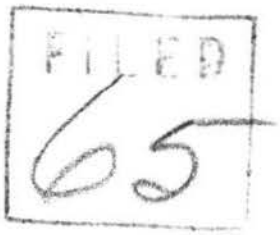
CHILDREN: A lawyer may perform all of the necessary legal
PLACEMENT: services involved in the transfer of the custody
LAWYERS: of a child and not be in violation of Section 210.211,RSMo 1949; it is the further opinion of this department that such a lawyer is not in violation of the above section even though he had knowledge that placement had been made by a person not authorized to do so.



January 31, 1957

Honorable Samuel B. Murphy
Representative, Ninth District St. Louis County
300 Gill Avenue
Kirkwood 22, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I refer to the opinion given by you under date of May 29, 1956 to the Hon. Proctor N. Carter, Director of Welfare, with reference to the placement of children by unlicensed persons in violation of Section 210.211 R.S.Mo. Cum. Supp.1955. In that opinion you hold that any unlicensed person, including a doctor, lawyer or nurse, who assists in placing even one child in a home or institution, is in violation of this law and is subject to prosecution under Section 210.245 of the same Act.

"This opinion has caused considerable concern to the legal profession, as a whole, since it is not clear as to what is meant by the words 'who assists in placing' a child.

"Specifically, I would like your answer to the following questions:

"1) Is a lawyer who performs professional legal services in preparing the papers for the transfer of custody of a child from the natural parent or parents to another individual and who files such papers in

> the Juvenile Court and obtains the order for transfer of custody, in violation of Section 210.211, if -
>
> "a) He did not participate in any way in the actual placement of the child and had no knowledge at the time that he performed such legal services that such child had been placed by an unlicensed person; or
>
> "b) He did not participate in the actual placement of the child but did have knowledge that such child had been placed by an unlicensed person.
>
> "2) Is a lawyer who performs professional legal services in preparing the papers for the adoption of a child and who files such papers in the Juvenile Court and obtains a decree of adoption, in violation of Section 210.211, if -
>
> "a) He did not participate in the actual original placement of the child but at the time of the performance of such legal services did have knowledge that such original placement had been made by an unlicensed person."

We direct your attention to the case of Goodman v. District of Columbia, 50 Atl.2d 812. The facts in that case are thus stated in the opinion (l.c. 812, 813):

> "Appellant was associated as counsel for a woman who was separated from her husband and who was being sued for divorce in Rhode Island on the ground of adultery. She was eager

that the divorce be granted and so she was advised to let the case go by default. At their first conference she revealed that she was pregnant by a man other than her husband, and asked appellant to find someone who would provide a good home for her child when born, and adopt it. He advised her to go to a welfare agency or to a certain infants' home of her religious denomination. She rejected this advice because she had herself been in an orphanage and did not wish her child brought up in such an institution; she insisted on having it placed in a private home.

"Appellant told her that if he heard of any suitable potential foster parents he would let her know. She phoned him persistently at his home and office several times a week to inquire if he knew of anyone who would take her child. Finally when she called him about two months before the child was born he told her that he had learned of a couple interested in adopting the child, and he would have them contact her; she told him she preferred to remain anonymous and did not want to know the names of the prospective parents. Thereupon, as the transcript recites, appellant 'offered to talk to the prospective adopters, report to her, and to otherwise conclude the matter for her so that the parties would not have to meet face to face.' And so it was agreed that appellant should come to the hospital after the confinement and arrange for the transfer of the

child. The mother had in the meantime instructed the hospital to permit the couple to see the child. The couple had through their own physician obtained from the mother's physician a satisfactory report as to her physical condition. After the child was born appellant took a release agreement to the hospital which he read to the mother in the presence of two of her friends and which she willingly signed. When she was ready to leave the hospital, appellant went there, took the child from her, and physically delivered it to the adopting father who was waiting at the front door of the hospital, while the mother left by a side door. The couple later adopted the child through court proceedings in Maryland.

"Appellant charged the mother nothing in the divorce case and refused to accept any fee for his services in connection with placing the child for adoption. He did, however, accept about one-third of $294.90, which he had collected from the adopting couple to cover the mother's medical expenses.

"The mother later changed her mind and sought appellant's services in regaining custody of the child. He refused, saying that he 'could not accept such an assignment in good conscience and that the child had probably been adopted.' Not long afterwards a complaint was filed against appellant with the Board of Public Welfare on the ground that he had no license to place children for adoption. Such complaint resulted in the prosecution and conviction which are here under review."

The acts for which the appellant was prosecuted are set forth in the opinion (lc. 813):

> " 'Any person, firm, corporation, association, or public agency that receives or accepts a child under sixteen years of age and places or offers to place such child for temporary or permanent care in a family home other than that of a relative within the third degree shall be deemed to be maintaining a child-placing agency.' Code 1940, § 32 - 782.
>
> and followed it with this later provision:
>
> " 'No person other than the parent, guardian, or relative within the third degree, and no firm, corporation, association, or agency, other than a licensed child-placing agency, may place or arrange or assist in placing or arranging for the placement of a child under sixteen years of age in a family home or for adoption.' Code 1940, § 32 - 785."

The court declared the law to be thus (l.c. 814):

> "What the appellant did is very clear. He 'arranged' and 'assisted' in placing and personally consummated the placement of the child. He was the intermediary who produced the prospective adopters and arranged contact (indirect though it was) with the mother. He it was who presented to the mother the document for release of her child and obtained her signature. He it was who arranged for the presence of the adopting parents at the hospital. And he it was who performed the final act

of placement by accepting the child from the arms of its mother and physically handing it over to the adopting father. It would be difficult to imagine a more clear-cut infraction of the letter as well as the spirit of the law.

"That appellant did these things without compensation, that he was animated by the most humane motives, that he was perhaps imposed upon by the mother or yielded in sheer pity to her cries of distress - all this we may concede. And all this appeals to our sympathy for him; but it cannot justify us in holding that his acts were within the law.

"If appellant were proceeding on the assumption that he, as a lawyer, had a right to place the child for adoption, though he was unlicensed for that purpose, he was mistaken. We look in vain for any token of intention within the statute that the placing of babies by lawyers should be in any different or forgiven status than such placing by citizens in any other class. No court has said that such statutes do not apply to lawyers. No scrutiny of the sections involved can yield up such an exemption by mere process of judicial construction. If it could, the courts might just as properly create a whole series of exemptions; and before long the process of erosion by judicial construction would be complete and the Act ineffective.

"We are told that if defendant is not

> absolved, no lawyer can feel safe when he is called on to advise or act in an adoption case. Even if that were so we could not help it; we would have to apply the statute as it is written. But we think the careful lawyer will have little trouble in determining what he may lawfully do in such situations. We think even a cursory reading of the statute will tell him how far he may go and where he must stop.
>
> "We think it plain that so long as the lawyer gives only legal advice; so long as he appears in court in adoption proceedings, representing either relinquishing or adopting parents; so long as he refrains from serving as intermediary, go-between, or placing agent; so long as he leaves or refers the placement of children and the arrangements for their placement to agencies duly licensed, he is within his rights under the statute. If that were all this appellant had done his conviction could not stand. It is plain he has done much more. Blameless though he is by ordinary standards of professional ethics, he has run afoul a statute which declares his actions malum prohibitum."

In view of the above we believe that the answer to your first question (1(a)) is clearly in the negative, that is to say, that the lawyer would not be in violation of Section 210.211, RSMo 1949, for doing the things which are set forth in the above question.

And now as to your second question (1(b)). We do not believe that in the fact situation which you set forth that the lawyer could be an accessory after the fact or an ac-

complice to the misdemeanor to another and unauthorized person placing a child. Therefore, the lawyer is a principal in the misdemeanor or he is nothing. We must, therefore, seek to find what constitutes a "principal" in a misdemeanor.

The case of Pendley v. State, 158 S.W. 811, holds that "In order to be a principal accused must be connected with the original taking and if he was not present at the time of the theft, but advised it, and the hogs were taken pursuant to his advice, he would be an accomplice."

In the case of Melton v. State, 58 S.W. 2d 103, the court holds that the prime distinction between a principal and an accomplice is that the law requires a principal to be present at the commission of the offense.

In the case of People v. Armstrong, 114 N.Y. 2d 871,the court held that "One who acts with another at one and the same time in pursuance of a common design . . . . is a principal."

In the case of McQuire v. State, 60 S.E. 2d 526, the court held that "All who aid and abet in the commission of a misdemeanor, as well as those who immediately perpetrate it are principals."

In the case of Commonwealth v. Giacobbe, 19 Atl. 2d 71,at l.c. 75, the court held:

> "It is true, as defendant asserts, that mere knowledge of the perpetration of a crime does not involve responsibility for its commission, nor does silence following such knowledge make one an accomplice or an accessory after the fact. Commonwealth v. Loomis, 267 Pa. 438, 444, 110 A. 257, 258, 259; Commonwealth v. Mazarella, 279 Pa. 465, 472, 124 A. 163,165; Commonwealth v. Guild, 111 Pa.Super, 349, 352, 353, 170 A. 699, 700."

In the case of State v. Potter, 19 S.E. 2d 257, the court held that to be an accessory after the fact one need only aid criminal to escape arrest and prosecution, but one merely failing to give information as to the crime which he knows has been committed does not make him a principal.

The case of State v. Naughton, 120 S.W. 53, holds that an accessory after the fact is one who, knowing that a felony has been committed, assists the felon.

In view of the above it would seem clear to us that in a misdemeanor case such as the one under consideration that the attorney who has knowledge that the child has been placed by an unauthorized person and who simply does the legal work necessary to bring about the adoption could not, by any stretch of the imagination, be held to be a principal to the misdemeanor.

We might point out, furthermore, that in these cases the lawyer represents not the person who placed the child but who was not authorized to do so, but that he represents the adopting parents.

Although, as we have stated above, we do not believe that a lawyer who simply does the legal work necessary to effect an adoption in a case where he knows the child to have been placed by an unauthorized person could be prosecuted as a principal to a misdemeanor, we do believe that a case of legal ethics might well be involved, and for a lawyer to do this would be acting in a manner not wholly compatible with the high standards of the legal profession.

We feel that your question (2(a)) is answered by our answer above.

CONCLUSION

It is the opinion of this department that a lawyer

Honorable Samuel B. Murphy

may perform all of the necessary legal services involved in the transfer of the custody of a child and not be in violation of Section 210.211, RSMo 1949; it is the further opinion of this department that such a lawyer is not in violation of the above section even though he had knowledge that placement had been made by a person not authorized to do so.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton
Attorney General

HPW:lc