

L.E.I. 98-02
WHEN LAWYERS KNOW ABOUT AND/OR COME INTO POSSESSION OF
FRUITS OR INSTRUMENTALITIES OF A CRIME

INTRODUCTION

The Office of Disciplinary Counsel periodically receives inquiries from criminal defense attorneys who know about or have come into possession of the fruits or instrumentalities of a crime, and the attorney has been retained to defend a client on that crime. By way of definition, fruits or instrumentalities of a crime are items having potential evidentiary value -- "fruits" of the crime, for example, could include such things as stolen money or other stolen items, while the "instrumentalities" of the crime could include weapons or blood stained clothing. An attorney who finds himself in this situation must recognize that the answer involves a resolution of two competing important public policies: the policy supporting the attorney-client privilege and the policy which prohibits an attorney from engaging in the obstruction of justice.

The purpose of this formal opinion is not to provide a black letter rule, but rather to provide lawyers with the ethical and legal principles to be considered in these situations. Courts have defined the outside parameters on how a lawyer should act, but there nonetheless remains a difficult area in between, where how a lawyer should act will turn on the individual circumstances of the case.

DISCUSSION

West Virginia Rules of Professional Conduct

The applicable West Virginia Rules of Professional Conduct include, but depending

on the circumstances may not necessarily be limited to, Rules 1.2(d), 1.6, 3.4(a), 3.4(b), 3.4(c), 3.4(f), and 8.4(b), 8.4(c), and 8.4(d). Rule 1.2(d)¹ prohibits a lawyer from counseling a client to engage, or assisting a client to engage, in conduct that the lawyer knows to be criminal or fraudulent.

Rule 1.6² implements the duties of loyalty and confidentiality by prohibiting a lawyer from revealing information relating to representation of a client except to prevent the client from committing a criminal act or to establish a claim or defense on behalf of the lawyer. However, neither the attorney-client privilege, nor the lawyer's office, safety deposit box or trust account can be used to shield potential evidence of a crime from law enforcement officers investigating a case.

¹Rule 1.2. Scope of representation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application for the law.

²Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act; or
- (2) 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.

Similarly, Rule 3.4³ prohibits a lawyer from unlawfully obstructing another party's access to evidence, unlawfully altering, destroying, or concealing potential evidence, from falsifying evidence, and from counseling or assisting a witness to testify falsely, etc. Also, Rule 8.4⁴ addresses the commission of crimes by a lawyer, as well as a lawyer's engaging in dishonest, fraudulent, deceitful or misrepresentative conduct. Rule 8.4⁵ further makes it professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. These rules would be implicated if a lawyer assists her client or a witness in concealing or disposing of evidence.

³Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence unlawfully alter, destroy or conceal a document or other a material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; . . .
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another part. . . .

⁴Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . .

⁵Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

- (d) engage in conduct that is prejudicial to the administration of justice. . . .

CASES AND ETHICS OPINIONS FROM OTHER JURISDICTIONS

Pursuant to the Rules of Professional Conduct cited above a lawyer may not conceal, destroy, or unlawfully alter fruits or instrumentalities of a crime. Further, a lawyer may not hold potential evidence in a manner which would hamper law enforcement's ability to locate the potential evidence. In an appeal from the District Court for the Eastern District of Virginia, the Fourth Circuit Court of Appeals held that "[i]t is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime." In re Ryder, 381 F.2d 713, 714 (4th Cir. 1967). The Fourth Circuit noted that when a lawyer took possession of stolen money and a weapon used in an armed robbery, with the intent to retain these items pending the end of trial, then the lawyer "made himself an active participant in a criminal act, ostensibly wearing the mantle of the loyal advocate, but in reality serving as accessory after the fact." *Id.* In Ryder, the Fourth Circuit upheld the District's Court's suspension of the lawyer from practicing before that court for 18 months.

Out-of-state courts have recognized that *information* a client communicates to his lawyer about the fruits or instrumentalities of a crime is protected by the attorney-client privilege, but that the actual *items* themselves are not protected. In other words, the physical object itself does not become privileged merely by reason of its conveyance to the attorney. People v. Superior Court (Fairbank), 192 Cal. App.3d 32, 34, 237 Cal. Rptr. 158, 159-160 (1987); State v. Olwell, 64 Wn.2d 828, 394 P.2d 681, 684-685 (1964); Commonwealth v. Stenhach, 514 A.2d 114 (Pa Super.Ct. 1986); In re Ryder, 263 F. Supp. 360 (DC E.Va. 1967). *Cf.* Fisher v. United States, 425 U.S. 391 (1976). For example, a

client can tell his lawyer about the gun used in a crime, and this communication is privileged. However, the client cannot give the lawyer the gun and expect the gun to be safeguarded from the authorities.

If the client informs the lawyer of the location of potential evidence, courts have held that the lawyer may go to that location and view the evidence -- and his observations are privileged. However, if the lawyer removes the potential evidence or alters the potential evidence, whether to examine and test it or for whatever reason, then the original location and condition of the evidence will likely lose the protection of the attorney-client privilege. See, People v. Meredith, 175 Cal.Rptr. 612, 631 P.2d 46 (1981) (holding that communication from defendant to lawyer about location of victim's wallet was protected by attorney-client privilege; however, when attorney retrieved the wallet, attorney-client privilege was not a bar to requiring the lawyer to testify about the original location and condition of wallet); People v. Belge, 372 N.Y.S.2d 798 (1975) (defendant told his lawyer the location of murder victim, lawyer went to location and inspected body but left it as he found it, lawyer was not required to report location to authorities). *But cf.* Rubin v. State, 602 A.2d 677 (Md.Ct. App. 1992) (Court distinguished Meredith).

The attorney-client privilege does not apply to communications with *non-client* witnesses and third parties. However, Rule 1.6 of the Rules of Professional Conduct, which makes confidential any information learned relating to the representation, does protect such information. Again, as with the attorney-client privilege, a lawyer may not retain, conceal or unlawfully alter the fruits or instrumentalities of a crime in the name of Rule 1.6 confidentiality.

A particularly difficult question is what should the lawyer do when he comes into possession of possible fruits or instrumentalities of the crime. As a starting point, the Board recommends that lawyers review both the West Virginia Rules of Professional Conduct and relevant cases and opinions from other jurisdictions. With regard to cases and opinions from other jurisdictions, two helpful research resources are the *ABA/BNA Lawyers' Manual on Professional Conduct*, 55:312 - 55:314, 61:704-61:705, 61:712-61:713; and Hazard and Hode's *The Law of Lawyering*, 2.6: 401-402, 1.6:106, 3.4:204.

A non-exhaustive list of out-of-state cases in this area includes: Commonwealth v. Stenhach, 365 Pa.Super. 5, 514 A.2d 114 (1986); People v. Superior Court (Fairbank), 192 Cal.App. 3d 32, 237 Cal.Rptr. 158 (1987); Commonwealth v. Ferri, 599 A.2d 208 (Pa.Super. 1991); People v. Meredith, 175 Cal.Rptr. 612, 631 P.2d 46 (1981); In re Ryder, 381 F.2d 713 (4th Cir. 1967); Rubin v. Maryland, 325 Md. 552, 602 A.2d 677 (1992); People v. Lee, 3 Cal.App.3d 514, 83 Cal.Rptr. 715 (1970); Clutchette v. Rushen, 770 F.2d 1469 (9th Cir. 1985); Hitch v. Pima County Superior Court, 146 Ariz. 588, 708 P.2d 72 (1985); Anderson v. State, 297 So.2d 871 (Fla. 1974); State v. Olwell, 394 P.2d 681 (Wn. 1964); Morrell v. Alaska, 575 P.2d 1200 (Alaska 1978); Kansas v. Carlin, 640 P.2d 324 (Ka. 1982); Michigan v. Nash, 418 Mich. 196, 341 N.W.2d 439 (1981); People v. Sanchez, 24 Cal. App. 4th 1012, 30 Cal. Rptr. 2d 111 (1994); United States v. Rhea, 29 M.J. 991 (1990).

Additionally, the lawyer disciplinary authorities from other states have issued both formal and informal opinions in this area, including: Virginia LEO # 551 "Duty to Reveal Fruits/Instrumentalities of a Crime," Nov. 23, 1983; Maryland Ethics Docket 90-24, Mar. 23,

1990; North Carolina RPC 221 "Receipt of Evidence of Crime by Lawyer for Defendant," Oct. 20, 1995; Nevada Formal Opinion No. 10, June 3, 1988; California Formal Opinion No. 1984-76, Mar. 23, 1984; Oregon Formal Opinion No. 1991-105 "Attorney-Client Privilege: Receipt of Property Stolen by Client or Other 'Fruits' of Crime," July 1991; Oregon Opinion No. 499 "Attorney-Client Privilege -- Receipt of Client's Stolen Property or Other 'Fruits' of a Crime by an Attorney," June 1984; Illinois Opinion No. 88-13 "Lawyer's Duty as to Nonprivileged Information Incriminating to Client; Lawyer's Duty With Respect to Possession of Physical Evidence Incriminating to His Client," May 10, 1989.

When considering this issue, Courts have attempted to balance the attorney-client privilege and the client's right against self-incrimination with the court's interest in truth-seeking. One Court has said:

A criminal defense attorney in possession of physical evidence incriminating his client may, after reasonable time for examination, return it to its source if he can do so without hindering the apprehension, prosecution, conviction or punishment of another and without altering, destroying or concealing it or impairing its verity or availability in any pending or eminent investigation or proceeding. Otherwise he must deliver it to the prosecution on his own motion.

Stenhach, 514 A.2d at 123. This holding is consistent with some opinions from the disciplinary authorities, including North Carolina.

Other cases, however, suggest that the lawyer has an obligation to turn over the possible fruits or instrumentalities to authorities. The Washington high court said:

It follows that the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution.

Olwell, 394 P.2d at 685.

Furthermore, when interpreting Meredith, the California Supreme Court of Appeals

said:

Meredith means what it says. The defense decision to remove or alter evidence is a tactical choice. If counsel or an agent of counsel chooses to remove, possess, or alter physical evidence pertaining to the crime, counsel must immediately inform the court of the action. The court, exercising care to shield privileged communications and defense strategies from prosecution view, must then take appropriate action to ensure that the prosecution has timely access to physical evidence possessed by the defense and timely information about alteration of any evidence.

People v. Superior Court (Fairbank), 192 Cal.App.3d at 39-40.

In recognizing a duty to turn physical evidence of a crime over to authorities, the State Bar of California notes that prior to taking possession of such evidence, the defense attorney should inform the client of the attorney's ethical obligations, and also "should seriously question the consequences of his taking possession of the evidence at all." Formal Op. 1984-76 Digest.

When making the decision on how to handle fruits or instrumentalities of the crime -- including whether to accept the item to begin with -- lawyers should consider that if they come into possession of possible fruits or instrumentalities of the crime, then they could be made to testify as to the authenticity and chain of custody of these items. Ferri, *Id.* (privilege does not preclude lawyer's testimony limited to chain of custody and authentication of clothes which had been delivered to lawyer). Police officers have also been able to obtain search warrants for lawyer's offices. See, Rubin, *Id.* Such testimony could disqualify the lawyer from handling the case, and at the very least, under Rule 3.7 of the West Virginia Rules of Professional Conduct the lawyer would be prohibited from

acting as the advocate at trial. A stipulation as to the authenticity of the item may eliminate the need for the lawyer to testify, and thus allow the lawyer to continue representing the client. Ferri, Id.

If defense counsel obtains possession of possible fruits or instrumentalities of the crime from his client, or based upon information from his or her client, then courts have implemented safeguards to protect the defendant's attorney-client privilege. For example, if defense counsel stipulates to the chain of custody of the evidence, then the prosecution could be prohibited from telling the jury how the evidence was obtained. People v. Superior Court, Id.; Ferri, Id.; Stenhach, Id. For example in Meredith a defense lawyer who, based on information from the client, had an item of evidence retrieved from its location was required to testify at trial about the location and condition of evidence. *Id.* However, the lawyer was replaced by other counsel at trial, and the jury was not told how the lawyer knew of the location or that he had previously been defense counsel. *Id.*

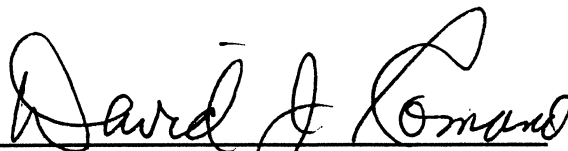
If defense counsel obtains fruits or instrumentalities of a crime from a non-client, the attorney-client privilege is not implicated, and the lawyer may be required to testify about the source of the evidence. Morrell v. Alaska, Id.

In summary, the Board provides this LEI as general guidance and reference to assist West Virginia attorneys in resolving the very difficult questions which can arise in this area of the law. There is no right or wrong answer for each factual situation that can arise in different cases. However, an attorney recognizing that there are dual obligations which must be considered in resolving any such issue will be much better prepared to make the correct decision under the circumstances. This LEI does not address the collateral issues that may be implicated by such situations, including defense counsel's responsibility under the criminal

discovery rules and the prohibitions against facilitating the presentation of perjured testimony at a hearing or trial. These are issues that also may surface when defense counsel is made aware, inspects or takes possession of the fruits or instrumentalities of a crime and, such issues must be considered and resolved using a similar balancing analysis.

APPROVED by the Lawyer Disciplinary Board this 4th day of September,

1998.



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