully able to execute it in the future on the house on behalf of the said purchaser.' " It seems impossible to imagine that anyone could believe such a story. Who has ever heard of a purchaser putting money into the hands of the builder when he bought a house from him because he might want some work done thereafter? Surely, if the builder did not think that the purchaser could pay for the work, he would say: "Will you pay something on account?" A story of that kind, on the face of it, is a mere colourable evasion of the Act. It is more than likely, I think, that, in reading the Act, the third defendant did not read as carefully as he might have done sub-s.5, of s.7. If he had read that subsection carefully, I cannot believe that he - or indeed any solicitor, or even a layman, - would not have understood that the arrangement which the builder said that he had made was just the kind of thing which that sub-section prohibited.
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> 'How could anybody say that the story which the builder told the third defendant was not a story with regard to a transaction with which the sale was associated? If that sub-section had been read by the third defendant and appreciated by him, he would have seen at once that the extra 250 pounds which the builder was obtaining was an unlawful payment; but unfortunately he did not realise it, but either misread the Act or did not read it carefully; and the next day he called on the purchaser to complete. Therefore he was clearly aiding and abetting the builder in the offence which the latter was committing."

In my view the gravamen of the decision was that the solicitor had actually taken part in the transaction by calling upon the purchasers to complete, and was thereby implicated. It thus has nothing to say about the question that I am presently considering. I agree, however, that, if correct, the decision does

have serious consequences for solicitors, and others, who are actually involved in effecting transactions on behalf of clients if those transactions involve any illegality.

I would respectfully suggest that the decision would not necessarily be followed if the participation is bona fide. The point hardly appears to have been argued, and the trend of modern authority would at least cast serious doubt upon the actual decision.

What if an opinion is given which represents the lawyer's bona fide view of the law, including all necessary qualifications, but is provided on the basis that it is a "marketing opinion" - that it would be used by the client to show third parties for the purpose of inducing them to enter into the transactions.

**"A lawyer should be able to express his bona fide view as to the lawfulness of the proposed action without fear of criminal consequences if it be incorrect."**

The views that I have expressed above as to liability for bona fide advice are based on the assumption that the lawyer concerned is simply answering a question posed to him as to the lawfulness of a formulated scheme, and that in so doing he or she does not step outside a proper professional role. It is certainly no part of the professional role of a lawyer to assist the client in the conduct of his business. That is not the purpose of obtaining and giving professional advice. Of course, a professional adviser appreciates that the client wishes the advice for the purposes of his business, and that sound advice will assist that business. But that does not make it a purpose of the advice.

Where, however, there is evidence aliunde of the actual existence of such a purpose the question arises as to whether that would amount to aiding, abetting, counselling or procuring any offence which is committed. If correct, this would have the consequence that a professional adviser, giving an opinion which he knows will be used in this way, runs the risk that if it is wrong, and an offence is committed, he will be implicated in that offence.

The contrary view is that provided an opinion is given bona fide it does not matter what the adviser knew or believed would be done with it. The client is entitled to receive legal advice as to the lawfulness of proposed actions, and the public policy and interest which this represents should not be categorised by fine distinctions as to what the lawyer knew or did not know in the particular case about the client's proposed use of the opinion. A lawyer should be able to express his bona fide view as to the lawfulness of the proposed action without fear of criminal consequences if it be incorrect.

A "marketing" opinion given to a tax promoter for the purpose of inducing taxpayers to enter the scheme charged for at very high rate is not likely to attract much sympathy. However, we either know or have good reason to believe that opinions may be used for many purposes, including disclosure to the other side during negotiations; for the purpose of being shown to the police or Crown authorities if a charge is contemplated or anticipated; or for provision to various regulatory bodies including statutory regulatory bodies in the event that the transaction is later questioned.

Whilst I have no doubt that there have been many abuses of the so called "comfort" opinion, I prefer the view that criminality should turn upon the bona fide nature of the advice, rather than the use which may be made of it. If there is evidence that the advice was not bona fide, and was purely a sham "comfort" opinion, then the necessary preconditions for criminal liability would normally be met.

What difference does it make, if any, if the lawyer either devised the course of conduct or participated in devising it? It is superficially attractive to say that this has a different quality about it compared to merely giving advice as to a formulated scheme. If I be correct in my thesis that the real touchstone is the proper professional role and responsibility of the adviser concerned, and if I am further correct in arguing that clients are entitled to advice as to the best method of arranging their affairs so as not to breach the law, then it is a proper function of lawyers (and others) to assist clients in doing so. This can be done by considering the substance of the matter, and then suggesting a series of steps which would not breach the law.

In conclusion, the words of Street C.J. in R. v. Tighe & Maher (1926) 26 S.R. (N.S.W.) 94 at 108 are as necessary now as they were in 1926:

> "I think therefore that the conviction must be quashed, but before parting from the case I wish to say this. Although, in the inception of the transactions which have been under review, Tighe acted as solicitor for Martin and for his daughters, he was not their regular solicitor, and he only acted for them on one or two isolated occasions. In all, or at all events in nearly all, the transactions which have been relied upon for the purpose of proving a criminal conspiracy between him and Maher, he was acting as the solicitor of the latter. It is expected of course of every solicitor that he shall act up to proper standards of conduct, that he shall give his clients sound advice to the best of his ability, and that he shall refrain from doing anything likely to mislead a Court of Justice; but, in the course of his practice he may be called upon to advise and to act for all manner of clients, good, bad or indifferent, honest or dishonest, and he is not called upon to sit in judgment beforehand upon his client's conduct, nor, because he does his best for him as a solicitor within proper

limits, is he to be charged with being associated with him in any improper way. In acting for a client, a solicitor is necessarily associated with him, and is compelled to some extent to appear as if acting in combination with him. So he may be, but combination is one thing and improper combination, amounting to a conspiracy to commit a crime or a civil wrong, is another thing. An uninstructed jury may easily fail to draw the necessary distinction between such combined action as may properly and necessarily be involved in the relation of solicitor and client, and such acts on the part of a solicitor, over and above what is required of him by his duty as a solicitor, as may properly give rise to an inference of an improper combination. I think, therefore, that it may be useful to point out the importance, in cases where a solicitor is charged with entering into an agreement with his clients which amounts to a criminal conspiracy, of seeing that the jury are properly instructed as to a solicitor's duty to his client, and that it is made plain to them that, before a solicitor can be convicted of conspiring with his client to commit a wrong, it must be proved that he did things in combination with him, over and above what his duty as a solicitor required of him, which lead irresistibly and conclusively to an inference of guilt." ❑

## *Swing Leader* *

*Boris Kayser was cross-examing a kidnap victim, and attempting to show that a co-accused was the obvious ringleader.*
***Kayser:*** *He was subject to violent swings of mood, was he not? Witness looks puzzled.*
***Kayser:*** *If you don't understand my question you only have to say so.*
***Dugan S.M.:*** *He might think you are referring to Benny Goodman.*

*Melbourne Magistrates' Court, January, 1982* ❑

## *Best Advice* *

*A man with a number of convictions for exceeding 0.05 was applying to be allowed to be relicensed:*
***S.M.:*** *How long since you had your last drink?*
***Applicant:*** *Two years ago.*
***S.M.:*** *Was that on medical advice?*
***Applicant:*** *No, on yours.*

*Coram Curtain S.M., Cohuna Magistrates' Court, June, 1981* ❑

* *See Motions and Mentions*