



Committee on Professional Ethics

Opinion #530 - 4/21/81 (8-81)

Topic: Confidences and secrets,
withholding evidence,
criminal practice

Digest: Where lawyer has legal duty
to turn over physical evi-
dence, lawyer has ethical
obligation to do so.

Code: Canon 4;

DR 1-102(A)(5), 2-110(A)(1),
4-101(C), 4-101(C)(2),
7-102(A)(3), 7-102(A)(5),
7-102(B)(1).

QUESTION

A client who is a defendant in a felony prosecution gives his lawyer a piece of documentary evidence. The client says that a friend surreptitiously removed the document from a police station.

Under the circumstances stated, may the lawyer retain the document?

OPINION

Lawyers often must balance the requirements of Canon 4, which enjoins them to preserve the confidences and secrets of their clients, against the obligation imposed by DR 1-102(A)(5) not to engage in conduct that is prejudicial to the administration of justice. For the most part, possible conflicts between Canon 4 considerations and the requirements of other Canons have been resolved in favor of the preservation of client confidences and secrets. See, e.g., DR 7-102(B)(1). The drafters of the Code have recognized that encouraging clients to disclose all possible relevant information to their lawyers is in the best interests, not only of the client, but also of the public generally and is necessary for the effective administration of justice.

Nevertheless, the protection of client confidences and secrets is not absolute. DR 4-101(C)(2) allows a lawyer to reveal confidences or secrets of a client where required by law. Moreover, although DR 4-101(C)(2) is discretionary with the lawyer, DR 7-102(A)(3) prohibits a lawyer from concealing or knowingly failing to disclose that which he is required by law to reveal. Thus, prior opinions of this Committee have turned upon whether there is a legal obligation to reveal a confidence or secret. For example, in N.Y. State 466 (1977), we said:

"[Canon 4] is not intended to suggest that lawyers may ever exceed 'the bounds of the law.'

Canon 7. And, it most assuredly is not intended to create a means by which a client can conceal evidence through the artifice of storing it with his lawyer or reap the benefits of his crime by depositing its proceeds with him for safekeeping."

Whether the lawyer has a legal obligation to reveal a confidence or secret is a highly complex question of law which is outside the jurisdiction of this Committee to resolve. It may be helpful, however, to illustrate the complexity of the matter, by referring to some of the most significant issues of law involved which a lawyer should consider.

First, and most basic, is the legal injunction contained in CPLR 4503(a), which prohibits a lawyer from disclosing privileged communications. This injunction requires the lawyer to determine whether the evidence is privileged. See Fisher v. United States, 425 U.S. 391 (1976), Matter of Victor, 422 F. Supp. 475 (S.D.N.Y. 1976), People v. Belge, 399 N.Y.S. 2d 539 (1977) (the mere deposit of documents concerning the subject of the representation into the custody of the attorney does not cloak them with the attorney-client privilege). See generally, Note, Ethics, Law, and Loyalty, The Attorney's Duty to Turn Over Incriminating Physical Evidence, 32 Stan. L.Rev. 977, 980-82 ("The privilege will...rarely apply to physical evidence unless that evidence was created in the course of the lawyer-client consultation.")

Another body of law which may determine the lawyer's duty with respect to evidence consists of statutes governing larceny. See N.Y. Penal Law §205.50 (McKinney 1975) (suppression of evidence), N.Y. Penal Law §§ 165.45 and 165.50 (receipt of stolen property). See also, Morrell v. State, 575 P.2d 1200 (Alaska 1978) (Court determines that decision of lawyer who concluded that state's concealment of evidence statute created a legal duty for an attorney to turn over incriminating evidence was the appropriate one); cf., In re Ryder, 263 F. Supp. 360 (E.D.Va.), aff'd, 381 F.2d 713 (4th Cir. 1967) (Court finds that affirmative act of taking evidence, rather than being unwillingly placed in possession, proves willful intent to conceal evidence and constitutes a violation of lawyer's ethical duty to obey the law.) The opinions of this Committee have followed the distinction between affirmative acts taken to conceal evidence and the passive role of possessing information with respect to a crime. See N.Y. State 405 (1975), N.Y. State 466 (1977), N.Y. State 479 (1978), People v. Belge, 83 Misc. 2d 186 (1975), aff'd 50 App. Div. 2d 1088 (4th Dept. 1975), aff'd 41 N.Y. 2d 60 (1976).

Still another legal consideration which affects the lawyer's obligation with respect to evidence in a criminal case is the client's Sixth Amendment right to effective assistance of legal

counsel. See Morrell, supra, and cases cited therein. See generally, Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 Calif. L. Rev. 1061, 1062 (1978).

If the lawyer has no legal obligation to turn over the physical evidence, then the duty to preserve the client's secrets is paramount and no ethical obligation to turn over the evidence exists. If, on the other hand, a legal obligation attaches, then the lawyer is ethically required to obey the law. This raises two further problems: first, the best way to return the evidence, and second, whether the fact that the lawyer is acting against the interest of the client requires asking for court permission to withdraw from representation.

If the law provides for a method of returning the evidence, the lawyer must comply with that method. If it does not, we believe that, consistent with the lawyer's duty to reveal only such confidences and secrets of the client as are necessary in the circumstances, N.Y. City 79-63 (NYLJ July 2, 1980, p. 3, col. 3), the lawyer should turn over the evidence in a manner least prejudicial to the client. See, State ex rel Sowers v. Olwell, 64 Wash. 2d 828, 394 P. 2d 681 (1964), Anderson v. State, 297 So. 2d 871 (Fla. App. 1974), cf., Morrell, supra.

Where the lawyer, after accepting custody of incriminating evidence, becomes convinced that it must be surrendered, we believe that it is also appropriate for the lawyer to explain to the client the legal requirements which prevent the lawyer from retaining it. At the same time, the lawyer should offer to withdraw from the case if the client no longer feels that continued representation by the lawyer is in the client's best interests. Cf., ABA Inf. 1057 (1968). If the court's rules require permission for such withdrawal, permission must, of course, be obtained. DR 2-110(A)(1).

For the reasons stated, subject to the qualifications hereinabove set forth, the question posed is answered in the negative.
