

ETHICS WHAT NOT TO DO—HANDLING INCRIMINATING EVIDENCE AND OTHER ADVENTURES

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Go back to law school. Go back to ethics class in law school. Your professor posits this question: Your client is accused (or about to be accused) of murder. He brings a bloody knife to your office and puts it on your desk. What do you do? You leave the classroom with this conclusion: Deliver the knife, anonymously, and undisturbed, to the prosecutor's office. End of story.

Not so fast, my friend. There's a lot more law on this subject, and a few twists and turns along the way. This article will review some of the cases on an attorney's duty to keep clients' secrets and bring you current with the law on professional responsibility.

CURRENT LAW

Business and Professions Code Section 6068(e) (1) provides:

It is the duty of an attorney to do all of the following:

(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

Simple, you think. Wrong, not simple. Since July 1, 2004, the law has changed. You have to read to the end of this article to see what has happened.

In *People v. Lee* (1970) 3 Cal.App.3rd 514, Mr. Lee was accused of attempted murder. The prosecution claimed that Marie Siuro had been kicked very severely in the head

with a pair of boots. About a week after Siuro was attacked, a Mr. Fontes found a pair of bloody work shoes in the shrubbery in front of his house. Mr. Fontes was Mr. Lee's neighbor, and Mr. Fontes had heard that Mrs. Lee was looking for the work boots. Mr. Fontes gave the boots to Mrs. Lee.

Mrs. Lee gave the boots to an investigator for the public defender's office. The investigator gave the boots to the public defender, and the public defender, in turn, gave the boots to the judge.

The district attorney had a search warrant issued, and the judge produced the shoes. The shoes were introduced into evidence, and Mr. Lee was convicted.

In sustaining the conviction, the court of appeal stated:

Neither the public defender nor substituted counsel for defendant had the right to withhold the evidence from the State by asserting an attorney-client privilege. It has been held "an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the instrumentalities of a crime."

The attorney should not be a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.), which in itself has little if any, material value for the purposes of aiding counsel in the preparation of the defense of his client's case. Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case, whether or not the case ever goes to trial, could clearly be withheld for a reasonable period of time. 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.

Look backward. If you had represented Lee, would you:

- ◆ Receive the shoes, and keep them in your desk drawer?

- ◆ Send the shoes out to be tested and throw them in the dumpster?
- ◆ Deliver the shoes anonymously to the district attorney's office?
- ◆ Return the shoes to Mr. Fontes and say nothing?

Read the case before you answer.

People v. Meredith (1981) 29 C.3d 682 is a two-defendant murder case. The defendant we are interested in is Frank Earl Scott. Michael Meredith and Frank Earl Scott were accused of conspiring to rob and murder David Wade. The important issue for Mr. Scott was identity.

Mr. Scott met with his attorney in jail. The attorney told his client in effect, "I need to know everything, the bad and the good. Everything you tell me is confidential." Scott told his lawyer that he had taken possession of Mr. Wade's wallet. He had tried to burn the wallet in his kitchen sink without success. Then he threw the partly burned wallet in the burn barrel behind his house.

The lawyer hired an investigator. The investigator went to Scott's house. The investigator looked into the burn barrel. The investigator found the wallet, and gave it to the lawyer. The lawyer delivered the wallet to the police, saying only that he believed it belonged to the decedent, Wade. What do you think the police and the prosecution were thinking when this happened? You're right.

The prosecutor called both the defense investigator and the defense lawyer as witnesses at the preliminary hearing. The lawyer was ordered to answer "yes" or "no" whether contact with Scott led to disclosure of the wallet's location. The lawyer was threatened with contempt and said "yes." The investigator was then questioned, and the tale of the wallet in the burn barrel behind the house was told in full. The appeal was based on an objection to the telling of this tale.

The California Supreme Court said:

[W]henver defense counsel removes or alters evidence, the statutory privilege does not bar revelation

of the original location or condition of the evidence in question. We thus view the defense decision to remove evidence as a tactical choice. If defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation. If, however, counsel chooses to remove evidence to examine or test it, the original location and condition of that evidence loses the protection of the privilege. Applying this analysis to the present case, we hold that the trial court did not err in admitting the investigator's testimony concerning the location of the wallet.

In other words, if the locus in quo is the important part of the evidence, and you take the evidence away, and don't put it back, you may become the evidentiary link that will convict your client.

In *Fairbank (People v. Superior Court (Fairbank))* (1987) 192 Cal.App.3rd 22), Robert Fairbank was accused of murder. Mr. Fairbank wrote letters to another jail inmate, saying that he had "foolishly told lawyer where weapons are" and that his lawyers "now have weapons and D.A. doesn't know it yet!" Well, no surprise, the prosecution found out about these letters right away. The prosecutor moved to compel defense counsel to produce the weapons.

The trial court asked defense counsel if they knew what their obligations were. Defense counsel said "yes." The trial court then denied the prosecutor's motion.

This decision was reversed on appeal, and defense counsel had to deliver the weapons.

In *People v. Sanchez* (1994) 24 Cal.App.4th 1012 the defendant was accused of strangling his girlfriend and tying her up with a telephone cord. The body was found in the defendant's bedroom.

About a week after the body had been removed, Mr. Sanchez's sisters started to clean his room. They came upon some papers in his handwriting including some that said, "I don't want to hurt my girl but if she's not going to be

mine, she won't be anyone else's either. Our love was meant to be 'Death do us Part.'"

Another stated that Saturday "could be the perfect opportunity, to follow through with what may very well be necessary. I really do wish that I had a gun, it would be so much easier and less painful. Although if it needs to come to this, maybe pain should be felt?"

The sisters gave the papers to a lawyer, Henry Gonzales. Mr. Gonzales gave the papers to an investigator for the public defender's office, and the investigator gave the papers to the lawyer assigned to the case. The public defender placed the papers in a sealed envelope and delivered it to the clerk of the court.

The prosecutor learned about the papers from the husband of one of the sisters.

The prosecution moved to have the envelope with the incriminating letters produced and unsealed. The motion was granted. Sanchez was convicted and appealed.

On appeal, it was held that the trial court ruled correctly. The court stated:

In delivering the inculpatory writings to the trial court defense counsel did no more than his "legal obligation."

But in a footnote, the court observed:

Whether, by delivering a sealed envelope without other notice or explanation to the trial court and without notice to the prosecutor, he did less—we are not asked to consider.

Now, look backward. Should the public defender have:

- ◆ Delivered the envelope to the police or the prosecutor, or
- ◆ Read the letters and returned them to Mr. Gonzales with instructions to return them to the sister and put them back where they found them? c.f. *People v. Meredith*.

The case of *Magill v. Superior Court* (2001) 86 Cal.App.4th 61 involved a fatal hit and run accident. Attorney Charles Magill was retained by the driver of a truck and a flatbed trailer believed by the police to have been involved in the crash. The client engaged Magill to photograph the vehicles and to find out whether the California Highway Patrol was looking for these vehicles. The client instructed the lawyer to keep the client's identity secret.

The lawyer photographed the vehicles, but redacted the license plates. He showed the photos to the highway patrol and asked whether they represented the vehicles involved in the accident. Attorney Magill also told the highway patrol that his client was driving.

Guess what? The highway patrol got a warrant for the search of Magill's office. There were some defects in the execution of the warrant, but that's not the point of this article.

- ◆ Were the photos work product?
- ◆ Did Magill waive the work product privilege?
- ◆ What did Magill do wrong?

The court of appeal upheld the search of Magill's office. Fortunately, this case was depublished. But it is another example of what not to do.

McClure v. Thompson (2003) 323 F.3d 1233 is a Ninth Circuit case interpreting Oregon law on a lawyer's duty of confidentiality. Hold on tight. The *McClure* case is going to affect your California practice, too.

Robert McClure's family engaged attorney Christopher Mecca to represent McClure in a triple murder case.

The police had found the body of Carol Jones, but her two children were missing. McClure was suspected. McClure did not reveal complete presence of mind when he spoke with his attorney. He told Mecca that Satan had killed Jones, but Jesus had saved the children. Mecca arranged to have his secretary call the sheriff's office anonymously to give the location of the children. Mecca stated at the habeas hearing that the welfare of the children was his primary concern.

The sheriff went to the locus in quo and found the children dead. McClure was convicted of triple murders.

The Ninth Circuit applied the American Bar Association's code of ethics, and said that Mecca had acted properly in disclosing his client's confidence as he had.



Should Mecca have:

- ◆ Kept quiet and said nothing to the sheriff, or
- ◆ Sent his own detective to the scene to see if the kids were alive, or
- ◆ Revealed what his client said, as he did?

Recent changes in the law governing lawyers' confidences will affect how you look at this problem.

Chanh Nimh Dang was accused of residential burglary, assault with a deadly weapon, and dissuading a witness. Before trial, Dang told his attorney that he was going to "whack" the witnesses against him if attempts to bribe them were not successful. The attorney told the prosecutor. The attorney was relieved and called to testify at trial.

If a client says he is going to "whack" a witness, what should you do? New business and professions Code Section 6068(e)(2) and Rule 3-100 of the Rules of Professional Conduct say some things on this.

Do you remember the O. J. Simpson case? Mr. Simpson was a famous football player and actor. He was accused of stabbing his former wife and a friend of hers to death.

Police investigation had revealed that Mr. Simpson had recently purchased a large stiletto from a local cutlery store. The police suspected that this was the murder weapon. A search by the police of Mr. Simpson's home did not reveal the knife.

But when Mr. Simpson's own lawyers searched the house, they found the knife right away. Should they have:

- ◆ Left the knife right where it was, or
- ◆ Put the knife in a sealed envelope and delivered it to the police?

In this case, the lawyers took an interesting approach. They met with the judge assigned to the case, ex-parte, and asked him to appoint a special master to retrieve the knife, keep it, and have it tested for blood or other evidence if necessary.

As it turned out, the knife was not a very important piece of evidence in the trial at all.

But in retrospect, was this a good way to handle things?

This leads us to the most recent revision of Business and Professions Code Section 6068(e):

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

This is quite vague. Suppose you meet with your client on Friday afternoon to prepare for his sentencing hearing on Monday morning. The client says, "If the judge gives me one more day, I'll see he is taken care of." Do you:

- ◆ Call the police right away, or
- ◆ Wait to see what the sentence will be, or
- ◆ Do nothing?

Before you consult your intestines, read *Tarasoff v. Regents of University of California* (1976) 17 C3d 425. In *Tarasoff*, a patient at a university hospital told his therapist that he planned to kill Tatiana Tarasoff, a young girl. Neither the university nor the police warned the child's parents. And the girl was killed.

The California Supreme Court held that the therapist and the university had a duty to use reasonable care to protect the child despite the therapist-patient privilege. And an action for damages is available.

The rules in *Tarasoff* and Business and Professional Code Section 6068(e)(2) haven't been tested in the attorney-client setting yet.

Stay tuned for further developments.

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