

60**DUTY WITH RESPECT TO CLIENT'S
INCRIMINATING PHYSICAL EVIDENCE**

Adopted July 24, 1982.

Syllabus

A lawyer has an affirmative duty to surrender incriminating physical evidence in his possession. Upon surrender of the evidence, the lawyer must not reveal the identity of the client and confidential communications of the client. When a lawyer observes incriminating evidence as a result of his representation of the client and does not alter or disturb the evidence, he must not disclose these observations to authorities.

Facts

This Opinion is designed to set out ethical guidelines for lawyers when faced with situations linking their clients to incriminating physical evidence. This Opinion is limited to these specific patterns:

1. The client charged with murder under felony murder theory, where the felony is aggravated robbery, shows his lawyer the gun used in the crime and asks him to hold it for him.
2. The wife of a client charged with felony murder brings a gun to the lawyer's office and tells the lawyer that her husband, the client, told her to ask the lawyer to hold the gun for him.
3. The best friend of a client charged with felony murder brings a gun to the lawyer stating that before the client was jailed, the client left the gun with him, stating he had just used it in a stick-up. The friend says he feels guilty holding the gun and gives it to the lawyer.
4. The robbery for which the client is being investigated, felony murder, involved the taking of 50 unmarked \$100 bills. The client retains the lawyer with 25 unmarked \$100 bills. The lawyer, aware of the denominations taken in the robbery, asks his client whether the retainer came from the robbery. The client grins and says, "What do you think?"
5. The client, a suspect in a robbery-homicide, before his surrender takes the lawyer to the area where the getaway car and the body of the victim are located.
6. In the situation described in paragraph 5, the lawyer directs his investigator to scrape a sample of material from the deceased's fingernails in order to determine whether the sample contains the defendant's flesh and could possibly be a fact supportive of the defense of self-defense.

Discussion

These fact patterns illustrate the conflict between the lawyer's duty of loyalty to the client and his duty of disclosure to the authorities as an officer of the court. The duty of client loyalty in this context emanates from a mixture of ethical duties requiring the lawyer to preserve his client's confidences and secrets, to represent his client zealously in the statutory attorney-client privilege. C.R.S. 1973, § 13-90-107(b). The purpose of this privilege is "to secure the orderly administration of justice by insuring candid and open discussions by the client to the attorney without fear of disclosure." *Losavio v. District Court*, 188 Colo. 127, 533 P.2d 32, 34 (1975).

The Code of Professional Responsibility ("Code") requires the lawyer *not* to "reveal a confidence or secret of his client," DR 4-101(B)(1) and *not* to "[u]se a confidence or secret of his client to the disadvantage of the client," DR 4-101(B)(2). "'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A).

A lawyer has a duty not to prejudice or damage his client during the course of the professional relationship except when the client commits an unprivileged fraud upon a tribunal. *See*, DR 7-101(A)(3) and DR 7-102(B)(1). EC 4-4 and EC 4-5 state that this duty of client loyalty is broader than the statutory

attorney-client privilege and direct the lawyer not to reveal information detrimental to the client in the absence of full client consent. *See also*, ABA Commission on Professional Ethics, Opinion No. 341 (1975).

The lawyer must reveal fraud perpetrated by the client upon a tribunal provided that the fraudulent information is not protected by the attorney-client privilege. DR 7-102(B)(1). The duty of disclosure arises only when the unprivileged client conduct involves affirmative misrepresentations made to a tribunal and does not extend to harmful material facts which are not revealed. *See*, ABA Commission on Professional Ethics, Opinion No. 314 (1965) (attorney in practice before IRS is under no duty to disclose weaknesses of client's case) and Opinion No. 287 (1953) (attorney has no duty to disclose client's admission of perjury in divorce proceedings and attorney has no need to correct erroneous information concerning defendant's past criminal record at the client's sentencing).

Lawyers may disclose client confidences and secrets "when permitted under Disciplinary Rules or required by law or court order," DR 4-101(C)(2) and when the secrets involve "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." DR 4-101(C)(3). The Code commands that a lawyer not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal." DR 7-102(A)(3). EC 7-27 requires that a lawyer "not suppress evidence that he or his client has a legal obligation to reveal or produce." Colorado makes conduct criminal if anyone, including a lawyer, "renders assistance" by helping a person "conceal, destroy or alter any physical evidence that might aid in the . . . prosecution . . . of such person." C.R.S. 1973, § 18-8-105(2)(e). Any person, including a lawyer, who "[d]estroys, . . . conceals, removes, or alters physical evidence with intent to impair its verity or availability in the pending or prospective official proceeding . . ." commits the felony of tampering with physical evidence. C.R.S. 1973, § 18-8-610.

The Code does not resolve the conflict of which duty, loyalty or disclosure prevails in a given situation. A method for solving this irreconcilable conflict may be found in one of the overriding principles of the Code which prohibits a lawyer from engaging in illegal conduct or from assisting his client in conduct known to be illegal. DR 7-102(A)(7) and (8). When a lawyer acts illegally he also acts unethically. By looking at the case law which requires disclosure depending upon the circumstances, the lawyer's ethical dilemma may be resolved.

One principle emerges clearly from the case law: When the lawyer takes physical possession of incriminating evidence, he has an affirmative duty to give the incriminating evidence to the proper authorities. *People v. Meredith*, 631 P.2d 46, 175 Cal. Rptr. 612 (Cal. 1981) (defense investigator removed victim's wallet from trash can as a result of client communication; *held*, prosecution entitled to be shown location of wallet which was crucial to homicide prosecution); *State v. Olwell*, 394 P.2d 681, 64 Wash.2d 828 (1964) (counsel required to produce knife obtained from client over objection of attorney-client privilege).

If the incriminating evidence is removed from its location with the assistance of the attorney, then the details of where the physical item was found, the original condition of the item and any defense testing of the item are provable by the prosecution at the trial and must be disclosed regardless of the lawyer's duty of loyalty to the client and the attorney-client privilege. *See, People v. Meredith, supra* and *State v. Olwell, supra*. If the lawyer, acting in good faith, alters the crime scene by taking or disturbing in any way a physical item, the right of the prosecution to discover evidence of crime is hindered and the public interest in prosecution prevails over the lawyer's duty of loyalty and the attorney-client privilege. In these situations, however, the client's communication to the lawyer and the lawyer's observations made as a consequence of protected communications are protected from disclosure except for the narrow area previously discussed.

Implicit in the reasoning of these decisions is the duty of the lawyer to preserve the evidence in the same form as it was found once he removes it. The prosecution will be deprived of the opportunity to discover the evidence if the lawyer destroys its tell-tale markings or wipes the object free from fingerprints.

When the lawyer receives incriminating evidence from his client or an agent of his client, he must voluntarily turn it over to authorities. In these situations, the identity of the client and the communication with the client must not be disclosed. *People v. Meredith, supra*, at 52, notes 4 and 5; *State v. Ohwell, supra*, at 684-685. When the incriminating evidence is obtained through means independent of any client communication (i.e., through third parties) there is no attorney-client privilege and the attorney must turn over the item and may be compelled to testify as to the source of the evidence. *Morrell v. State*, 575 P.2d 1200 (Alaska, 1978) (kidnapping plan in defendant's handwriting properly turned over to authorities and lawyer required to answer source questions); *People v. Lee*, 3 Cal.App.3d 514, 83 Cal. Rptr. 715 (1970) (lawyer had no right to withhold shoes of client given by wife independently to lawyer). In these situations, the duty of client loyalty gives way to the need of the public to prosecute criminals and the duty of the attorney as an officer of the court.

The lawyer's duty of disclosure does not extend to situations which involve the observation of incriminating evidence as the result of a lawyer-client representation or communication. Disclosure by the lawyer without the client's consent may subject the lawyer to disciplinary action. In *People v. Belge*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), the lawyer was indicted for failure to disclose the existence and location of a body he found as the result of a client communication. The indictment was dismissed because the attorney-client privilege prohibited disclosure. See also, *State v. Douglass*, 20 W.Va. 770 (1882), where the court held that lawyer's observations of the location of his client's pistol were protected by the attorney-client privilege. N.Y. Ethics Op. 479 (1978). In *Belge, supra*, photographs of the body taken by the lawyer were also protected and not subject to voluntary disclosure. It is only when the lawyer takes possession of incriminating physical evidence from its present location that the duty of voluntary disclosure arises.

Independent of an existing duty requiring a lawyer to turn over incriminating evidence, a lawyer may not accept as a fee payment in goods or items which he has reason to suspect have been stolen. *People v. Zelinger*, 179 Colo. 379, 504 P.2d 668 (1972). If the lawyer wrongfully retains funds suspected of being stolen, he will be forced to surrender the funds and may be forced to testify about their source. *In re January 1976 Grand Jury*, 534 F.2d 719 (7th Cir. 1976); *In re Michaelson*, 511 F.2d 882 (9th Cir. 1975), *cert. denied*, 421 U.S. 978 (1975).

Opinion

A. Fact Situations 1, 2 & 3

In each of these fact situations, possession by the lawyer of the incriminating evidence¹ requires voluntary disclosure to the authorities regardless of client consent. A lawyer may not hold incriminating evidence for a client because disclosure of the client's secret, the gun, is required by law and withholding it would be illegal.

In the first two fact situations, the lawyer obtained the gun through protected client communications. Therefore, he must turn over the gun to the authorities, but protect his client's identity and not reveal statements made by his client or his agent, his wife, about the gun. In the third situation, the lawyer received the gun from a third party and may be compelled to answer questions about the circumstances leading to his possession of the gun, even though he owes a duty of loyalty to his client not to use information gained in a professional capacity to his client's detriment.

In situations when the client intends to give possession of incriminating evidence to the lawyer, the lawyer has an ethical duty to inform the client that the lawyer is obligated to surrender the evidence to the authorities. If the client decides not to give the evidence to the lawyer, the lawyer's response should be to advise the client to permit the lawyer to surrender the evidence or, if the evidence is not on the person of the client, to leave the evidence where it is and urge the client to inform the authorities as to its location. ABA Informal Ethics Opinions, Nos. 778, 1057. Advice from the lawyer which might be construed by the client that the evidence should be destroyed is unethical and might constitute criminal conduct. See, *Clark v. State*, 261 S.W.2d 339 (Tex. 1953), *cert. denied*, 346 U.S. 855 (1953) (attorney unethically

advised client to destroy murder weapon). If the evidence is not under the personal control of the client, informing the client to leave the evidence where it is an ethically permissible alternative based upon the lawyer's duty not to "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(7). *Cf., People v. Schultheis*, 638 P.2d 8 (1981) (Justice Erickson's discussion of the lawyer's responsibility not to commit an illegal or deceitful act).

B. Fact Situation 4

If the lawyer accepts the 25 unmarked bills, he must voluntarily give this evidence to the authorities under the principles previously discussed. Independent of this duty to disclose, the lawyer may not accept as a fee payment in goods or items suspected of being contraband.

C. Fact Situations 5 and 6

As stated in the cases discussed earlier, the lawyer has a duty *not* to reveal incriminating evidence which he observes as a result of a client's communication. He may not tell the authorities the location of the getaway car or the body of the victim. Observations made and information obtained by the lawyer as a consequence of client communication may not be revealed because of the lawyer's duty of confidentiality. This duty to protect the client does not extend however to the evidence itself. Client information about incriminating evidence is protected, but the evidence itself is not if it is possessed or disturbed by the lawyer or his agent.

The defense attorney's testing of the scrapings of the deceased's fingernails must be voluntarily revealed to the prosecution. The scraping constitutes an alteration of physical evidence which deprives the prosecution of the opportunity to discover the evidence in the same way in which the defense lawyer initially found it. Under the holdings of both *People v. Meredith, supra*, and *State v. Olwell, supra*, the lawyer must reveal the facts of the removal and any test results to the prosecution. It is important to stress that the defense lawyer who does take possession of physical evidence for scientific testing is acting ethically. He is attempting to establish his client's innocence. He must, however, make a tactical decision before testing because voluntary disclosure is required once the attorney or his agent removes evidence from its location.

NOTE

1. The words "incriminating evidence" as used in this Opinion include evidence which is contraband.