

L.E.O. 2015-03

**THE AMENDED RULES OF PROFESSIONAL CONDUCT
AND THEIR EFFECT ON L.E.I. 98-02**

INTRODUCTION

The West Virginia Rules of Professional Conduct were amended on January 1, 2015. The Rules of Professional Conduct that were applicable in L.E.I. 98-02¹ were Rules 1.2(d), 1.6, 3.4(a), 3.4(b), 3.4(c), 3.4(f), 8.4(b), 8.4(c), and 8.4(d). Out of this list of rules, the only the rule with a change in its language was Rule 1.6. Rule 1.6 was expanded to provide more examples of when disclosures are allowed regarding client confidential information.² While

¹ L.E.I. 98-02 “When Lawyers Know About and/or Come Into Possession of Fruits or Instrumentalities of a Crime” is attached to this L.E.O. as an appendix.

² Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, disclosures is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
- (4) to secure legal advice, or informal ethics advice from the Office of Disciplinary Counsel, about the lawyer’s compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client; or
- (6) to comply with other law or a court order; or

(continued...)

the language in Rule 3.4 did not change, the additional comment that was added to the rule is noteworthy.

The comment to Rule 3.4 of the Amended West Virginia Rules of Profession Conduct states that if a lawyer takes possession of evidence, “applicable law” may require the lawyer to turn the evidence over to police or the prosecutor. A lawyer should be careful in the advice which he or she provides to clients and should review the “applicable law,” state or federal, which addresses these issues. This review would include whether possession of the evidence would be in violation of statutes dealing with obstruction of justice, tampering with evidence or any other offense related to the alteration, concealment or destruction of evidence. Defense lawyers, or even their investigators, may be required to turn over evidence, even without a court order or subpoena, if they take physical possession of an item of physical evidence.

State v. Carney, 222 W.Va. 152, 663 S.E.2d 606 (2008), is one West Virginia case where an investigator, working for an attorney in a murder investigation, was charged with, and convicted of, obstruction of justice after the investigator had removed several items of evidence from a residence and turned that evidence over to the attorney. The attorney

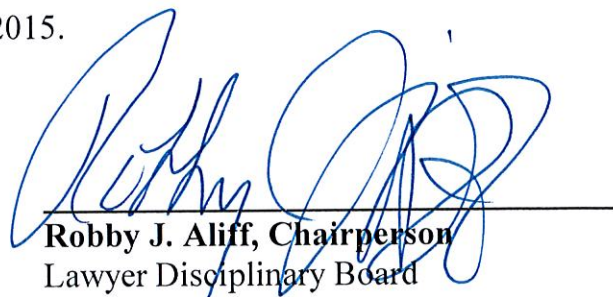
²(...continued)

- (7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

subsequently turned the evidence over to the United States Attorney. In reversing the investigator's conviction, the Supreme Court of Appeals of West Virginia, held that "... the removal of the items in issue, which were obtained through lawful entry and then provided to the authorities, does not constitute evidence sufficient to sustain a conviction for obstruction under West Virginia Code § 61-5-17(a)." *Id.* at 159, 613. This case certainly suggests that evidence obtained unlawfully and/or held by an attorney or investigator and not turned over to authorities, may very well be grounds sufficient to sustain a conviction for obstruction of justice. Because there is a risk in a lawyers having to turn over evidence to authorities, lawyers should consult with the client before taking possession of evidence and clearly inform the client that it is a crime to alter, conceal or destroy evidence.

This Legal Ethics Opinion fully adopts L.E.I. 98-02. This opinion also provides additional guidance to help attorneys in following the amended Rules of Professional Conduct. Again, there is no right or wrong answer for each factual situation that can arise in different cases. "Applicable law" needs to be reviewed prior to anyone taking temporary possession of physical evidence of client crimes.

APPROVED by the Lawyer Disciplinary Board on the 18th day of September, 2015, and **ENTERED** this 22nd day of September, 2015.



Robby J. Aliff, Chairperson
Lawyer Disciplinary Board