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Restraints On Alienation As A Standard Of Per Se Illegality Under The Sherman Act

of available physicians from which to select is small (because the expert is required to be from the same locality as the defendant), make it very difficult, if not impossible, for the plaintiff to find an expert witness.

The problem, however resolved, demonstrates convincingly the real desirability of having experts appointed by the court to make independent examinations and to render written reports to the court. Every modern effort has been directed toward this goal,[30] but the courts have not adopted this practice. The next most desirable approach would appear to be that adopted in *Dark v. Fetzer.* If a physician is innocent of any malpractice, his testimony will certainly aid him and make out his own case; if not, justice will be better served when the physician is forced to develop the plaintiff's case for him.

EDWIN A. GENDRON, JR.

RESTRAINTS ON ALIENATION AS A STANDARD OF PER SE ILLEGALITY UNDER THE SHERMAN ACT

Since the end of the Second World War, franchising has become the fastest growing form of product distribution in the United States.[1] There are presently 330,000 franchisees with total sales of $65 billion each year, one-tenth of the Gross National Product.[2] Surveys indicate that at least 83 percent of these franchise agreements incorporate

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[30]The *Model Code of Evidence* and the *Model Expert Testimony Act* call for experts recommended by the parties but appointed by the court. This procedure would eliminate partisanship and allow the experts to examine the problem situation out of court and later express their conclusions in a written report. It would eliminate the hurried, confused, and often misunderstood conclusions arrived at under the pressures of examination and cross-examination at the trial. If one party was dissatisfied with the report of the appointed expert, he would have the right to call his own expert. The court would also preserve the privilege of calling the appointed expert to the stand to qualify or explain any questionable portions of his report.

Here there is also the advantage of preservation of the adversary system and retention of the jury as the final decision-making body. There would also be a solution to the hang-up of pre-trial testimony. Because of the rule that one party is not allowed to cross-examine a paid expert at the pre-trial investigation (because of the unfair expense to the other party) there is a question whether the defendant-doctor may be cross-examined in that capacity. If there were a court appointed expert this problem would no longer exist and the result would be a saving of time, energy, and expense.

[1]E. GRETHER, MARKETING AND PUBLIC POLICY 85 (1966).

[2]Handler, *Statement Before the Small Business Administration,* 11 ANTITRUST BULL. 417, 418 (1966).

vertical restrictions imposed by the franchisor upon the franchisee.[3] The legality of customer and territorial restrictions under the antitrust law was recently decided by the Supreme Court, for the first time, in *United States v. Arnold, Schwinn & Company*.[4]

Schwinn sells through a nationwide franchise system and imposed territorial and customer restrictions upon its franchised distributors. These restrictions required the distributors to resell Schwinn's line of bicycles and bicycle parts only in certain geographical areas and only to franchised retailers. Other restrictions required the retailers to sell only to the general public and not to non-franchised retailers.

Schwinn employed three separate distribution arrangements; territorial and customer restrictions were common to all three. Under the first arrangement Schwinn products were sold to the distributor, with title to the products passing to him. The second type was a consignment arrangement where the title remained in Schwinn and the distributor acted as an agent, taking the order from the franchised retailer and delivering the bicycles to him. The third distribution arrangement was the so-called "Schwinn Plan" whereby Schwinn retained title and placed the bicycles directly on the retailers showroom floor, receiving payment when the bicycles were sold.

The Supreme Court held that where title passed to the distributor the restrictions on resale customers were illegal per se. In so holding the Court found that these restrictions were a restraint upon alienation, were implemented by agreement, and therefore, were so obviously destructive of competition that their mere existence was sufficient to constitute a violation of section 1 of the Sherman Act.[5] The Court went on to point out that these restrictions were identical in effect to the territorial restrictions found illegal per se by the district court.[6]

The Court refused to hold that the same territorial and resale customer restrictions were illegal per se when Schwinn retained title to the products as in the second and third distribution arrangements, but held that the legality of such arrangements was subject to the rule of reason. Upon examination of competition in the bicycle market, the Court found that the restrictions were not unreasonable where Schwinn retained title, dominion, and risk.

The Supreme Court first considered vertically imposed restrictions

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[3]J. CURRY, PARTNERS FOR PROFITS, A STUDY OF FRANCHISING 51 (1966).

[4]388 U.S. 365 (1967).

[5]15 U.S.C. § 1 (1964).

[6]Schwinn did not appeal the district court's holding that the territorial restrictions, after passage of title, were per se illegal.

on territory and resale customers in *White Motor Company v. United States.*[7] White Motor limited the territory in which its dealers and wholesalers could sell and the customers to whom they could sell within those territories. The case was before the Supreme Court on appeal from a summary judgment holding the restrictions to be illegal per se. In returning the case for a jury determination the Court said: "This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us."[8] And later in the opinion the Court added: "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain."[9]

The lower courts took this language in the *White Motor* opinion as conclusive of the inapplicability of per se standards to vertical territorial and customer restrictions. Relying on *White Motor,* the circuit court in *Snap-On Tools Corporation v. FTC,*[10] after a thorough examination of all factors, held that territorial and customer restrictions were reasonable. *Sandura Company v. FTC*[11] reached the same conclusion on similar facts pointing out that the restrictions on territory increased interbrand competition. Thus, prior to *Schwinn* it seemed settled that vertically imposed territorial and customer restrictions were not per se illegal.[12]

The Supreme Court in deciding *Schwinn* did not follow the *Snap-On Tools* and *Sandura* interpretation of the *White Motor* decision, but instead based its decision of per se illegality on the principle that agreements which restrain alienation of chattels are illegal as restraints of trade. Although never before used in the area of vertical territorial and customer restrictions, this concept was used as part of the rationale to find vertical price fixing restrictions illegal per se when imposed by a seller after passage of title to the buyer.[13]

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[7]372 U.S. 253 (1963).

[8]*Id.* at 261.

[9]*Id.* at 263.

[10]321 F.2d 825 (7th Cir. 1963).

[11]339 F.2d 847 (6th Cir. 1964).

[12]White Motor Co. v. United States, 372 U.S. 253, 263 (1963); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 75 YALE L.J. 373 (1966); Averill, *Antitrust Considerations of the Principle Distribution Restrictions in Franchise Agreements,* 15 AM. U.L. REV. 28 (1965); *Restricted Channels of Distribution Under the Sherman Act,* 75 HARV. L. REV. 795 (1961).

[13]Simpson v. Union Oil Co., 377 U.S. 13 (1964); Northern Pac. R.R. v. United States, 356 U.S. 1 (1958); United States v. General Elec. Co., 272 U.S. 476 (1926);

This principle was expounded in *John D. Park & Sons v. Hartman,*[14] where attempts were made on the part of a manufacturer to enforce price fixing which had been imposed on the original vendee. The original vendee had purchased medicines from the manufacturer and in turn sold them to the defendant who was selling them at a discounted price to the public. In holding the agreement between the manufacturer and the original vendee void and as such unenforcible, the Court said: "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy...."[15]

The doctrine was further amplified in *Dr. Miles Medical Company v. John D. Park & Sons.*[16] Dr. Miles produced medicines and transferred them to so-called agents who in turn passed them on to retailers. The agreements provided for minimum prices and required the wholesale agents to sell only to approved retailers. The Court held that the agencies were not valid since the goods were actually bought for resale. The Court then applied the rule of *Hartman* invalidating agreements which restrain alienation and held that the defendant could not be enjoined from selling at prices below those specified by the plaintiff.[17]

Both *Hartman* and *Dr. Miles* were suits to enforce private agreements which included provisions restraining alienation. The courts in both cases pointed out that the contracts in question were void also because they were unreasonable restraints of trade and thus violated

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United States v. Colgate & Co., 250 U.S. 300 (1919); Boston Store v. American Graphophone Co., 246 U.S. 8 (1918); Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911); Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N.E. 219 (1901).

[14]153 F. 24 (6th Cir. 1907).

[15]*Id.* at 39.

[16]220 U.S. 373 (1911).

[17]Successful attempts were made in cases such as *United States v. Colgate & Co.,* 250 U.S. 300 (1919), to show that where there was, in fact, no formal agreement to support price fixing restrictions, there was no restraint upon alienation and thus no per se illegality. Colgate merely suggested prices and would refuse to supply goods in the future if these prices were not followed. Since an agreement is essential to an action under section 1 of the Sheman Act, the absence of such an agreement being alleged resulted in the Court holding that Colgate was not restraining trade. Three years later the Court clarified its position on the necessity of a formal agreement in *FTC v. Beech-Nut Packing Co.,* 257 U.S. 441 (1922). In considering another price fixing situation the Court in *Beech-Nut* made it clear that the necessary agreement might be implied from a course of dealing or other circumstances. The Court went on to find that there was an implied agreement and that the price fixing agreement restrained alienation and therefore was a per se violation of the Sherman Act, following the rationale of the *Dr. Miles* case.

section 1 of the Sherman Act. It was in these early private contract cases that the courts equated restraints upon alienation, when implemented by agreement, with unreasonable restraints on trade under the Sherman Act. The rationale for the equation of the two principles was best expressed in *Dr. Miles* where the Court pointed out that when title to goods has passed to the distributor accompanied by restraints upon alienation, such as price fixing, only the various distributors can benefit from the price fixing agreements, since the manufacturer had received his fair price before he passed title. The Court concluded that the effects are identical to horizontal price fixing and thus illegal as unreasonable restraints on trade.[18]

Subsequent to the *Dr. Miles* decision, the Court in *United States v. General Electric Company*[19] reiterated the importance of the location of title and the inherent rights of the holder of title to impose restrictions upon his agents. "The owner of an article . . . is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer."[20]

Thirty-one years after *Dr. Miles* the Supreme Court began to modify the strict title-passage distinction set down in that case and followed in *General Electric*. When the Court considered vertical price fixing restrictions in *United States v. Masonite Corporation*,[21] it recognized a valid agency relationship between Masonite and its distributors. The Court, however, found that the agents were potential or actual competitors of Masonite and, therefore, held that the restrictions were unreasonable restraints of trade, even though effected through a valid agency without passage of title.

An analysis of *Dr. Miles* and *Masonite* indicates that if title has passed to the distributor, vertical price fixing is per se illegal and, likewise, if title has not passed, the arrangements still could be found illegal upon application of the rule of reason. The significance of the location of title, and the related restraints upon alienation, had evolved through these two decisions into a line of separation between the application or non-application of per se illegality.

Schwinn did not follow the rationale of the earlier vertical restriction cases. The Court found the necessary passage of title but refused to find vertical territorial and customer restrictions identical to hori-

[18] 220 U.S. at 408.
[19] 272 U.S. 476 (1926).
[20] *Id.* at 488.
[21] 316 U.S. 265 (1942).

zontal divisions of markets, long recognized as illegal per se.[22] In omitting this final step, the Court has given new significance to the location of title and restraints upon alienation as applied to antitrust cases. This property doctrine of restraints upon alienation has become, as a result of *Schwinn,* a standard of per se illegality in its own right.

It would seem that the results of *Schwinn* would be the same regardless of whether the *Dr. Miles* rationale or the pure property right argument were followed. However, the question of whether modern antitrust decisions should be based on ancient property law principles, rather than on economic analysis, still remains to be answered.

WILLIAM P. BOARDMAN

SALES TAX IMPLICATIONS OF RETAILER'S PURCHASE OF PREMIUM MERCHANDISE FOR TRADING STAMP REDEMPTION

The typical sales and use tax statute exempts items purchased for the purpose of resale.[1] The most common purchase for resale occurs when a retail merchant purchases goods from a wholesaler for subsequent sale to his customers. The customer becomes the taxable purchaser of the goods, while the liability for the collection and payment of taxes rests with the retailer.[2] When a retailer purchases premium merchandise for the express purpose of redeeming the merchandise for trading stamps which he has issued, a question arises whether the retailer's purchase of the premium merchandise is exempt from taxation as a purchase for resale.

In *Colonial Stores, Incorporated v. Undercofler*[3] a retailer issued trading stamps to its customers with their purchase of its retail product line. The trading stamps were redeemable for premium merchandise which the retailer had purchased. The retailer paid a sales and use tax on its purchase of the premium merchandise and the customer paid a sales and use tax on his retail purchases. The retailer petitioned

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[22]United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

[1]CAL. REV. & TAX CODE § 6007 (West 1956); FLA. STAT. ANN. § 212.02 (1958); GA. CODE ANN. § 92-3403a(C) (Supp. 1965); N.C. GEN. STAT. § 105-164.3 (1965).

[2]CAL. REV. & TAX CODE § 6052 (West 1956); FLA. STAT. ANN. § 212.06 (1958); GA. CODE ANN. § 92-3402a (1961).

[3]223 Ga. 105, 153 S.E.2d 549 (1967).

for a refund of the sales tax collected on its purchase of premium merchandise. The Georgia Court of Appeals denied the petition holding that the purchase of the premium merchandise was a cost of doing business and that the premium merchandise was not purchased for resale.[4] On appeal the supreme court held that the premium merchandise was sold to the customers, hence Colonial's purchase of the premium merchandise was a purchase for resale[5] and not taxable under the Georgia Retailers' and Consumers' Sales and Use Tax Act.[6]

The court reasoned that there was a sale of the premium merchandise to the customer because consideration was present in the transaction. It was shown that the redemptive value of the stamps was equal to the cost of the premium merchandise and that the cost was reflected in the prices of the retailer's product line, therefore the customer paid for the premium merchandise. In addition, the court noted that the customer also paid the sales tax on the premium merchandise because he paid a sales tax on his retail purchase and such purchase included the sales price of the premium merchandise.

The court summarily rejected arguments that there was no consideration for the transaction because no separate charge was made for the stamps, and that consideration was lacking because there was no reduction in the purchase price if the customers refused or did not receive the stamps.[7]

The dissent in *Colonial* concluded that the premium merchandise was a gift from the retailer rather than a sale to the customer. The dissent observed that profits belong exclusively to the operator of a business and that an operator has a right to expend these funds for promotional activities, such as giving customers free gifts.[8]

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[4]Undercofler v. Colonial Stores, Inc., 114 Ga. App. 466, 151 S.E.2d 794 (1966).

[5]*Colonial* is the first case that has litigated the issue of whether a retailer's purchase of premium merchandise is a sale for resale. *State Tax Comm'n v. Consumers Market, Inc.*, 87 Ariz. 376, 361 P.2d 654 (1960), involved a similar fact situation, however this issue was not discussed as it was stipulated by the parties that merchandise was purchased for resale.

[6]GA. CODE ANN. ch. 92-34A (1961).

[7]The court stated that these contentions were not meritorious in light of *Undercofler v. Eastern Air Lines, Inc.*, 221 Ga. 824, 147 S.E.2d 436 (1966). In *Eastern* the court was concerned with whether meals served to passengers were a sale for resale. The cost of the meals was included but not separately stated in the price of a passenger's ticket and the cost of the ticket remained the same regardless of whether the meals were taken. The court reasoned that the sale of the food was complete when the ticket was purchased. The fact that the cost of the meal was included in the price of the ticket did not prohibit the sale of the meal as the cost was a known amount and hence separable from the charge made for the transportation.

[8]The dissent contended that the majority could not identify the price of the stamps even though the price was included in the sales price of the retailer's pro-

To determine whether the retailer's purchase of premium merchandise was a purchase for resale and therefore not a taxable transaction, the Supreme Court of Georgia looked to the transaction between the retailer and his customer to determine if there had been a "sale." The Georgia Sales and Use Tax Act defines a sale as "any transfer of title or possession or both . . . in any manner or by any means whatsoever of tangible property for a consideration . . . ."[9] The court stated that the stamps represented a right to the premium merchandise and treated the premium merchandise, rather than the stamps, as the object of the sale.[10] To find that there was a statutory sale of the merchandise to the retail customer there must be (1) a transfer of title or possession and (2) consideration.

The court in *Colonial* did not discuss the transfer of title[11] to the premium merchandise. Apparently the court considered the receipt of the stamps by the customer to be the transfer necessary to satisfy the statutory requirement of a transfer of title or possession of the

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duce. Moreover, the sales price included not only expenses but also profits of the retailer. The retailer may utilize these profits, as the profits are his property, by purchasing promotional items such as stamps or premium merchandise. The dissent also noted there would be administrative difficulties if the court's decision were followed. This point was exemplified in a hypothetical question posed by the dissent, "[I]f with a sale of fertilizer that is exempt from the sales tax, 100 stamps are delivered, as in this case, then how can the sales tax for the stamps that are not exempt be collected?" 153 S.E.2d at 553. The dissent concluded that if the majority opinion were followed the delivery of the stamps must be taxed, but the tax could not be collected with the sale of the exempt item. 153 S.E.2d at 553.

[9]GA. CODE ANN. § 92-3403(a) (B) (Supp. 1965). For similar statutory definitions of a sale see CAL. REV. & TAX CODE § 6006 (West 1956); FLA. STAT. ANN. § 212.02 (1958); N.C. GEN. STAT. § 105-164.3 (1965); OHIO REV. CODE ANN. § 5739.01 (1965); VA. CODE ANN. § 58-441.2 (1966).

[10]The question of whether stamps are the object of the sale in a two-party transaction has never been litigated. Nevertheless, it would appear that the stamp holder under a two-party plan holds a right similar to that of a stamp holder in a three-party stamp transaction. Under the three-party transaction the customer becomes a third party beneficiary to the contract between the retailer and the trading stamp company. Rance v. Sperry & Hutchison Co., 410 P.2d 859, 868 (Okla. 1965); Hornof v. Kroger Co., 35 Ill. 2d 125, 219 N.E.2d 512 (1966). There appears to be no reason why stamps in a two-party transaction should not have characteristics similar to their three-party counterparts. Thus the *Colonial* court was correct in not discussing the stamps as objects of the sale because they represent rights to premium merchandise and could merely be considered a convenient accounting method to aid customers in recording the value of their right to the merchandise.

[11]Questions of title transfer have generally arisen where a state has attempted to establish jurisdiction to tax a sale. Rite Tile Co. v. State, 278 Ala. 100, 176 So. 2d 31 (1965); Ham v. Continental Gin Co., 276 Ala. 611, 165 So. 2d 392 (1964); Goodyear Aircraft Corp. v. State Tax Comm'n, 1 Ariz. App. 302, 402 P.2d 423 (1965); Santa Clara Sand & Gravel Co. v. State Bd. of Equalization, 225 Cal. App. 2d 676, 37 Cal. Rptr. 506 (1964).

premium merchandise. However, this position appears untenable. The customer, stampholder, only receives a value of merchandise as represented by the stamp; he does not receive the merchandise itself. It is generally recognized that title to goods does not pass until the goods are ascertainable,[12] as ownership in goods is not created unless the goods are in existence and can be identified by the terms of the bargain.[13] Before redemption, the premium merchandise necessarily remains a mass of property composed of units of varying quality, size, and value; consequently, there must be a selection of the merchandise in order to execute the sale.[14] The transfer of possession and identification of the premium merchandise occurs only upon selection of the merchandise when the stamps are redeemed. Thus, it would appear that there could be no completed taxable sale until the merchandise is selected at redemption.[15]

Consideration, the second statutory requirement for a sale, was found in the fact that the cost of the premium merchandise was included in the price charged for the store's retail items.[16] However, other courts have refused to find consideration solely on this basis.[17] Indeed, another Georgia court previously recognized that all costs of a business operation are reflected in the prices charged and the fact that this cost is included in the general charge is not sufficient to constitute a sale of an item used in the promotion of its business.[18] Although inclusion of the cost of an item in the price of general goods alone may not be sufficient to constitute consideration, if the portion

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[12]GA. CODE ANN. § 109A-2-401(1) (1962); UNIFORM COMMERCIAL CODE § 2-401(1) (1958 version); Chatam v. Clark's Food Fair, Inc., 106 Ga. App. 648, 127 S.E.2d 868 (1962); 2 S. WILLISTON, SALES §258 (rev. ed. 1958).

[13]GA. CODE ANN. § 109A-2-501(1) (1962); UNIFORM COMMERCIAL CODE § 2-501(1) (1958 version); 2 S. WILLISTON, SALES § 258 (rev. ed. 1948).

[14]*See* GA. CODE ANN. § 109A-2-401(2) (1962); UNIFORM COMMERCIAL CODE § 2-401(2) (1958 version); Chatham v. Clark's Food Fair, Inc., 106 Ga. App. 648, 127 S.E.2d 868 (1962); Albany Mill Supply Co. v. United Roofing & Mfg. Co., 12 Ga. App. 537, 77 S.E. 829 (1913); Annot., 106 A.L.R. 1284 (1937).

[15]*Colonial* did not discuss the identity issue, although it is arguable that the issue could have been dismissed summarily and the sale justified on the basis of an implied consent for future delivery which was recognized in *Undercofler v. Eastern Air Lines, Inc.*, 221 Ga. 824, 147 S.E.2d 436, 443 (1966). However, *Colonial* is distinguishable as the premium merchandise must be selected and delivered to the stamp holder, rather than simply delivered as was the situation with the meals.

[16]*Accord,* McCarroll v. Scott Paper Box Co., 195 Ark. 1105, 115 S.W.2d 839 (1938); Belleville Dr. Pepper v. Korshak, 36 Ill. 2d 352, 221 N.E.2d 635 (1966).

[17]Undercofler v. Macon Linen Serv., Inc., 114 Ga. App. 231, 150 S.E.2d 703 (1966); San-A-Pure Dairy Co. v. Bowers, 173 Ohio St. 469, 183 N.E.2d 918 (1962); Commonwealth v. Benjamin Franklin Hotel Co., 77 Dauph. 14, 28 Pa. D.&C.2d 329 (1961).

[18]Undercofler v. Macon Linen Serv., Inc., 114 Ga. App. 231, 150 S.E.2d 703 (1966).

of the price attributable to the cost of the item is known and separable,[19] or if the customer realizes that he is paying directly for the item,[20] consideration can be found. However, it is doubtful that there was consideration for the premium merchandise in *Colonial* under either of these tests.[21]

Even if the transaction between the retailer and his customer satisfies the statutory requirements for a sale of the premium merchandise, it is not necessarily a taxable transaction. The Georgia statute levies a sales tax on the purchase in a *retail sale,* which is "[a] sale to a *consumer* or to any person for any purpose other than for resale...."[22] *Colonial* failed to analyze the original transaction—the sale of the premium merchandise to the retailer—in terms of the complete statutory definition of a "retail sale," which identifies the *consumer* as the taxable party. Thus, the question presented is whether the retailer or his customer is the consumer of the premium merchandise exchanged for the stamps.

In determining who is the consumer and therefore the taxable party, the basic area of inquiry is whether the item is merely incidental to the objective of the business and therefore consumed by the business, or whether the sale of the item is the object of the business and therefore consumed by the customer.

The application of the "incidental to the business" test is illustrated by retail sales cases involving the question of whether a customer purchases the wrappings, packages, and containers used to hold the retailer's product line when he makes his retail purchase. Where paper bags and twine are used by the retailer for the purpose of delivering articles to the customer, the retailer is the taxable consumer of the packaging.[23] In reaching this conclusion an Arkansas court reasoned that "the retail merchants were engaged in selling merchandise and as an incident to their business... to entice trade, and as a matter of convenience for the customers, used and consumed [the paper bags and

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[19]Undercofler v. Eastern Air Lines, Inc., 221 Ga. 824, 147 S.E.2d 436 (1966).

[20]Morton Pharmaceuticals, Inc. v. MacFarland, 212 Tenn. 168, 368 S.W.2d 756 (1963).

[21]As a practical matter it would be difficult to isolate the price of the merchandise since only a small percentage of each retail price reflects the cost of the merchandise. Moreover, it is probable that the customer has no knowledge that he is paying for the merchandise.

[22]GA. CODE ANN. § 92-3403(a)(C) (Supp. 1965) (emphasis added). It should be noted that a definition of "resale" is not given in the statute.

[23]Dermott Grocery & Comm'n Co. v. Hardin, 203 Ark. 446, 156 S.W.2d 882 (1941); Wiseman v. Arkansas Wholesale Grocers' Ass'n, 192 Ark. 313, 90 S.W.2d 987 (1936); *see* Colgate-Palmolive-Peet Co. v. Joseph, 308 N.Y. 333, 125 N.E.2d 857 (1955).

twine] in their business...."[24] However, where a retailer purchases a product already packaged, such as a box of biscuits, and resells this product in its original form to its customer, the packaging is considered to be a natural and integral part of the sale; the customer is the taxable consumer of the packaging.[25] It does not appear that premium merchandise is a natural and integral part of any sale of the retailer's product line as the customer's receipt of premium merchandise is not necessarily present in any retail sale. It is apparent that premium merchandise, like paper bags, entice trade for the retailer, and this fact indicates that the premium merchandise is incidental to the retailer's business.

In applying the "incidental to the business" test to professional service situations courts have examined the nature of the service in relation to the item in question. If an item is employed in reaching the objective of the professional service, such as a physician's utilization of dressings to effect the cure of a patient, the professional man is the consumer of the item as it is incidental to his business.[26] Obviously the physician is not in the business of selling medical dressings. It would follow that an enterprise such as a stamp plan must be incidental to the business itself as the retailer is in the business of buying and selling produce, not premium merchandise.

Another professional service case utilized a different approach by examining the use of the items in question rather than relying on the nature of the professional practice to determine the consumer. Where a dentist purchased dentures from a manufacturer and transferred them to his patients, the court held that the patients who used the dentures as they were intended to be used were the consumers of the

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[24]Dermott Grocery & Comm'n Co. v. Hardin, 203 Ark. 446, 156 S.W.2d 882, 883-84 (1941).

[25]McCarroll v. Scott Paper Box Co., 195 Ark. 1105, 115 S.W.2d 839 (1938). *See* Moore v. Arizona Box Co., 59 Ariz. 262, 126 P.2d 305 (1942); American Molasses Co. v. McGoldrick, 281 N.Y. 269, 22 N.E.2d 369 (1939); Paper Prods. Co. v. City of Pittsburgh, 183 Pa. Super. 234, 130 A.2d 219 (1957), *aff'd*, 391 Pa. 87, 137 A.2d 253, 256 (1958).

[26]Babcock v. Nudelman, 267 Ill. 626, 12 N.E.2d 635 (1937); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954); Axelrod-Beacon Dental Laboratory v. Philadelphia, 34 Pa. D.&C. 190 (Phila. County Ct. 1938). *Contra,* Commonwealth v. Miller, 337 Pa. 246, 11 A.2d 141 (1940). In *Miller* it was shown that an optometrist who orders and sells glasses to his patients was not engaging in a business at all necessary to his professional service and consequently was a retail vendor of the glasses. In *Axelrod* it was shown that a dentist's purchase of dentures was incidental to his professional services and consequently there was no resale of the dentures to the patients.

dentures.[27] The court defined use as the continued possession and employment of the item as it was intended to be used. This approach appears to support *Colonial*'s holding as the retailer's customers will actually use the premium merchandise for the purpose for which it was manufactured.

However, in a non-professional service situation, while demonstrating that a guest actually uses a hotel room's furnishings such as a television set as part of his rented room, the court stated that a hotel owner uses the furnishings by making the room liveable and rentable. The court held that the furnishings were incidental to the hotel's business and as such constituted a business expense.[28] Thus, the owner is the consumer of the furnishings. As applied to the premium merchandise it is apparent that both the retailer and the customer actually use the merchandise. The retailer uses it for its intended promotional effect, while the customer actually uses it after stamp redemption occurs. Applying the rationale of the hotel case it would appear that the retailer is the consumer of the premium merchandise.

The foregoing discussion has examined the "incidental to the business" test in cases which are analogous to *Colonial* but which do not deal specifically with promotional items. Nevertheless, the sales tax implications of the purchase of promotional items have been tested under a unique Ohio statute which exempts items used "directly in making retail sales."[29] It has been held that advertising booklets, signs, and promotional items fall within the statutory exemption.[30] The issue of whether promotional items are taxable has not been raised in other jurisdictions apparently because promotional items have generally been considered a business expense. Courts have reasoned that the one who benefits from the promotional value of an item is the

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[27]Berry-Kofron Dental Laboratory Co. v. Smith, 345 Mo. 922, 137 S.W.2d 452 (1940). *Contra,* Axelrod-Beacon Dental Laboratory v. Philadelphia, 34 Pa. D.&C. 190 (Phila. County Ct. 1938).

[28]Atlanta Americana Motor Motel Corp. v. Undercofler, 222 Ga. 295, 149 S.E.2d 691 (1966); *accord,* Hotels Statler Co. v. District of Columbia, 199 F.2d 172 (D.C. Cir. 1952); Sine v. State Tax Comm'n, 15 Utah 2d 214, 390 P.2d 130 (1964).

[29]OHIO REV. CODE ANN. § 5739.01(E) (Baldwin 1964). In *Warren Tel. Co. v. Bowers,* 173 Ohio St. 164, 180 N.E.2d 595 (1962), the court in applying the statute held that for materials to be exempted from the tax, the item must be essential to the rendering of the service of the business, rather than merely essential to the operation of the business. *Warren* held the purchase of goods relating primarily to the administrative aspect of the company, such as billing and providing employees facilities were subject to the tax.

[30]Standard Oil Co. v. Donahue, 10 Ohio St. 2d 134, 226 N.E.2d 758 (1967); White Castle Systems, Inc. v. Bowers, 172 Ohio St. 141, 174 N.E.2d 108 (1961).

consumer of that item.[31] This strongly suggests that the premium merchandise was consumed by Colonial as it was used in the promotion of its retail business.[32]

The consumer test appears to be the most realistic approach to determine sales tax liability on the purchase of a promotional item for use in a retail business. *Colonial* employed a technical analysis of a sale in order to meet the statutory resale exemption requirement and consequently did not consider the nature of the premium merchandise and its relation to the retailer's business. Using the technical analysis the same conclusions could be reached for any item purchased by a retailer and used in the operation of his business. The consumer test considers the nature and business effects of the item itself and consequently leads to a more realistic interpretation of the sales tax act. It is hoped that the *Colonial* decision is not indicative of the direction other courts will take in applying sales tax statutes to strictly promotional items.

The retailer freely acquired the financial burden of the premium merchandise and it is the retailer who receives the benefit from offering the promotional device. According to *Colonial* a customer purchases the promotional items which are used to encourage his patronage of the store. This being the case, perhaps the customer should at least be notified that he is taking part in the sale of the premium merchandise and thereby have the opportunity to decline the sale.

DAVID D. REDMOND

AN ATTORNEY IN POSSESSION OF EVIDENCE INCRIMINATING HIS CLIENT

One of the most difficult dilemmas facing an attorney is determining where his duty lies with respect to evidence incriminating his client. Often this evidence has been revealed to the attorney on the strictest basis of secrecy, and he frequently must decide if it is his duty to reveal such evidence to the court, of which he is an officer. The Oath of Admission to the American Bar Association requires an attorney not only never to "seek to mislead the Judge or jury by any

[31]Undercofler v. Macon Linen Serv., Inc., 114 Ga. App. 231, 150 S.E.2d 703 (1966); Long Mfg. Co. v. Johnson, 264 N.C. 12, 140 S.E.2d 744 (1965); San-A-Pure Dairy Co. v. Bowers, 173 Ohio St. 469, 183 N.E.2d 918 (1962).

[32]The majority in *Colonial* acknowledged that the objective of the trading stamp scheme was sales promotion. 153 S.E.2d at 551.

artifice or false statement," but also to "maintain the confidence and preserve inviolate the secrets of [his] client."[1]

In *In re Ryder*,[2] attorney Richard R. Ryder voluntarily took possession of stolen money and a sawed-off shotgun which had been secreted in a safe-deposit box by his client, who was about to be charged with bank robbery. Before and immediately after transferring the incriminating evidence to an adjacent safe-deposit box rented under his own name, Ryder consulted with several prominent members of his local bar association about the propriety of his actions. By retaining possession of the money and gun, Ryder intended to invoke the attorney-client privilege regarding confidential communications and thereby prevent use of the evidence in establishing his client's guilt. When the FBI discovered the evidence in Ryder's safe-deposit box and informed the court, Ryder was suspended from practice until further order. The matter then was referred to the United States Attorney, who was requested to file charges within five days. In the proceeding to determine whether Ryder should be removed from the roll of attorneys qualified to practice before the federal district court, the court decided that, in light of mitigating circumstances,[3] Ryder's conduct warranted eighteen months' suspension from practice before the court.[4] In its denunciation of Ryder's actions, the court treated the question as involving a breach of professional conduct.

> Ryder's action is not justified because he thought he was acting in the best interests of his client. To allow the individual lawyer's belief to determine the standards of professional conduct will in time reduce the ethics of the profession to the practices of the most unscrupulous. Moreover, Ryder knew that the law against concealing stolen property and the law forbidding receipt and possession of a sawed-off shotgun contain no exemption for a lawyer who takes possession with the intent of protecting a criminal from the consequences of his crime.[5]

Although the court did not say what Ryder should have done with the incriminating evidence, it nevertheless strongly denounced his concealment of the money and gun as being beyond the limits of

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[1]Recommended Oath of Admission to the Bar, American Bar Association.

[2]381 F.2d 713 (4th Cir. 1967)

[3]"There is much to be said, however, for mitigation of the discipline to be imposed. Ryder intended to return the bank's money after his client was tried. He consulted reputable persons before and after he placed the property in his lockbox, although he did not precisely follow their advice." *In re* Ryder, 263 F. Supp. 360, 370 (E.D. Va. 1967). It is unlikely that the court felt that Ryder deserved special consideration because he was an attorney seeking to aid his client.

[4]*In re* Ryder, 263 F. Supp. 360 (E.D. Va. 1967).

[5]*Id.* at 369.

ethical conduct imposed by Canons 15 and 32 of the Canons of Professional Ethics.[6]

On appeal, the United States Circuit Court of Appeals for the Fourth Circuit affirmed Ryder's suspension and denounced his actions in stronger terms than did the lower court.

> It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime. Ryder's acts bear no reasonable relation to the privilege and duty to refuse to divulge a client's confidential communication. Ryder made himself an active participant in a criminal act, ostensibly wearing the mantle of a loyal advocate, but in reality serving as accessory after the fact.[7]

Although one would suspect that many criminal lawyers would be forced to make ethical decisons about the handling of incriminating evidence and thus would be placed in a situation similar to Ryder's there is little direct precedent for the *Ryder* case.[8] The Canons of Professional Ethics,[9] as well as the reports of the American Bar Association's Committee on Professional Ethics, provide ethical guidelines for the attorney, but neither of these really confronts the precise dilemma in *Ryder*. Attempts to reconcile the attorney's duties usually produce a general discussion of the attorney-client privilege and relationship,[10] an analysis of whether the attorney's actions are crimi-

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[6]Canons 1-32 of the Canons of Professional Ethics were adopted by the American Bar Association at its Thirty-First Annual Meeting on August 27, 1908. Canon 15 states in part, "[I]t is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client." Canon 32 states in part, "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 minsters 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."

[7]381 F.2d at 714.

[8]The courts only recently have begun to recognize a lawyer's dual role in relation to incriminating evidence. In a case involving the propriety of the lawyer's revelation of such evidence received from his client, the court recognized two competing policies of law, each demanding conflicting duties from the attorney. *In re* Selser, 15 N.J. 393, 105 A.2d 395 (1954).

[9]At present the American Bar Association's Special Committee on Evaluation of Ethical Standards is undertaking to write "a more modern, improved and correct restatement, in usable form, of the lawyer's professional responsibilities in the light of the present structure and development of the profession." 53 A.B.A.J. 902 (1967).

[10]*See, e.g.*, Clark v. State, 159 Tex. Crim. 187, 261 S.W.2d 339 (1953).

nal,[11] or, perhaps, a look at the lawyer's social and professional obligation to preserve justice.[12] Those few authorities directed to the problem tend to produce conflicting conclusions or superficial analyses with each of these approaches.

Ryder argued that the attorney-client privilege required him not to reveal the incriminating evidence and also allowed him actively to conceal the stolen money and sawed-off shotgun. As applied to incriminating evidence, the attorney-client privilege has been justified on the social theory that "preservation of the confidence will create a general social benefit of greater value than would the disclosure of the truth in special instances."[13] The Committee on Professional Ethics has suggested that an attorney should refuse to comply with a court's order to reveal privileged communications even though the court might order him to jail for such refusal.[14] It certainly can be argued that to require Ryder to produce the incriminating evidence—indeed, to make it his duty to do so—is practically the same as requiring him to be an advocate both for the defense and for the prosecution. In deciding a case where an attorney learned that his client did not meet the residence requirements for a pending divorce suit and asked whether this information should be revealed to the court, the Committee on Professional Ethics answered that although a lawyer has a duty to expose any fraud about to be practiced on the courts, nevertheless in this situation "this duty does not transcend that to preserve the client's confidences."[15] The Committee's opinion logically could be extended to make the duty of secrecy expected and required of an attorney paramount to any duty to reveal incriminating evidence. The client is presumed innocent, and it seems inconsistent with this premise that the lawyer could be required in a criminal case to present evidence of guilt while at the same time asserting innocence.

It also would seem inconsistent to find the attorney "disloyal" to the court because he asserted the attorney-client privilege in regard to incriminating evidence. Loyalty to the courts certainly should not be isolated from loyalty to the entire concept of criminal rights in our judicial system. The criminal defendant is guaranteed the right to

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[11]State v. Johns, 209 La. 244, 24 So. 2d 462 (1946).

[12]*See, e.g.*, ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 91 (1933).

[13]E. MORGAN, BASIC PROBLEMS OF EVIDENCE 114 (1953). It has been suggested that protection of the individual's rights may at times be paramount to the public interest. State *ex rel.* Sowers v. Olwell, 64 Wash. 2d 828, 394 P.2d 681, 684 (1964).

[14]ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, Informal Opinion No. 312.

[15]ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 268 (1945).

effective assistance of counsel,[16] and no professional or ethical responsibility can exist which interferes with this constitutional standard for the administration of justice. Indeed, in an opinion deciding that an attorney was not required to reveal to the court that his client had committed perjury in an earlier divorce proceeding, the Committee on Professional Ethics has been explicit.

> We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice....[17]

Some courts have not followed this logic. In *Clark v. State*,[18] where the attorney had advised his client to dispose of the murder weapon, a Texas court disagreed with the Committee opinion. Although the court only ruled on the admissibility of the testimony of a telephone operator who had overheard the lawyer advise the client to dispose of the murder weapon, it nevertheless condemned the attorney's action. The court concluded that the general rule that the attorney-client privilege should not be used to protect one who seeks to commit a crime should apply to anyone who, "having committed a crime, seeks or takes counsel as to how he shall escape arrest and punishment, such as advice regarding the destruction or disposition of the murder weapon or the body following a murder."[19]

Clark seems to follow the theory that the attorney, as an oath-bound servant to the administration of justice, owes his first duty to the court and that the duty owed to the client's cause is subordinate to that owed society and justice.[20] However, it certainly could be argued that in many situations the attorney who zealously protects the individual defendant's rights and privileges is by his actions serving the highest interests of society and justice.[21] Such a view has been adopted

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[16]Gideon v. Wainwright, 372 U.S. 335 (1963); People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

[17]ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953).

[18]159 Tex. Crim. 187, 261 S.W.2d 339 (1953).

[19]*Id.* at 347. However, the Supreme Court has suggested that the attorney-client privilege could be invoked as to information revealed to the attorney for the purpose of "devising a scheme to escape the consequences of [the client's] crime." Alexander v. United States, 138 U.S. 353, 360 (1891).

[20]One court has even gone so far as to suggest that when in such cases lawyers fail to live up to this high ethical standard imposed by the demands of justice, "they injure themselves, wrong their brothers at the bar, bring reproach upon an honorable profession, betray the courts, and defeat justice...." *In re* Kelly, 243 F. 696, 705 (D. Mont. 1917).

[21]Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956).

in more general terms by the *Model Code of Evidence,* which submits that "[t]he social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of evidence in specific cases."[22]

The *Model Code* appears to be in conflict with Canon 22, which states that a lawyer's conduct with the court should be characterized by "candor and fairness."[23] The Committee on Professional Ethics has said that a lawyer should not "endeavor in any way, directly or indirectly, to prevent the truth from being presented to the court in the event litigation arises."[24] Although not involving criminal prosecutions or confronting the exact situation posed in *Ryder,* several courts have followed the reasoning of Canon 22 and this Committee opinion. In a case where the attorney advised his client to destroy a list made by the decedent concerning the distribution of the decedent's property, the Minnesota Supreme Court held that a lawyer who wilfully either destroys or suppresses evidence which may be required at any legal proceeding is guilty of a breach of professional duty and should be disciplined for such action.[25] It has been suggested that the court relies on counsel to inform it of all the facts and that because of this reliance the court will not tolerate the deliberate withholding of facts,[26] nor will it permit an attorney to "bide his time and decide himself when the disclosure should be made."[27] However, while stating general principles, these decisions do not squarely confront the prob-

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[22]MODEL CODE OF EVIDENCE rule 210, Comment (1942).

[23]ABA CANONS OF PROFESSIONAL ETHICS No. 22.

[24]ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 131 (1935). In *Meek v. Fleming,* [1961] 2 Q.B. 366, where a police officer was sued for false imprisonment, the court held that the plaintiff was entitled to a new trial after defendant's counsel had concealed the fact that the defendant had been reduced in rank after he had tried to deceive the court in another case.

Both the bench and bar impose a strong duty upon those lawyers engaged in public prosecution not to conceal or suppress evidence which would aid the defendant in his defense. Canon 5 states that the prosecutor's primary duty is to justice rather than to conviction, and it has been suggested that the "suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." (Canon 5). Thus, where a public prosecutor suppressed evidence of the adulterous conduct of the defendant's wife on the night the defendant killed her, Alcorta v. Texas, 355 U.S. 28 (1957), or of the drunken state of a defendant charged with murder, United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955), courts have awarded new trials to the defendants.

[25]*In re* Williams, 221 Minn. 554, 23 N.W.2d 4 (1946).

[26]Harkin v. Brundage, 13 F.2d 617 (7th Cir. 1926), *rev'd on other grounds,* 276 U.S. 36 (1928).

[27]*In re* King, 7 Utah 2d 258, 322 P.2d 1095, 1098 (1958).

lem posed by *Ryder*. They imply that an attorney by fulfilling his obligation to respect his client's confidences and communications, could be guilty of suppressing evidence. However, the Committee on Professional Ethics, apparently in agreement with the *Model Code of Evidence*, has submitted in a long and well-reasoned opinion that the duty of candor and fairness imposed upon the lawyer by Canon 22 is "not sufficient to override the purpose, policy and express obligation" imposed by the canons supporting the attorney-client privilege.[28]

It is not clear whether Ryder's failure was the result of his violation of some special duty peculiar to attorneys or whether he simply violated the general prohibition imposed on every citizen against possession of stolen property and illegal shotguns. It has been argued that an attorney who invokes the attorney-client privilege with respect to incriminating evidence is in effect guilty of the crime of destroying evidence.[29] The federal district court was quick to point out in *Ryder* that Ryder's actions were illegal.[30] It would be a logical assumption that any other person who acted as Ryder did would clearly be guilty of a criminal offense. Ryder was not criminally prosecuted, however, but was charged with a violation of Canons 15 and 32. The court in *Ryder* did not confront the more difficult question of how far an attorney's ethics may properly depart from the ethical standards imposed upon a citizen not of the legal profession.[31] It has been held that the fact that it is an attorney and not an ordinary citizen who

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[28]ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953). The Committee referred specifically to Canon 37. There was a rare dissent to this opinion. Although the Committee did not discuss whether its opinion was inconsistent with prior opinions, the Committee rule is that subsequent decisions overrule prior opinions to the extent that a conflict exists.

The Committee has also suggested that an attorney may not agree to accept stolen goods from his client as a fee in an attempt to discover their location and disclose that information to the police. "It is not justifiable under any circumstances for a lawyer to double-cross a client who employs him." ABA COMM. ON PREFESSIONAL ETHICS, OPINIONS, Informal Opinion No. 12.

[29]The *Model Penal Code* states that it is a misdemeanor if anyone "conceals or removes any record, document or thing with purpose to impair its verity or availability in [an official] proceeding or investigation." MODEL PENAL CODE § 241.7 (Proposed Official Draft, 1962).

[30]263 F. Supp. at 369. While no distinction has yet been drawn between the lawyer's concealing evidence which is the fruit of the crime and that which is merely an instrumentality of the crime, such a distinction might be drawn in determining whether the lawyer himself was guilty of any crime.

[31]*See* Ritz, *Criminal Law and Procedure, Annual Survey of Virginia Law*, 53 VA. L. REV. 1584 (1967).

aids the client in concealing incriminating evidence in no way prevents the attorney from becoming an accessory.[32]

Ryder does not state what an attorney should do with evidence in his possession incriminating his client. Assuming that Ryder should have turned the evidence over to the court or the prosecutor, how should the evidence be introduced at the trial without infringing upon the client's privilege against self-incrimination? The Supreme Court of Washington, in *State ex rel. Sowers v. Olwell*,[33] has provided what is at present the only judicial attempt to reconcile the possible duty of the attorney to submit incriminating evidence to the prosecutor with the client's constitutional privilege against self-incrimination. The decision also makes an attempt to resolve the *Ryder* conflict between an attorney's duty to the court and the attorney-client privilege. Under this compromise solution the attorney within a reasonable time after receipt of the evidence is required to turn it over to the prosecutor. However, the prosecutor is not allowed to reveal the scource of the evidence to the jury, and to do so would be reversible error. The court observed that this procedure serves not only the public interest, by allowing the prosecution to use the evidence, but also the client's interest, by refusing to allow the prosecution to disclose the source of the evidence. Assuming that the attorney has a duty to submit incriminating evidence in his possession to the prosecution, the compromise solution in *Sowers* seems to be the only possible ethical alternative that the lawyer presently has in order both to preserve his client's confidences and to fulfill his assumed duty to the court.

The court's approach in *Ryder* to the difficult ethical dilemma imposed upon an attorney was essentially negative. The court gave no guidelines and did not tell an attorney what he should do with evidence incriminating his client. It seems that in deciding that what Ryder did was wrong, the court raised more questions than it answered.[34] The court's decision perhaps is buttressed by Ryder's taking an affirmative and also illegal act to conceal the evidence. Because of this, it is uncertain whether the same result would be reached by the

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[32]Clark v. State, 159 Tex. Crim. 187, 261 S.W.2d 339, 347 (1953). Of course, the attorney may be guilty of unprofessional and unethical conduct even if his actions do not constitute a crime. People *ex rel.* Colorado Bar Ass'n v. ....., Attorney at Law, 88 Colo. 325, 295 P. 917 (1931).

[33]64 Wash. 2d 828, 394 P.2d 681 (1964).

[34]For example, the court drew no distinction between evidence lost to the world and evidence that may be found with diligence by the police. It might be argued that it is less culpable for an attorney to advise a client not to reveal incriminating evidence than it is for him to advise the client to destroy the evidence.

court if the attorney had been passive or if, instead of stolen money and a sawed-off shotgun which is itself illegal, the incriminating evidence had consisted of a conventional weapon that had been used for murder. Until the courts supply a definite solution to the attorney's dilemma or at least a delineation of the outer bounds to which he can go on behalf of his client, the problem will remain one of the most difficult facing an attorney.

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