Lawyer's Professional Responsibility and Interstate Organized Crime

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scale combat with the forces which use interstate commerce to conduct their criminal activities. 

“Opponents,” he added, “are ruthless, vicious and resourceful. I cannot stress this too much.” Then, having described the enemy, he asked for a change in the statutes because “the present state of the law is an open invitation to them to cripple our efforts and prevent our inquiries at the very point where witnesses need protection the most.”37

One of the members of the House Committee, Congressman McCullough of Ohio, echoed similar fears. “If the cancer is apparent and deadly, we must move with that degree of certainty in order to save the patient’s life. I think in this matter of racketeering and like crimes, we are approaching that realization of the peril.”38

If there are forces that in fact require “large-scale combat,” and if they are tough, ruthless, vicious and resourceful, obviously we cannot be too discriminating in the tools we use. If we are fighting cancer, we must use the knife and submit to drastic surgery. Perhaps the greatest impact on civil liberties made by efforts to control organized crime will come from these strident opinions and the response which they call forth.

IV. THE LAWYER’S PROFESSIONAL RESPONSIBILITY AND INTERSTATE ORGANIZED CRIME

Murray L. Schwartz*

One of the popular images of the American lawyer is that of “The Mouthpiece,” the lawyer who is the hireling of the mob, skilled in tricks and chicanery, wealthy, suave, and unscrupulous. Probably formed during the days of Prohibition and gang wars, this image is the result not only of the press, movies and television, but of the statements of responsible public officials, legislators, legislative committees, bar association officers and committees. It has persisted until the present day, with the criminal activities shifting to narcotics and gambling and the other types of illegal endeavors so widely publicized today.1

Despite the shift in the crimes and perhaps the syndicate’s methods of operation, the accusations of improper involvement of lawyers in criminal syndicate affairs have remained surprisingly constant. Thus, in 1934, Attorney General Cummings stated:

The American Bar is confronted with a vital problem growing out of the improper activities of certain of its members in their contacts with the criminal classes. There have been repeated instances of a studied abuse of the privileges of the profession. A startlingly large number of lawyers have not only misconceived their duties as ad-

37 Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. 16 p. 27 (1961).
38 Id. at 59.

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 vocates but have, in effect, actually participated in criminal activities. . . .

If we fail to break up the liaison between certain members of our profession and the leaders of highly organized crime, we cannot complain when public movements are instituted to do for us what we have been unable to do for ourselves. We must perforce accept the challenge.²

In 1960, prior to his becoming Attorney General, Robert F. Kennedy repeated the charge:

I feel very strongly that our bar associations should deal with these problems [relationships of attorneys with allegedly corrupt labor officials]. But as matters presently stand the bar associations are not meeting their responsibilities. And if they continue to ignore such practices as our Committee encountered, as well as the unethical tactics of some attorneys engaged in the practice of criminal law, they will simply be asking for stricter regulation.

The sooner lawyers face up to this situation, the sooner we will have a profession of which we can properly be proud.³

Three decades ago the Wickersham Commission reported:

Our attention has been called in several connections to the humiliating spectacle of members of the bar giving advice and counsel to organized conspiracies to defeat the Constitution and the laws of the United States. . . . [I]t is manifest that lawyers have been advising those who are not accused how to operate with the least risk, . . . and in other ways have been aiding in the violation of the law. . . .

There is a heavy responsibility upon the leaders of the profession and upon bar associations to bring about and maintain adequate standards of admission, of competency, and of conduct. It will not do to say, as has been said so often, that 'lawyers are as honest as those in other callings.' Much more than a high average of conventional honesty is demanded of those who are to assist the courts in administering and maintaining justice.⁴

Similarly, in 1951 the American Bar Association’s Commission on Organized Crime in Interstate Commerce had this to say:

Many specific instances have come to the attention of the [Kefauver] Committee where members of the bar have cooperated with notorious gangsters quite outside of the obligations they owe their clients. . . . It is well known also that certain members of the bar frequently facilitate the activities of criminal gangs. The Commission believes that active measures should be undertaken to eliminate this fringe group of lawyers who are unworthy of their profession. . . .

To draft and enforce standards and canons for the conduct of the lawyer is a task of great difficulty but of paramount importance. Obviously the bar cannot remain aloof or overlook its obligations to keep its own house in order.⁵

Though times have changed, the statements have remained the same. So, too, the assumptions on which the statements have been based have been generally uniform: there exists in the United States an extensive and powerful activity called organized crime (although there is not unanimity on the definition of "organized crime"); those who comprise the syndicate engage in illegal activities, today largely narcotics and gambling (in an earlier day, illicit traffic in alcoholic beverages), with perhaps an overflow into labor racketeering; in one way or another some members of the Bar collaborate with these activities in their professional capacities; those who are operating illegally are to some extent engaging in "lawful" activities (this is probably a more recent phenomenon) using illegal methods, coercion and corruption, for the conduct of these activities, or employing the lawful activities as fronts for the illegal ones or to siphon off profits from the illegal ones; and lawyers are collaborating with these "lawful activities."

It is perhaps not novel to suggest that history repeats itself, even in the short space of some thirty years. But it is troublesome that the same complaints about the conduct of lawyers are voiced now as were voiced some thirty years ago, particularly since, despite the calls for action which have been issued throughout the period, a search for any substantial effort on the part of somebody to do something produces very little.

It is therefore appropriate to inquire as to what the problems are, why they exist and what may be done about them.

I.

The three principal ways by which a lawyer may become involved with an organized criminal ring include entering into arrangements with the leaders of the ring whereby he agrees in advance to represent those employees of the syndicate, and perhaps the leaders, who run afoul of the criminal law; representing employees or members of the syndicate at their criminal trials; and counseling or rendering other types of legal assistance to the organization in the planning and protection of its operations.

Inasmuch as the first two ways center about the trial of cases it is in order to set forth an unequivocal principle at the outset: every defendant is entitled to the fullest effective representation by counsel which can be obtained. Any suggestion that the right to defense counsel should be limited or abrogated, whether the defendant be an otherwise respectable member of the community

6 For similar expressions, see McClellan, *Select Committee on Improper Activities in the Labor or Management Field*, Interim Report, S. Rep. No. 1417, 85th Cong., 2d Sess. 7 (1958). There is a remarkable coincidence of language as well as ideas. Compare, for example, the language of Senator McNamara's 1958 comment, "I can conclude only that members of the legal profession are no more or no less honest than any other citizen," *Individual Views of Senator Pat McNamara*, id. at 460, with that of the Wickersham Commission, "It will not do to say, as has been said so often, that 'lawyers are as honest as those in other callings,'" *supra*, p. 712.

7 *But cf.* the caveat, p. 716 *infra*.

8 The same caveat, note 7 *supra* is applicable here.
or the worst kind of syndicate member, should be rejected out of hand. But to state that it is the right or even the duty of lawyers to represent defendants in criminal cases is of course a long step from approving any and all arrangements and tactics in which a lawyer may engage.

The problem which is usually described as "agreeing in advance to represent someone for crimes not yet committed," is therefore an appropriate place to begin.

Such advance arrangements are clearly prohibited. There will be close cases. Thus, a client who has employed an attorney on a general retainer expects that the attorney will represent him if he gets into criminal difficulty, or at least that the attorney will assure that the client is provided adequate representation. Antitrust violations, criminal breaches of regulatory statutes and rulings are examples of such subsumed representation. But the activities may be of such a nature that the future representation is not the outside possibility but the anticipated probability; it is unquestionably in the latter category that the organized criminal syndicate's narcotics and gambling activities will fall.

There are guidelines here. Arrangements have been condemned whereby the lawyer regularly appears for the lower echelons of the organization — the numbers pick-up men and the like — whom he has never seen before and where his fee is in fact paid by the higher echelons. Interestingly, however, the major cases disbarring lawyers for such conduct date back to the 1930s; recent cases are difficult to find.

The line which has been drawn seems to depend on the regularity of the representation, the nature of the crimes with which the defendants have been charged, and the anonymity of the lawyer-client relationship. (In many instances the lawyer had never seen or talked to his client before appearing for him in court.) But the cases and the line raise some interesting questions.

Why are such advance agreements prohibited? There are several possible reasons: the incidence of gambling and illegal activity may increase if the

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9 Admittedly, there has been no responsible suggestion to the effect that the right to counsel should depend upon how evil the defendant is deemed to be.
10 A.B.A. Canons of Professional Ethics, Canon 32. See A.B.A. Committee on Professional Ethics and Grievances, Opinion No. 281 (1952); N.Y. County Criminal Courts Bar Ass'n, Code of Ethics and Principles for the Prosecution and Defense of Criminal Cases, Par. 1, 2; Am. Coll. of Trial Lawyers, Code of Trial Conduct (1963), Par. 27. See generally, Note, Disbarment of Attorney Retained to Defend Against Crimes When and If Committed, 47 Yale L.J. 812 (1938).
11 See Note, Disbarment of Attorney Retained to Defend Against Crimes When and If Committed, supra.
14 Opinion No. 281 of the ABA Committee on Professional Ethics and Grievances, supra note 10, was written in 1952 in response to an inquiry from some "Members of the Association." Whether this was an outgrowth of the work of the ABA Commission on Organized Crime in Interstate Commerce or of the ABA Special Committee on Disciplinary Procedures, infra p. 722, does not appear. See also ABA Committee on Professional Ethics and Grievances, Opinion No. 155 (1936).
participants know in advance that they have counsel to defend them; continuing familiarity and dependence upon this type of client will tend to push the lawyer into illegal and unethical conduct in his actual handling of the cases, for this is what his client expects — it is, by hypothesis, the norm of the client's usual activities; and, perhaps an extension of this latter idea, the lawyer will become an integral part of the activity if he does so.

The significance of the first idea is somewhat questionable. The same charge could be made of the Public Defender. By hypothesis today, particularly with the recent overruling of Betts v. Brady, every defendant can anticipate that he will be represented in court by counsel, either of the Public Defender or court-appointed variety. To suggest that advance private arrangements may be more reprehensible per se than the Public Defender may imply that the Public Defender is less effective on the average than privately obtained counsel, a troubling indictment of the former. At the same time, it is true that the syndicate client is better financed, expects more experienced and more effective representation, regardless of the rules, and can exert more pressure on the attorney than the usual defendant. Moreover, the syndicate attorney can provide services which as yet the Public Defender usually cannot or does not provide: immediate representation, bail arrangements, representation in misdemeanors, which is perhaps the usual gambling charge. Whether these services should be available to all defendants, the fact is that they are not. Clearly, too, one who has a lawyer whom he or his employer has chosen in advance may feel more confidence in the latter representation than in lawyers selected from the "grab-bag" of the Public Defender or court appointment.

Yet, although there is merit to the argument that advance agreements to represent criminal defendants may produce more confidence in that representation, it is more questionable to assert that that fact alone tends to increase the incidence of the criminal activity. While some weight may be given to this argument, other reasons seem more persuasive, reasons which include the lawyer's later unethical or illegal conduct at the criminal trial and his pre-involvement with the criminal affairs of the organization.

What then of the second area of the lawyer's relationships with organized crime: his representation during the trial?

The fundamental question is whether a higher standard of conduct should be imposed upon those who represent defendants charged with organized criminal activity than is imposed upon those lawyers who represent the more usual type of criminal defendants. Assuming for the moment that we could formulate such a standard, would we want to? In favor of doing so is the assertion that it is highly probable that the trials of organized criminals are more likely to be attended by coercion and bribery of witnesses, jurors, and occasionally and unhappily, judges, subornation of perjury, and all the other vices which press upon our criminal courts. In a very substantial sense, it can be asserted that the

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problems which plague us in the ordinary case are magnified in the trial of organized criminals.

But the problem is not one of changing the standards; these practices are not immune from sanction. The problem is one of enforcing them — the same problem which, to look ahead, permeates this entire area with respect to lawyers and nonlawyers alike. Moreover, it is difficult to conceive of a manageable system of the administration of criminal justice which sets one standard of conduct for the lawyer who represents one type of defendant and another standard for the lawyer who represents a different type. The idea of a dual standard must therefore be rejected; this is a price we must continue to pay as long as we adhere to the adversary system.

If the existing rules are adequate to deal with lawyers' activities which center about trial representation, or at least are as adequate for dealing with organized crime defense as with other types, what about another important phase of the lawyer's activities: his counseling function?

Once again, it seems necessary to draw a rough distinction in the context of organized crime: between counseling which relates to the illegal activity itself and counseling which relates to a legal activity which is an outgrowth of or substantially related to the illegal activities.

The ringing first few sentences of ABA Canon 32 speak unequivocally:

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation.

Lest there be any doubt about where the responsibility for rendering such advice is located, ABA Canon 31 is equally unambiguous:

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. . . . The responsibility for advising as to questionable transactions . . . is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

Admittedly, there may be close cases as to when the lawyer's role has contravened the Canons. But there are close cases any time a line is drawn, and in situations which do not involve lawyers we do not usually hesitate to adopt rules because of an anticipated gray area, or to apply them, at least in the clear cases. Insofar as the available reports of lawyers' activities with regard to organized crime indicate, proceedings in this area against the clear case are infrequent. To pose a possibly absurd example: the lawyer who drafts a partner-
ship agreement for a criminal syndicate for its own use would clearly violate
the rules of professional responsibility and ethics. Even more so would he vi-
olate the rules if he participated in the intimidating or bribery of law enforce-
ment agents.

There remain, however, two difficult problems: first, lawyer's advice which
relates to an incidental "legal" activity of the syndicate, and, second, the lawyer's
deliberate refusal to ask questions about the activities which he is aiding through
his professional talents.

In the first category could be included such "legal" activities as obtaining
liquor license permits, zoning changes and income tax return assistance. The
first two create less difficulty than the third. If the lawyer knows that the
premises for which the liquor license is to be obtained or the zoning change
acquired is to be used for gambling or illegal liquor transactions, prostitution,
or the like, why he should not be implicated in the illegal aspects of the transac-
tion which he is truly "furthering," is very difficult to understand.

Income tax returns present a somewhat different problem. For the law re-
quires that the return be filed, whether the income has been legally or illegally
acquired.\textsuperscript{19} Is the violator therefore entitled to professional assistance in the
preparation and filing of his return?

A realistic approach to this problem suggests that it is less troublesome than
at first blush. In the few reported instances of such advice,\textsuperscript{19} the real vice was
the deliberate refusal of the lawyer to attempt to ascertain whether the in-
formation he was including on the return had any semblance of truthfulness.
It is most unlikely that where the income has been obtained illegally the tax-
payer will wish to set forth the required details in his return. Only if the lawyer
agrees to misstatements or willfully blinds himself to the obvious facts, will his
assistance be of value. The real issue is the responsibility of the lawyer to ascer-
tain the facts. Whether in the above circumstances the lawyer might himself
be linked into the crime \textit{via} the conspiracy or the complicity route is not the
important issue.\textsuperscript{20} Regardless of the resolution of this question, it does not fol-
low that decisions about the lawyer's professional responsibility must adhere
to the minimum standard of the criminal law.

If there is any content to the idea that the law is a "profession," and not
simply a kind of service business, surely the lawyer may be required to make
reasonable efforts to ascertain the truth about his client's statements in the area

\textsuperscript{18} James v. United States, 366 U.S. 213, 218 (1961); Rutkin v. United States, 343 U.S.
130, 137 (1952).

\textsuperscript{19} See, \textit{e.g.}, ABA Commission on Organized Crime in Interstate Commerce, Report, 76

\textsuperscript{20} The question of the appropriate standard for implication in a substantive crime is of
course one which has been vigorously debated. That debate includes at least such issues as
the state of mind required to constitute one a conspirator with another; whether conspiracy
is alone sufficient to render one liable for the substantive offenses committed by another con-
spirator; and what state of mind is required to constitute one an accessory to another's crime
(the problem of complicity). These issues are canvassed in the American Law Institute's
Model Penal Code and Comments. See Tent. Draft No. 1 (1953), § 2.04 and comment; Tent.
Draft No. 4 (1955), § 2.06; Tent. Draft No. 10 (1960), § 5.03 and comment. The
mental element required for criminal culpability by these formulations would not generally
impose liability where the actor did not know of the alleged conspirator's or alleged
principal's illegal purposes, even though he was negligent in his ignorance.
of rendering legal advice. There is of course a sharp distinction between the

duty with regard to a trial and that with regard to counseling.

It is important that any confusion between the lawyer's duties and respons-
bilities as an advocate and his duties and responsibilities as a counselor or
advisor be dispelled. The nature of the trial and the adversary system require
a separation of the lawyer from his client. Even where his client is guilty, the
lawyer is not associated with the prior illegal activity, although his client may
escape what appears to be well-deserved punishment. But this immunization
of the lawyer from his client's activities, which is a price which must be paid
for the preservation of the adversary system, does not at all require a similar
immunization of the lawyer from his client's activities where the lawyer is en-
gaged in pretransaction counseling. Here, the price of lawyer-client confidential
relationship and lawyer-client privilege seems sufficient to pay. As the Joint
Conference on Professional Responsibility has so aptly stated:

Partisan advocacy plays its essential part in . . . a hearing, and the
lawyer pleading his client's case may properly present it in the
most favorable light. A similar resolution of doubts in one direc-
tion becomes inappropriate when the lawyer acts as counselor.
The reasons that justify and even require partisan advocacy in the
trial of a cause do not grant any license to the lawyer to participate
as legal adviser in a line of conduct that is immoral, unfair, or of
doubtful legality. . . .

Thus, a number of the incidents which have been condemned in the
various committee reports where lawyers have obviously refused to ask ques-
tions of their clients but have done their clients' bidding, would cause no problem
were the question considered as one of professional responsibility with regard
to counseling, and set apart from the different professional demands of trial
representation.

Perhaps if there is one area where the Canons require some revision it
is this one. For it is obvious that they center about the trial practice, with a
substantial part of the remaining attention paid to intra-Bar economic relation-
ships.

Enforcement of such a rule may create lawyer's problems in other areas.
Imposing a rigid duty to find out everything about a client's statements or
intentions may be too much, given the range of activities and clients with which
a lawyer may be daily concerned. But surely a "reasonable" requirement would
suffice here. Moreover, and this is the important point, most, if not all, of the
cases which have caused concern have not been of the borderline type. A
standard of "wilfully assisting" or "recklessly refusing" to ascertain the ends
to which the advice will be put should dispose of the most flagrant cases which
have been the principal concern.

There remains one area to discuss briefly: counseling relating to a legal
activity which is an outgrowth of or substantially related to the illegal activities.

22 Indeed, Canon 31, supra, p. 716, which treats responsibility for advice as well as for
litigation, is entitled "Responsibility for Litigation."
23 This is of course a less severe standard than is employed for the imposition of civil
There are two broad possibilities here. The first is the occupation of a legitimate field by organized crime by the use of the same coercive and corrupting tactics as its activities in the illegal one. Here, there is no substantial professional problem, for the lawyer who is a party to this type of activity is no different from the one who collaborates in a totally illegal activity.

The second is where the legal activity is much more attenuatedly related to the illegal one. For example, if Al Capone had decided to make a gift of several million dollars to a bona fide charity, the lawyer who drafted the donative instrument would not have been acting unethically, if that was his only role. But the cases about which we are concerned are not of that character. They turn on the furtherance of the illegitimate enterprise by the apparently legitimate activity. Here, again, the professional responsibility standard which would require of the lawyer a duty to find out what was going on should take care of the problem.

One caveat should be expressed here about the magnitude of the problem or the extent to which many or some lawyers, in their professional capacities, contribute to it. It seems somewhat egocentric to say, as at least one leader of the Bar is reported to have said, that "no organized criminal syndicate can long exist without utilizing regularly the services of those trained in the law and willing to utilize their legal ability in promoting the unlawful activities of such criminal syndicates and aiding them in escaping successful prosecution." If this remark refers to representation in criminal cases, perhaps it is accurate; the existing rules should be adequate to deal with this problem. But if it refers to counseling advice, it is not so clear from the reports that lawyers are really significant. More often, their roles seem to be the demeaning ones of "bag men" or "flunkies."

But whether lawyers are indeed important to the syndicate or not is beside the point. We too must be as Caesar's wife, and to the extent that active lawyer cooperation with syndicates exists, it should be eliminated.

II.

The foregoing discussion attempted to review the existing rules relating to the lawyer's involvement with organized criminal activity. In sum, it would seem that with perhaps only minor exceptions, there is ample present power to discipline the lawyers who have in fact been engaging in the kinds of professional activities so roundly condemned by the commentators and investigating liability upon the attorney for negligence. See Leavitt, The Attorney as Defendant, 13 Hastings L.J. 1, 23-37 (1961); Wade, The Attorney's Liability for Negligence, 12 Vand. L. Rev. 755 (1959). See also the materials in Cheatham, Cases and Materials on the Legal Profession, 341-46 (2d ed. 1955) under the heading "Competence as an Ethical Duty."

25 See, e.g., id. at 596-98; Peterson, The Career of A Syndicate Boss, 8 Crime and Delinquency 339, 344-45 (1962). Interestingly, none of the biographies (even the posthumous ones) or autobiographies of defense attorneys who have been well known for their representation of famous criminals suggests a close continuing affiliation in the planning, or even representation, stages of syndicate operations. The closest appears in Fowler, The Great Mouthpiece (1931), but even here whatever counseling relationship there was seems to have fallen short of serious infractions.
groups. But there is another point which seems equally clear. In fact, little such discipline has been imposed. It is therefore in order to inquire as to who is responsible for upholding the standards of the Bar and as to why so little discipline has been imposed.

The responsibility for the enforcement of ethical standards could be theoretically imposed in one of four places: the public, the prosecuting attorney (representing traditional law enforcement agencies), the self-discipline of the individual attorney, and the organized Bar, acting on its own or through the courts.

The first three may be briefly treated.

Although there have been suggestions that the public will take into its own hands the discipline of lawyers who collaborate with organized crime, this seems to be an overstatement. Indeed, one major problem is the apathy of the public toward organized crime. Why the public would decide to tackle the particular and incidental problem of lawyers, when it generally has been unwilling to tackle the overall problem, is difficult to comprehend. Moreover, what could the public effectively do? Finally, there is the uneasy feeling that perhaps the public does not consider the well-publicized conduct of some lawyers atypical; that it considers their conduct the norm of the Bar, and resignedly accepts this kind of conduct as a price it must pay for the entire legal profession. If this is so, then the Bar truly has cause for concern.

The second major possible institution includes the law-enforcement agencies, represented by the prosecuting attorney. Even where there have been extensive conspiracy prosecutions of organized criminal activity, lawyers have not ordinarily appeared as defendants. In view of the apparent availability of prosecutorial evidence against the entire conspiracy (as represented by the initiation of the prosecution), it may be inferred either that lawyers are not part of the conspiracy, or that prosecuting attorneys are reluctant to prosecute their brethren at the Bar.

The latter explanation makes some sense. For the prosecuting attorney may fear charges of persecution of attorneys who have defeated him in legal combat. He may consider the legal difficulties involved in conviction of attorneys too difficult to warrant the effort, at least, to clutter up his case against the more important members of the syndicate.

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26 This point is on somewhat shaky ground. There are no meaningful statistics. There are no real data on the extent of the lawyer's cooperation with organized crime. Further, the total number of reported disciplinary cases is incredibly small. Of the 285,000 lawyers in the United States, 74 were disbarred, 90 suspended and 45 resigned under fire during the period September 1, 1961 to August 31, 1962. Twelve states reported no disciplinary cases. Stason, Disbarments and Disciplinary Action: Record for 1960-1961 and 1961-1962, 49 A.B.A.J. 270 (1963). As Dean Stason states, "One wonders how many there are who deserve discipline but in fact escape." Id. at 272.

27 See, e.g., supra, pp. 711-712.

28 For a discussion of the problem of the corrupt prosecuting attorney, see infra, p. 725.

29 This is not intended to minimize the special problems of proof which appear in potential prosecutions against attorneys. Apart from the fact that attorneys who become involved in these matters are probably more circumspect than those with whom they deal, there is the problem of the evidentiary rules relating to the lawyer-client privilege. Technically, of course, the privilege does not apply to protect the client who consults with reference to a future crime. 8 WIGMORE, EVIDENCE § 2298 (McNaughton rev. 1961). Professor McNaughton recommends that, to overcome the problem of which comes first, proof of the future crime or admissibility
Another source of possible enforcement of the professional responsibility of the legal profession is the individual attorney — his self-discipline. In other words, is it possible to educate or indoctrinate the individual attorney to abide by the minimum rules, or, more ambitiously, to abide by higher standards of conduct?

The problems of educating the future lawyer for professional responsibility have been extensively discussed in recent years. Perhaps some progress is being made in this area. But how one attempts to educate the existing Bar in this respect is an infinitely more difficult problem. The Bar's willingness to be educated as to its professional responsibility is, from past experience, somewhat less than enthusiastic.

It seems, as has been said by other commentators in the past, that the first-line hope is the Organized Bar. But, if history is the best teacher, one is forced to conclude that to be realized this hope needs a good deal more nurture than it has received or predictably will receive. Consider the following example:

In September, 1950, the American Bar Association appointed a Special Commission on Organized Crime in Interstate Commerce; its functions were to review the hearings and reports of the Kefauver Committee and to make recommendations with regard thereto. It did so, and supplemented its review of the Kefauver Committee materials with independent research conducted pursuant to its supervision. In 1951 and 1952, it issued its reports and recommendations. Included in those recommendations, which covered all aspects of organized crime, were specific calls for action against lawyers who cooperated with organized crime. To repeat the words of the Commission:

The Commission recommends a vigorous campaign by state and local bar associations to eliminate the lawyer who actively cooperates with criminals, advises them how to evade the criminal law, or otherwise participates in the activities of those violating the criminal laws. The Commission further recommends that the American Bar Association take the leadership in developing the facts and formulating the specific methods to deal with these individuals.

In its 1952 Interim Report the Commission was more specific. It included a proposal to implement the ABA resolution for action against unethical members of the Bar. In this proposal it reviewed the examples of lawyer affiliation with organized crime — largely the activities of lawyers in public office — and urged that the ABA "proceed at once past the talking and resolution stage to implement by positive measures the action it took so forthrightly in September." The Commission recommended that the Association alert local associations of the lawyer-client conversation, the burden of proof should be placed upon the attorney to show that he did not believe that the proposed transaction was wrongful, where there is evidence of the commission of the crime apart from the communication and where there is evidence of some dealings between the attorney and client. See supra note 5. Like statements were voiced in the foreword to the report, throughout its contents, and in the concluding statement by Chairman Robert P. Patterson. See supra note 5.

30 See supra note 5.
31 76 A.B.A. REP. 385, 420 (1951). Like statements were voiced in the foreword to the report, throughout its contents, and in the concluding statement by Chairman Robert P. Patterson. See supra note 5.
33 Id. at 600.
tions to the necessity of investigating and acting upon cases within their juris-
diction, and that the Association survey the situation, including the nature and
extent of the lawyer's involvement, and analyze the adequacy of the existing
canons of ethics to deal with these types of situations. Finally, the Association
was requested to evaluate the mechanics and operations of grievance procedures.
To this end, a new Committee was to be appointed to carry out these objectives,
working in consultation with the other committees of the Association which were
concerned with various aspects of the problem. The Commission concluded:
"[T]he Commission is . . . convinced that the magnitude of the task is matched
only by the importance of our profession and the welfare of our country, of
our finding a solution to the problem of the lawyer criminal."

The major result of this Report was the committing of one of its recom-
mendations to the ABA Special Committee on Disciplinary Procedures, namely:

[T]he President of the American Bar Association be, and hereby
is, directed to create a new committee whose duties shall be to
survey the nature and extent of activities of members of the bar
who foster organized crime either as public officials or as private
practitioners, or who engage in other types of unethical practice,
and to evaluate the adequacy of existing canons of ethics and griev-
ance procedures for dealing with these individuals. . . . [T]he com-
mittee . . . is directed to consult with those committees and sec-
tions of the . . . Association which have a vital interest in this
problem. . . .

The Special Committee concluded that the Association did have jurisdic-
tion to investigate misconduct of members of the Bar anywhere in the nation;
that the existing disclosures were of sufficient scope and detail to enable it to
arrive at a conclusion as to (1) whether the existing canons were adequate to
deal with the conduct, and (2) whether special provisions should be prepared.
The Committee also concluded that a nationwide survey of the nature and ex-
tent of activities would require more funds than the ABA could reasonably be
expected to provide and also, because of the absence of subpoena power, the
conduct of the survey should not be undertaken. Accordingly, the Committee
concluded that it should proceed with the task for which it had been originally
created — the study of the matter of formulating model grievance and disci-
plinary procedures, as well as the evaluation of whether new canons were needed
for this particular area. Further, the Committee was to solicit the making of sur-
veys by the state bar associations.

In 1953 the Committee concluded (1) that the conduct of the suggested
surveys by state bar associations would not be "advisable and effective in any
state," and (2) that no special grievance procedures should be applicable to
lawyers involved with organized crime.

34 Id. at 601.
35 Id. at 285-86.
36 Id. at 286-88.
38 Ibid.
Finally, in 1956 the Committee filed its recommended draft of Rules of Court for Disciplinary Proceedings\textsuperscript{39} and terminated its deliberations.\textsuperscript{40}

This narration is not intended in any way to be critical of this or any other Committee. Indeed, it is one of the few times that any Committee attempted to deal with the problems. But the results are somewhat bemusing. For example, what did the state and local bar associations do with respect to the offending lawyers?\textsuperscript{41} After all had been said and done, what had the Bar done about its internal problems? There is no evidence to indicate that anything substantial was accomplished.

An earlier caveat must be repeated: one reason that little was done may be that there was little to be done; that the problem may not really be a very extensive or serious one. But in view of the impressive list of responsible people and committees who have asserted that there is a substantial “in-house” problem for the Bar, that inference is not easily accepted. It is necessary therefore to analyze what seem to be the reasons for the Bar’s inaction. There are several unpleasant possibilities which merit discussion.

(1) In general, the organized Bar is not only not interested in, but deliberately refuses to become interested in or involved with the practice of criminal law. Some commentators who have written about this problem have suggested that one of the real faults is the low state of the criminal practice; that the prevailing ethics of the criminal bar are so low that nothing much can be done until more capable lawyers are attracted to the practice.\textsuperscript{42} So long as the practice is in the hands of the bar sinister, as it were, we shall continue to have our problems. It is something like this: “Criminal practice is a dirty business. A little more or less dirt doesn’t really make much difference. Let’s not have anything to do with it.” It is unnecessary here to reiterate that the criminal practice is un-economic,\textsuperscript{43} that it deals with unpleasant people and unpleasant events, that it, with a few noted exceptions, is not a “status” part of the profession. Perhaps at the root is Canon 31, which permits lawyers to refuse to handle criminal cases. It would at least be strongly hoped that if every lawyer were required to handle some criminal cases,\textsuperscript{44} the kind of attention would be paid to the criminal courts and the process which until recent years has been so sadly lacking.

(2) Another possible reason is related: the Bar’s concentration on other matters. For one, the daily demands of practice leave little time for “profes-
sional" concerns. But one looks with some chagrin at the "in-house" matters which seem to receive major emphasis; efforts made by the Bar in the areas of enforcement of its economic interests: unauthorized practice regulation, campaigns against solicitation and advertising, and the almost frenetic move to incorporate law offices for personal tax advantages (after an unbroken, inexorable tradition of prohibition).

(3) Another possibility is even more invidious: "the glass house stone-throwing" theory or "there's a little bit of the shyster in all of us." One may suspect that some of the practices which have been so roundly condemned by the committees, apart from the "who" that is involved, are at least not unfamiliar to many lawyers. Perhaps a doctrine of estoppel is working here.

There may be a little bit of truth in each of these and similar possible reasons.

But clearly they do not constitute the entire story. The apathy and failure of the Bar in this area seem to be symptomatic of the more fundamental problems with which it is generally confronted. These are problems which arise out of the growing divorcement of the average lawyer from the traditional professional ideals of the practice of law and with which the Bar is just beginning to deal. This is not to say that the ethical standards of the Bar are lower today than at any prior time of our history.45 No student of the American legal profession could make that claim. It is, however, to say that the problems with which the Bar is confronted are different in kind from those faced by it at an earlier time.

The problem is not that of the ethical standard of the individual lawyer, whether he is honest, worthy of trust or competent. The problem is whether the very structure of the Bar is adequate for its purposes of public service.

The Bar today is beset with at least three very substantial and complex pressures: the proliferation of legal materials which are the raw materials the lawyer's labor converts into the final produce of advice and representation; the drive towards specialized practice (a de facto if not de jure phenomenon); and the increasing need, if not demand, of the general American public for legal services. The real issue is whether the present structure of the American Bar is adequate to cope with those pressures.

These themes are obviously separate topics of their own. The important point is that the apathy of the Bar toward the specific problem of the lawyer who collaborates with organized crime may well be just a symptom of the Bar's fundamental problems.

Be that as it may, we still have the problem of at least treating the symptom, even though the ailments of the "whole profession" may remain uncured.

III.

If then there is a problem of lawyers' collaboration with organized crime and something should be done about it, what can feasibly be done? The following suggestions are submitted as a proposed start on a program:

(1) As a result of internal limitation, no attention has been paid in this article to the particular problems surrounding the one lawyer in the community who is most qualified to do something about organized crime — the prosecuting attorney. Time after time the reports have made the obvious point that gambling, for example, one of the principal activities of organized crime, cannot flourish without the acquiescence or cooperation of the prosecuting attorney. When lawyers' misdeeds are cited, the major emphasis is upon the prosecuting attorney. It is almost inconceivable, where a prosecuting attorney is corrupt or totally incompetent, that the local Bar is unaware of that fact. Yet, those instances of removal of prosecuting attorneys for corruption or their disbarment have generally followed the investigations of others, and not as a result of the Bar's initiative. 46

The selection of a prosecuting attorney and review of his office are activities for which lawyers are peculiarly qualified. To some extent the Bar is active in the selection and appointment of judges. In a very real sense the prosecuting attorney, in his discretion to prosecute or not to prosecute, is a judge who daily makes many more decisions than the judicial judge does in a week or month. 47

The reasons the Bar should become more involved in the selection and review of the office of prosecuting attorney are many. But insofar as we are concerned about a check over organized crime's link with the prosecuting attorney, the Bar could furnish a meaningful control.

(2) Although the ABA Special Committee on Disciplinary Procedures took the contrary position, 49 the Bar should consider a revision of the Canons with regard to the obligations and responsibilities of an attorney in the area of counseling. As has previously been pointed out, the major emphasis of the Canons is upon the trial of cases, not upon what constitutes the major part of the average lawyer's practice — counseling, planning, negotiation and settlement. Clarification of these responsibilities and duties would seem generally desirable. But without regard to the general effect, the clarification would at least eliminate one argument for what appears to be the existing reluctance to consider the activities of lawyers in the counseling of organized criminal activities.

(3) Over ten years have passed since the Reports of the American Bar Association's Commission on Organized Crime in Interstate Commerce. In the interim, more legislative hearings have been conducted. These reports and other available information could be collated and all reanalyzed. Such a task might be an appropriate endeavor for the American Bar Foundation, the research arm of the American Bar Association, which is now engaged in both an extensive study of the administration of criminal justice, and a study of various aspects of the problems of the legal profession.

49 See supra, p. 722.
In undertaking such a program appropriate inquiries could be made in those places where the problems are reported acute. The absence of the subpoena power should not be too hampering. For what is intended is not the building of a record on the basis of which to initiate proceedings against particular attorneys. What is intended is the accumulation of information on which a specific program can be developed.

(4) Finally, no matter how the problem is approached, it is clear that at bottom it is a local problem. The primary responsibility is that of the local Bar. No amount of study or attempted persuasion from a national association can be very effective if there is no local cooperation. Under the present federalized bar system, there is no substitute for local action. Direct and continuing efforts should be made to encourage local bar associations to take appropriate steps; inquiries, possibly in conjunction with prosecuting attorneys and grand juries, disciplinary proceedings and continued supervision are in order. This is where the real responsibility lies. And it is here where it must be implemented.

Whether the problem will be solved if these ideas are carried out is not crucial. For we would then at least know what the problems are to a greater extent than we do now, and, in typical lawyer fashion, once we know the problems we should be able to do something about their solution.