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Confidentiality: The Future Crime--Contraband Dilemmas

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CONFIDENTIALITY: THE FUTURE CRIME—CONTRABAND DILEMMAS

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I. INTRODUCTION

It is not unusual for an attorney to be told about the commission of gruesome homicides or of savage acts against the elderly, the incompetent or the young. Nor is it uncommon for a criminal defendant to deliver a murder weapon to his attorney. When a client confides in his lawyer, the attorney faces a Hobson's choice: should he remain silent or report the information to the authorities? The regulation of this choice is found in the code of ethics.[1] Traditionally the attorney has been under a dual duty to refrain from disclosing his clients' confidences: The evidentiary attorney-client privilege which prevents an attorney from testifying as to any privileged information,[2] and the ethical principle of lawyer-client confidentiality,[3] which is broader in scope than the evidentiary principle. The ethical confidentiality doctrine requires an attorney to preserve the "confidences"[4] and "secrets"[5] of his client.

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[1] Several ethics codes have been developed to govern the legal profession. The first, the ABA Canons of Professional Ethics, was instituted in 1908. That was superseded by the ABA Code of Professional Responsibility in 1969. Currently there are several movements to revise the legal code of ethics. Most notably the Kutak Commission has developed the ABA Model Rules of Professional Conduct in a discussion draft of 1980 and a proposed final draft in 1981. In February 1983, the American Bar Association House of Delegates met and voted on various proposed amendments. *See infra* notes 35-40 and accompanying text.

For a theoretical discussion of the bases for regulating the ethics of the legal profession see Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981). *Compare* Abel, *Why Does the ABA Promulgate Ethical Rules?* 59 TEX. L. REV. 639 (1981) (attacks self promulgated code of ethics) *with* Frankel, *Why Does Professor Abel Work at a Useless Task?*, 59 TEX. L. REV. 723 (1981) (a member of the Kutak Commission defends the code of ethics).

[2] The attorney-client privilege developed from the common law rules of evidence. A complete discussion of the evidentiary privilege is outside the scope of this Article. *See* Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978) for further reading.

[3] Preservation of client confidences is the fourth axiomatic norm of the current Code. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1979) [hereinafter cited as CODE].

[4] Confidence "refers to information protected by the attorney-client privilege under applicable law.: *Id.* at DR 4-101(a).

[5] Secrets are defined as "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. *Id.* The Code further provides:

Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

DR 4-101(C) provides:

A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after

During the past several years the legal community has been split as to the scope and extent of the lawyer-client confidentiality relationship.[6] The prevalent view is that the attorney should preserve the confidences and secrets of his client.[7] Debate frequently centers around two related issues: (1) whether the confidential relationship between lawyer and client requires the attorney to remain silent when he knows that his client intends to commit future crimes which will result in the serious physical injury or death and (2) whether the attorney should withhold from the court or prosecuting authorities fruits and instrumentalities which are under his dominion and control.

A lawyer's function, particularly in the context of a criminal case, is difficult to assess. On the one hand, a lawyer must represent his client zealously within the bounds of the law.[8] On the other hand, a lawyer is an officer of the court and owes a duty to society to protect its members from imminent physical injury or death. Concomitantly, a lawyer's office should not be deemed to be a haven for the storage and warehousing of fruits and instrumentalities of past crimes. These conflicting notions become increasingly difficult to balance since the currently applicable ethical rules are not definitive; rather they permit the attorney to choose his course of action.

The principle of confidentiality must be preserved. However, it should not grant a lawyer the right to remain silent about future criminal activity which is likely to cause serious physical injury or death. Nor should the confidentiality doctrine permit an attorney to withhold from prosecuting authorities the fruits or criminal instrumentalities which are under his dominion or control. The first part of this Article will deal with the principle of confidentiality as it pertains to both past and future criminal activity of the client. The current code provisions will be analyzed and proposed provisions will be examined. A recommendation for mandatory disclosure will be set forth. The latter part of this Article will discuss the ramifications of a lawyer's action when dealing with the

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a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or defend himself or his employees or associates against an accusation of wrongful conduct.

Id. at DR 4-101(B) and (C).

[6] *See, e.g.*, Elliot, *Kutak II: On the Trail of the Ethical Grail*, 55 CONN. B.J. 431 (1981); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); M. FREEDMAN, LAWYERS ETHICS IN AN ADVERSARY SYSTEM, 27-42 (1975); Popkin, *Client-Lawyer Confidentiality*, 59 TEX. L. REV. 755 (1981); Redlich, *Disclosure Provisions of the Model Rules of Professional Conduct*, 1980 AM. BAR FOUND. RESEARCH J. 981; Spiegel, *The New Model Rules of Professional Conduct: Lawyer Client Decision Making and the Role of Rules in Structuring the Lawyer Client Dialogue*, 1980 AM. BAR FOUND. RESEARCH J.; Wolfram, *Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the Adversary System*, 1980 AM. BAR FOUND. RESEARCH J. 964. *See also* The American Lawyers' Code of Conduct (discussion draft June 1980); National Organization of Bar Counsel, Report and Recommendations on Study of the Model Rules of Professional Conduct (Aug. 1980).

[7] *See infra* note 17 and accompanying text.

[8] CODE, *supra* note 3, at DR 7-101 to 7-102. *See infra* note 18.

fruits and instrumentalities of his client's crimes. The relevant cases will be discussed and a recommendation offered for an equitable mechanism by which to deliver physical evidence to the authorities.

II. CONFIDENTIALITY

The confidentiality principle is the product of a fiduciary relationship which exists between a lawyer and his client.[9] It is greater in scope than the lawyer-client privilege[10] and is essential for the functioning and continuation of the American criminal justice system.[11]

The primary goal of the confidentiality doctrine is to ensure that a client may freely inform his lawyer of any and all pertinent facts and circumstances.[12] Thus, the principle of confidentiality is not merely a concept safeguarded by the Code of Professional Responsibility; it is the cornerstone for the effectuation of such fundamental constitutional rights as the effective assistance of counsel, the right of confrontation, the right to summon witnesses on one's own behalf and the right to due process of law.[13]

The importance of confidentiality as a tool for effective assistance of counsel should be underscored. For example, motions must be based on facts. They

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[9] "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. CODE, *supra* note 3, at EC 4-1.

See L. PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY 2-1 (1982) [hereinafter cited as L. PATTERSON].

[10] *See supra* note 2.

[11] The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege. . . .

CODE, *supra* note 3, at EC 4-4. *See* People v. Belge, 83 Misc. 2d 186, 190, 372 N.Y.S.2d 798, 801, *aff'd mem.* 50 A.D.2d 1088, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), *aff'd per curiam* 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976). The county court opined: "The effectiveness of counsel is only as great as the confidentiality of its client-attorney relationship." 83 Misc. 2d at 189, 372 N.Y.S.2d at 801. Moreover, the court determined that the attorneys were mandated to uphold the "sacred trust" of confidentiality to preserve the defendant's constitutional right not to incriminate himself. *Id.* at 190, 372 N.Y.S.2d at 802.

[12] The basis for the confidentiality doctrine has been described as follows:

The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance.

ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, FORMAL OP. 250 (1943) [hereinafter cited as ABA OP.] (quoting MECHEM ON AGENCY § 2297 (2d ed. 1914).

[13] People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798 *app'd mem.*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), *aff'd* 41 N.Y.2d 60, 354 N.E.2d 377, 390 N.Y.S.2d 867 (1976); *see also* People v. Canfield, 12 Cal. 3d 699, 527 P.2d 633, 117 Cal. Rptr. 81 (1974).

may contain neither conjecture, hunches or suppositions.[14] Ordinarily, facts necessary to make motions are obtained in only one way - a recounting of events by the client to his lawyer. Unless a lawyer is fully familiar with the facts at hand, effective assistance of counsel is impossible.[15] Moreover, an attorney must be fully apprised of the facts in order to meaningfully cross examine the prosecution's witnesses as well as to determine which, if any, witnesses should be called on his client's behalf. In recognition of the importance of confidentiality, this principle has been firmly rooted in both the common law and statutes.[16]

If substantial restrictions are placed on the doctrine of confidentiality, clients will be less likely to reveal to their attorney what occurred. Fear that the prosecuting authorities would gain access to this information would substantially deter a true recitation of unseemly facts. This, in turn, would all but eviscerate the right to effective assistance of counsel. Consequently, substantial restrictions on the principle of confidentiality may result in the denial of due process to those accused of crimes. This is a notion which has traditionally been objectionable to prosecutors and defense lawyers alike.

Nevertheless, a balancing of conflicting rights and interests is needed. The attorney is an officer of the court and owes a duty to society which cannot be disregarded. The present Code of Professional Responsibility evidences this balancing of interests. Canon 4 directs that a lawyer should preserve the confidences and secrets of his clients.[17] However, Canon 7 provides that a lawyer should represent a client zealously *within* the bounds of the law.[18] These two provisions serve as legal and ethical guidelines for the lawyer-client relationship. Thus, while the attorney's primary obligation is to his client, he has other obligations as well. Undoubtedly, both zealous representation and fairness are mandated. Notably, fairness is not restricted to a defense lawyer but is equally applicable to the prosecution.

DR 7-103 specifically states that "[a] public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to [a] defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."[19] This obligation is deemed consonant with the dual obliga-

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[14] *See, e.g.*, N.Y. CRIM. PROC. LAW § 710.60 (McKinney 1971).

[15] ABA Standards Relating to Criminal Justice. The Defense Function 4-4.1 (2d ed. 1980).

[16] H. Drinker, in his legal ethics treatise stated: "[C]onfidential communications by or on behalf of a client may not be disclosed without his consent, has long been a rule of the common law, and is in many jurisdictions the subject of statute. As such, its application is usually a question of law rather than of ethics." H. DRINKER, LEGAL ETHICS 132 (1953).

[17] "A lawyer should not use information acquired in the course of the representation to the disadvantage of a client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes." CODE, *supra* note 3, at EC 4-5. Moreover, DR 4-101(B)(1) provides "[e]xcept when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) reveal a confidence or secret of his client." *Id.* at DR 4-101(B)(1).

[18] "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law*, which includes Disciplinary Rules and enforceable professional regulations." *Id.* at EC 7-1 (emphasis supplied).

[19] *Id.* at DR 7-103(B). *Cf.* United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373

tion possessed by a prosecutor: (1) the right to vigorously prosecute those who prey upon members of society and (2) to secure justice.[20]

While a defense attorney does not possess this dual obligation and is instructed not to "[f]ail to seek the lawful objectives of his clients through the reasonably available means,"[21] he is not given carte blanche. His conduct is subject to the Code of Professional Responsibility.[22] What are the contours of the law and the disciplinary rules in the case of future offenses, are questions which must be addressed.

DR 4-101(C)(3) states: that a lawyer may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime."[23] It is essential to note that this DR is permissive rather than mandatory.[24] The essential thrust of the provision is that the lawyer *may* reveal. No sanctions are contained in the Code for failure to reveal secrets pertaining to future criminal conduct planned by the client. A comment in the Model Rules of Professional Conduct specifically states that "[a] lawyer's decision not to take preventative action permitted by paragraph (b)(2) [of proposed rule 1.6] does not violate this Rule."[25]

A. *The Proposed Code*

Reflecting a different philosophy, the early draft of the Model Rules of Professional Conduct of the American Bar Association Commission on Evaluation of Professional Standards (Kutak Commission) changed the language to provide that "a lawyer *shall* disclose information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm to another person, and to the extent required by law or the rules of professional conduct."[26] This provision, had it

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U.S. 83, 87 (1963).

[20] *See* N.Y. CODE OF PROFESSIONAL RESPONSIBILITY E.C. 7-13, adopted by the New York State Bar Association, effective Jan. 1, 1970, as amended through Apr. 29, 1978 which provides: "[t]he responsibility of a public prosecutor differs from that of the usual advocate, his duty is to seek justice, not merely to convict." *Id.*

[21] CODE, *supra* note 3, at DR 7-101.

[22] The Code is divided into three sections: Canons, Ethical Considerations and Disciplinary Rules. The Canons are axiomatic norms. They express general standards of professional conduct. Ethical considerations are aspirational in design and are conceived to supply guidance. The Disciplinary Rules, however, are mandatory in nature. They prescribe a minimum level of conduct. When an attorney fails to live up to the level of conduct required by a DR, he is subject to disciplinary action. CODE, *supra* note 3, at Preliminary Statement. "The canons of professional ethics must be enforced by the Courts and must be respected by members of the Bar if we are to maintain public confidence in the integrity and impartiality of the administration of justice." *In re Meeker*, 76 N.M. 354, 357, 414 P.2d 862, 864 (1966) *appeal dismissed* 385 U.S. 449 (1967).

[23] CODE, *supra* note 3, at DR 4-101(C).

[24] The use of the verb "may" indicates a permissible choice. Throughout the Code, the verb "shall" is used to indicate a mandatory duty.

[25] MODEL RULES OF PROFESSIONAL CONDUCT (Final Draft 1981) [hereinafter cited as MODEL RULES] (Rule 1.6 comment).

[26] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (Discussion Draft 1980). Currently one state, Florida requires disclosure under these circumstances. *See ABA Code of Professional Responsibility by State* DR 4-101 (1980).

been adopted, would have substantially altered the lawyer's obligation vis-a-vis his client. For the first time a standard would have been established whereby timely disclosure would have been mandated. This provision came under substantial attack not only from defense lawyers, but from such well respected and highly regarded sources as the Committee of Professional and Judicial Ethics of the Bar Association of the City of New York.[27] This Committee after carefully evaluating the proposed change, concluded: "[w]e believe . . . the current rule DR 4-101 which permits disclosure where a client intends to commit a crime reflects a sufficient balance of the competing social interests that any broadening of the permissible disclosure of confidences or secrets is unwarranted."[28] Moreover, the Committee stated, "where information about a client is necessary to rectify a fraud, we believe the current code . . . adequately balances the competing interests under DR 7-102(b) by mandating disclosure of such information, except where it involves 'confidences' or 'secrets'."[29] The Committee also opined that "except with regard to the need for permissive disclosure to protect against death or serious bodily harm, the provisions of the current code of dealing with confidentiality and disclosure are far superior to Rule 1.7."[30] This Article contends that the posture taken by the New York City Bar Association as well as other critics of proposed Rule 1.7 is erroneous and adversely affects the balance which our criminal justice system must reflect if it is to be respected by society.

Pressures brought forth by various trial lawyer associations, bar associations, and law professors resulted in the modification of the proposal.[31] Rule 1.6 of the Model Rules, entitled "Confidentiality of Information," now provides:

> (a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure. (b) A lawyer *may* reveal such information to the extent the lawyer believes necessary: (2) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another.[32]

Mandatory disclosure was abandoned. Permissive disclosure is currently the standard of the Model Code. Reacting to the adverse responses to proposed Rule 1.7 (currently proposed Rule 1.6) regarding disclosure, the commentary to this section equivocates. The commentary states:

> It is arguable that the lawyer should have a professional obligation to make a disclosure in order to prevent homicide or serious bodily injury which the law-

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[27] New York City Bar Association, *Committee Reports on the Model Rules of Professional Conduct* 18 (July 1980) (based on discussions held on Jan. 30, 1980).

[28] *Id.* at 18.

[29] *Id.* at 19.

[30] *Id.* (emphasis added).

[31] For example, two groups which were adamantly opposed to much of the new code were the New York City and State Bar Associations. *See* New York State Bar Association, *Report of the Special Committee to Review ABA Draft Model Rules of Professional Conduct* (1980); Association of the Bar of New York City, *Committee Reports* (1980).

[32] MODEL RULES, *supra* note 25, at Rule 1.6(a) to -(b)(2) (emphasis supplied).

> yer knows is intended by a client. However, it is very difficult for a lawyer to 'know' when such a heinous purpose will actually be carried out, for the client may have a change of mind. To require disclosure when a client intends such an act, at risk of disciplinary liability if the assessment of the client's purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma.[33]

B. *The Recent ABA Proposal*

In February 1983, the American Bar Association assembled in New Orleans, Louisiana to vote on various proposals to amend the legal code of ethics, many of which specifically pertained to client secrets.[34] The resultant votes constituted a broad rejection of the Kutak Commission's proposals to limit the duty to maintain client confidences.[35] The American Bar Association House of Delegates voted 207 to 129 to require a lawyer to keep a client's secrets even when the client insists on committing further financial or white collar crimes.[36] Additionally, the House rejected disclosure rule provisions which would have allowed attorneys to act to prevent their client's frauds and injuries to the financial or property interests of third parties.[37] Thus, the ABA enhanced and expanded the confidentiality doctrine. Disclosure, even of ongoing criminal activity, was determined to be unethical. Advocates of these amendments asserted that an attorney who learns of continuing crimes should resign, rather than "blow the whistle."[38]

Despite the overall trend to strengthen the lawyer's duty to remain silent, certain limited exceptions were carved out. First, where a client commits perjury or submits false documents to the court, the attorney *must* reveal the client's secrets to correct the situation.[39] The second important exception is in

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[33] *Id.* at Commentary to Rule 1.6.

[34] Proposals were submitted by the Kutak Commission, the American College of Trial Lawyers, as well as individual State Bar Associations.

[35] *Lawyers Vote Against Disclosure of Fraudulent Activity By Clients*, N.Y. Times, Feb. 8, 1983, at 1, col. 2; *ABA Rejects Plan to Widen Lawyers' Whistle-Blowing*, L.A. Daily J., Feb. 8, 1983, at 1, col. 2; *Lawyers Vote for Disclosure If Needed to Correct Perjury*, N.Y. Times, Feb. 9, 1983, at 24, col. 1.

[36] N.Y. Times, Feb. 8, 1983, § A, at 1, col. 2. Thus under the newly voted amendment a lawyer would be prohibited from revealing that his client is stealing money, through fraud or other white collar crimes. In fact, this bar precludes an attorney from disclosing secrets to rectify continuing crimes in which the attorney has unknowingly participated. *Id.* at § D at 21, col. 1.

[37] L.A. Daily J., Feb. 8, 1983, at 1, col. 2. The House passed a rule permitting a lawyer to disclose client confidences when necessary to defend himself in a civil or criminal case or a disciplinary hearing. Furthermore confidences may be revealed when the attorney seeks to collect his fee. These two exceptions have been the subject of scorching criticisms of the Bar. *See* Schanberg, *To Tell the Truth, We Can't*, N.Y. Times, Feb. 12, 1983, at 23, col. 4 ("The other special situation that justifies a departure from the sacrosanct tenet of lawyer-client confidentiality, said the A.B.A. is when the client tries to run out on his bill."); *Lawyers for Hire for Anything?*, N.Y. Times, Feb. 11, 1983, at 26, col. 1 ("As adopted, this rule comes close to saying that client confidentiality may be sacrificed to protect a lawyer's financial interests, but no one else's.").

[38] N.Y. Times, Feb. 8, 1983, sec. D, at 21, col. 2. In keeping with the prevailing philosophy to maintain silence, the House of Delegates voted 188 to 135 to prohibit lawyers from revealing illegal actions by corporate officers and directors which are contrary to the interests of stockholders. *Id.*

[39] N.Y. Times, Feb. 9, 1983, at 24, col. 1. The ABA distinguished the courtroom situation

the realm of future crimes which would be "likely to result in imminent death or substantial bodily harm."[40] Where such violence is deemed likely, an attorney *may* disclose his client's confidences; however, the attorney is not required to do so.

It is submitted that Rule 1.7 accurately represented societal views on the matter. It did not seek to eviscerate the confidentiality relationship. It did not intend to deny a defendant his constitutional rights. It only sought to "ensure" that in certain unique circumstances, such as an ongoing kidnapping where the lawyer knew the whereabouts of the victim, his duty as an officer of the court required disclosure for the preservation of human life.

The safeguarding and promoting of human life far outweigh the importance of the technical application of the confidentiality principle. As early as 1936, the ABA declared:

> there are some circumstances under which . . . a communication is not privileged for reasons founded on sound principles of public policy. In such cases the attorney may not remain silent. When the communications of the client to the attorney with respect to commission of an unlawful act or to a continuing wrong, the communication is not privileged.[41]

The United States Supreme Court has frequently opined that our adversarial system should be geared to the preservation of truth rather than its obfuscation.[42] President Reagan, Congress and the Supreme Court recently addressed

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where disclosure is required from the noncourtroom situation where disclosure is prohibited. Moreover, the House of Delegates noted that in those jurisdictions where it is a violation of the defendant's attorney's duty to report his client's perjury this exception would be inapplicable.

[40] N.Y. Times, Feb. 8, 1983, at 1, col. 2; L.A. Daily J., Feb. 8, 1983, at 1, col. 2. One critic, Professor Stephen Gillers, commented sceptically:

> I suggest another more fundamental explanation of the ABA's vote. . . . Lawyers do not want to judge their clients or themselves. They are taught to be sceptics. Right is relative. . . . If a lawyer must withdraw because a client turns out to be a crook or worse, he will, but after that he'd rather look the other way. Lawyers believe that their job is not to question a client's goals but to achieve them in any lawful way possible . . . Now, by making it unethical to warn a client's future victims, the ABA reinforces the promise of silent nonjudgmental lawyers - safe instruments of client's wishes and, secondly, the law.

Gillers, *Lawyers' Silence: Wrong*, N.Y. Times, Feb. 14, 1983, at 16, col. 1.

The ABA's vote invited numerous criticisms of the profession. For example, Robert W. Meserve, chairman of the ABA commission which evaluated professional standards and drafted the proposed code, stated that the vote was an "unfortunate" retreat from the existing obligations owed by lawyers to the public. N.Y. Times, Feb. 8, 1983, § D, at 21, col. 1.

In a New York Times editorial, it was poignantly suggested:

> Courts and legislatures need not accept this standard. The Supreme Court has struck down misnamed ethical principles that let lawyers fix their fees, ban advertising and boycott new kinds of legal services. Unless the ABA clarifies its new rule, states asked to adopt it may take their own, higher route. And that would further damage the bar's most valued possessions: professional pride and the right to regulate itself.

Lawyers for Hire for Anything?, N.Y. Times, Feb. 11, 1983, at 26, col. 1. Final action on the code of ethics is scheduled to take place at the ABA's summer meeting in Atlanta, Georgia in August of 1983.

[41] ABA Op. *supra* note 12, at 155 (1936).

[42] *See* United States v. Havens, 446 U.S. 620 (1980); Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).

the notion of a "good faith exception" to the exclusionary rule and all concluded that the scales of justice have tilted greatly against society.[43] If truth is to be ascertained at trial and the exclusionary rule is to be substantially restricted in the hope of rectifying what is deemed to be the societal imbalance of a victim's rights vis-a-vis those of the offender, then a putative victim must also be protected. What societal goal could be more important than the preservation of human life? Mandatory disclosure would not undermine the criminal justice system. Furthermore, lawyers would no longer be viewed as a group, who, via legal technicalities, have lost sight of the utmost principle and goal of any society—the preservation and safe-guarding of human life.

III. Fruits and Instrumentalities

A perplexing, albeit infrequent, dilemma which a criminal defense lawyer must resolve occurs when the accused delivers to him the fruits or instrumentalities of a crime. This predicament raises many important questions. What are the lawyer's duties? Should he keep a weapon? Should he keep the proceeds of a robbery? The broader questions raised include: (1) Are these articles protected by the principles of law and ethics? (2) Should they be? (3) As an officer of the court, must a lawyer disclose their existence and then turn them over to the prosecuting authorities or the court? The current code of ethics as well as the proposed code are silent on this matter. Therefore, lawyers are uncertain as to their duties. Moreover, no guidance is provided for a means of disclosure which does not contravene the lawyer's obligation to zealously safeguard the client's interests within the bounds of the law.[44]

A. *The Case Law*

In addressing this problem, the courts have been inconsistent and have failed to provide attorneys with badly needed guidance. In *In re Ryder*[45] the attorney's presence was requested by the defendant while being interviewed by the FBI concerning a bank robbery. The defendant had told Ryder that the money which the FBI had in its possession constituted proceeds of a card game. He denied either committing or abetting the commission of the robbery. The FBI informed Ryder that they had recovered from his client "bait money" taken during a robbery. Ryder nevertheless removed a substantial amount of cash and a sawed off shotgun from his client's safety deposit box. He then placed these articles in another safety deposit box which he had rented in his own name.

During his disciplinary hearing, Ryder maintained that he believed that these articles were protected by the attorney-client privilege and that furthermore he intended to reimburse the victimized bank of the money.[46] He also

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[43] *See* Illinois v. Gates, 103 S. Ct. 436 (1982). *See also* "The Good Faith Exception", N.Y.L.J., Feb. 7, 1983 at 1, col. 1.

[44] *See* Code, *supra* note 25, at Canon 7. *See also* Lockwood v. Bowles, 46 F.R.D. 625 (1969) (discusses attorney's obligations as an officer of the court).

[45] 263 F. Supp. 360 (E.D. Va.), *aff'd* 381 F.2d 713 (4th Cir. 1967).

[46] *Id.* at 365.

maintained that all he sought was to "exercise the attorney-client privilege."[47] The District Court did not accept this contention and suspended Ryder from practice for a period of eighteen months, pursuant to the then applicable Canons.[48] The court concluded that his "intention was to assist [the defendant] by keeping the stolen money and the shotgun concealed in his locked box until after the trial."[49] Relying on *United States v. United Shoe Machinery Corp.*,[50] and *Wigmore on Evidence*,[51] the court held that the attorney's conduct "went beyond the receipt and retention of a confidential communication from his client."[52] The *Ryder* decision seems to reflect the majority view that fruits and instrumentalities of a crime do not come within the parameters of the attorney-client privilege.[53]

Addressing the issue of instrumentalities, one court has noted that "authority in this area is surprisingly sparse. The existing authority seems to indicate, however, that a criminal defense attorney has an obligation to turn over to the prosecution physical evidence which comes into his possession."[54]

There is, however, authority to the contrary. Perhaps the leading case adopting an opposite conclusion is *State v. Olwell*.[55] In *Olwell*, the defendant-attorney refused to comply with a subpoena duces tecum which sought the production of a knife allegedly used by his client in the commission of a homicide. Olwell asserted the lawyer-client privilege and was cited for contempt by a superior court in Washington. The Supreme Court of Washington reversed and found that the knife came within the parameters of the lawyer-client privilege.[56] Relying on a 1956 Florida case,[57] the court concluded that communication with a client included within its contours instrumentalities delivered by

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[47] *Id.*

[48] ABA CANONS OF PROFESSIONAL ETHICS, Canons 15 and 32. These Canons were incorporated into the Code of Professional Responsibility in 1969.

[49] 263 F. Supp. at 365.

[50] 89 F. Supp. 357 (D. Mass. 1950). The definition of the attorney-client privilege in *United Shoe Machine* emphasizes that the holder is the client, not the attorney. The *Ryder* court, therefore, reasoned that since Ryder took the initiative of moving the evidence, this exceeded mere receipt of a confidence.

[51] 8 WIGMORE, EVIDENCE § 2292 (1961).

[52] 263 F. Supp. at 365. For an excellent discussion of *In re Ryder* see Comment, *Professional Responsibility and In re Ryder: Can An Attorney Serve Two Masters?*, 54 Va. L. Rev. 145 (1968).

[53] On appeal, the Fourth Circuit Court of Appeals stated:

> It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime. Ryder's acts bear no reasonable relation to the privilege and duty to refuse to divulge a clients confidential communication. Ryder made himself an active participant in a criminal act, ostensibly wearing the mantle of an advocate, but in reality serving as an accessory after the fact.

In re Ryder, 381 F.2d 713, 714 (4th Cir. 1967). *See* In re January 1976 Grand Jury, 534 F.2d 719, 729 (7th Cir. 1976) (the court stated: "[w]e think that the *Ryder* conclusion is persuasive authority that the appellant cannot assert the privilege.").

[54] Morrell v. State, 575 P.2d 1200, 1207 (Ala. 1978). *See* People v. Lee, 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (1970).

[55] 64 Wash. 2d 828, 394 P.2d 681 (1964). *Accord* Anderson v. State, 297 So. 2d 871 (1974).

[56] 64 Wash. 2d at 831, 394 P.2d at 684.

[57] Dupree v. Better Way, Inc., 80 Fla. 500, 86 So. 2d 425 (1956) (a privileged communication encompasses information or objects which a client delivers to his attorney).

the client to the attorney.[58] The decision is nevertheless unclear since the court opined in dicta that the privilege is not permanent in nature.[59] Therefore, after a reasonable passage of time, the attorney must produce the evidence. This holding sought unsuccessfully to balance society's interest in a criminal justice system which seeks the truth as its ultimate aim with the client's interest in a confidential relationship with his attorney. It is submitted that the *Olwell* decision represents an abberation rather than the rule. The well reasoned determination in *In re Ryder*[60] should be the norm. Actual fruits and instrumentalities are not protected by the attorney-client privilege.

This is not to say, however, that information pertaining to the fruits and instrumentalities is not protected by the privilege. The landmark case concerning this corollary issue is *People v. Belge*.[61] In this case, attorney Belge and his partner were appointed to represent a defendant accused of murder. While interviewing the client, Belge learned from him that he had committed three other murders, and was told where the body of one of the victims was located. Belge went to the area where the body was supposed to be and confirmed his client's statements. He left the body where he found it. This sequence of events became known through the course of the trial. As a result, attorney Belge was later indicted for violation of the New York Public Health laws.[62] He sought dismissal of the indictment on the grounds that the discovery of the body was directly attributable to statements obtained through the lawyer-client privilege. In granting the dismissal, the court held that the defendant "was constitutionally exempt from any statutory requirement to disclose the location of the body."[63] The court further held that the attorney was "under a positive stricture precluding such disclosure."[64]

The district attorney of Onondaga County was not satisfied with this holding. Ironically, in his quest for a conviction he apparently forgot the dictates of EC 7-13, which states "the responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict."[65] The appellate division affirmed the dismissal holding "the attorney-client privilege attached insofar as the communications were to advance a client's interest."[66]

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[58] 64 Wash. 2d at 830, 394 P.2d at 683-84.

[59] *Id.* at 830, 394 F.2d at 684.

[60] 263 F. Supp. 360 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967).

[61] 83 Misc. 2d 186, 372 N.Y.S.2d 798 *aff'd* 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975) *aff'd* 41 N.Y.S.2d 60, 359 N.E.2d 370, 390 N.Y.S.2d 867 (1976).

[62] N.Y. Pub. Health Law §§ 4200(1) and 4143 (McKinney 1976).

[63] 83 Misc. 2d at 190, 372 N.Y.S.2d at 802.

[64] *Id.* at 186, 372 N.Y.S.2d at 798.

[65] CODE, *supra* note 3, at EC 7-13.

[66] 50 A.D.2d 1088, 376 N.Y.S.2d 771 *aff'g* 83 Misc. 2d 186, 372 N.Y.S.2d 798 (1975). Further appeal was taken to the New York Court of Appeals. In a *per curiam* decision, the court of appeals held, "there can be no doubt that the order affirming the dismissal of the indictment is appealable to us. . . . We are obliged to conclude, however, that in this case it is not reviewable in our court." 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976). Thus, the court of appeals did not address the merits of the case.

For an interesting examination of the *Belge* case see Comment, *Legal Ethics: Confidentiality*

A crucial caveat to the *Belge* holding is the recent California Supreme Court decision of *People v. Meredith.*[67] While generally upholding the principle of confidentiality, the court held that once a client informs his attorney of the location of physical evidence, the confidential relationship will be destroyed if the evidence is either moved or altered. The court reasoned that such a determination was necessary since

> [w]hen defense counsel alters or removes physical evidence, he necessarily deprives the prosecution of the opportunity to observe that evidence in its original condition or location. . . . [T]o bar admission of testimony concerning the original condition and location of the evidence in such a case permits the defense in effect to "destroy" critical information. . . .
> We therefore conclude that courts must craft an exception to the protection extended by the attorney-client privilege in cases in which counsel has removed or altered evidence.[68]

On the other hand, the court specifically stated that "if defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation."[69]

B. *Recommendations*

A defense attorney's office cannot become a warehouse for contraband. Nor can a lawyer allow himself to be put into the position of aider and abettor by concealing evidence. Obstruction of justice is a crime which substantially inhibits our criminal justice system. Therefore, the interests of society mandate that a defense lawyer turn over fruits and instrumentalities which have come into his possession. It is recognized, however, that once a defense lawyer turns physical evidence over to the court or to the prosecutor directly, he is placed in the compromising situation of having to explain how and why he came into possession of the articles. If he answers the questions, the defendant's right to effective assistance of counsel is destroyed. If the attorney refuses to answer the questions, the effects upon his client are equally detrimental.

Therefore, it is suggested that physical evidence should be deposited with the administrative judge of the court of jurisdiction rather than to the prosecuting authorities. By informing the administrative judge, the attorney will fulfill his obligation under the Code while concomitantly affording his client effective assistance of counsel by keeping his confidences and secrets. The imposition of the neutral and detached administrative judge into this process provides the necessary buffer to protect the defendant's constitutional rights. Moreover, the administrative judge is best able to determine what is within the parameters of the confidentiality privilege and what must be disclosed.

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and the Case of Robert Garrow's Lawyers, 25 BUFFALO L. REV. 211 (1975).

[67] 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981). *See* Note, People v. Meredith: *The Attorney-Client Privilege and the Criminal Defendant's Constitutional Rights*, 70 CALIF. L. REV. 1048 (1982).

[68] 29 Cal. 3d at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619.

[69] *Id.* at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620.

By developing a uniform system for dealing with this problem, the arbitrary case-by-case disposition is displaced. Individual defense attorneys need not make these important decisions by themselves, and the criminal justice system is enhanced. The defendant's fifth and sixth amendment rights, as well as his presumption of innocence, are preserved. In the same vein, the procedure of turning over physical evidence to a neutral administrative judge represents a small, albeit vital, exception which should be carved out of the confidentiality doctrine and uniformally followed.

IV. Conclusion

The principle of confidentiality, the cornerstone of any criminal defense, is not absolute. Its desirability and efficacy must be weighed against society's interest. In the overwhelming majority of cases it should be strictly adhered to. However, if imminent threat or serious bodily injury or death is feared, disclosure should be mandated. Mere conjecture or surmise of potential danger does not rise to the standard of mandatory disclosure. This limited requirement does not interfere with due process or the orderly administration of the criminal justice system. It merely seeks to preclude serious injury to potential witnesses, members of the judiciary, and other victims, who but for the lawyer's disclosure would be irreparably and irretrieveably harmed. This inroad into the principle of confidentiality represents a necessary compromise in light of the interests of all parties involved.